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Presidential Documents

Title 3—

The President

Executive Order 14060 of December 15, 2021

Establishing the United States Council on Transnational Organized Crime

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. *Purpose.* Transnational organized crime (TOC) poses a direct and escalating threat to public health, public safety, and national security. Transnational criminal organizations engage in a broad range of criminal activities, including drug and weapons trafficking, migrant smuggling, human trafficking, cybercrime, intellectual property theft, money laundering, wildlife and timber trafficking, illegal fishing, and illegal mining.

These networks continue to expand in size and influence in the United States and abroad. Transnational criminal organizations contribute directly to tens of thousands of drug-overdose deaths in the United States each year and adversely affect American communities and economic prosperity. They also threaten United States national security by degrading the security and stability of allied and partner nations, undermining the rule of law, fostering corruption, acting as proxies for hostile state activities, directly or indirectly funding insurgent and terrorist groups, depleting natural resources, harming human health and the environment, contributing to climate change through illegal deforestation and logging, and exploiting and endangering vulnerable populations. In some regions, transnational criminal organizations wield state-like capabilities, disregarding sovereign borders, compromising the integrity of democratic institutions and threatening the legitimacy of fragile governments, and securing their power through intimidation, corruption, and violence. For these reasons, it is in the national interest of the United States to counter TOC. Addressing TOC requires a coordinated Federal framework accompanied by a cohesive whole-of-government effort executed in collaboration with State, local, Tribal, territorial, and civil society partners in the United States and in close coordination with foreign partners, international and regional organizations, and international and local civil society groups abroad.

Sec. 2. *Policy.* Executive departments and agencies (agencies) shall take actions within their respective authorities, including, as appropriate, through the provision of technical and financial assistance, to enhance efforts to counter TOC. It is the policy of the United States to:

(a) employ authorized intelligence and operational capabilities in an integrated manner to target, disrupt, and degrade transnational criminal organizations that pose the greatest threat to national security;

(b) collaborate with private entities and international, multilateral, and bilateral organizations to combat TOC, while also strengthening cooperation with and advancing efforts to build capacity in partner nations to reduce transnational criminal activity;

(c) improve information sharing between law enforcement entities and the Intelligence Community to enhance strategic analysis of, and efforts to combat, transnational criminal organizations and their activities, while also preserving our ability to speedily bring TOC actors to justice;

(d) expand tools and capabilities to combat illicit finance, which underpins all TOC activities; and

(e) develop and deploy new technologies to identify and disrupt existing and newly emerging TOC threats.

Sec. 3. *Establishments.* (a) There shall be established a United States Council on Transnational Organized Crime (USCTOC), which shall report to the President through the Assistant to the President for National Security Affairs. The USCTOC shall monitor the production and implementation of coordinated strategic plans for whole-of-government counter-TOC efforts in support of and in alignment with policy priorities established by the President through the National Security Council.

(i) The USCTOC shall replace the Threat Mitigation Working Group, previously directed to lead whole-of-government efforts on TOC under Executive Order 13773 of February 9, 2017 (Enforcing Federal Law With Respect to Transnational Criminal Organizations and Preventing International Trafficking). Accordingly, section 3 of Executive Order 13773 is hereby revoked.

(ii) The USCTOC shall consist of the following members or their designees:

(A) the Secretary of State;

(B) the Secretary of the Treasury;

(C) the Secretary of Defense;

(D) the Attorney General;

(E) the Secretary of Homeland Security; and

(F) the Director of National Intelligence.

(iii) The USCTOC may request other agencies to contribute to the USCTOC's efforts as necessary, including by detail or assignment of personnel consistent with subsection (b)(v) of this section.

(iv) The USCTOC shall meet not later than 60 days from the date of this order and periodically thereafter.

(b) There shall be established a USCTOC Strategic Division (Division), an interagency working group housed at the Department of Justice, comprising personnel from agencies designated in subsection (a)(ii) of this section.

(i) The Division shall produce coordinated strategic plans for whole-of-government counter-TOC efforts in support of and in alignment with policy priorities established by the President through the National Security Council. These strategic plans shall be informed by intelligence assessments, be developed in coordination with agencies, and include recommendations for actions by agencies. The Division shall submit its completed strategic plans to the USCTOC.

(ii) The Division shall be chaired by a senior official from the Department of Justice or the Department of Homeland Security. The Chairperson shall serve a 2 year term. The Attorney General and the Secretary of Homeland Security, or their designees, shall alternate every 2 years selecting the Chairperson.

(iii) The Division shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Division.

(iv) Agencies designated in subsection (a)(ii) of this section are hereby directed, consistent with their authorities, budget priorities, and mission constraints, and to the extent permitted by law and consistent with the need to protect intelligence and law enforcement sources, methods, operations, and investigations, to provide to the Division:

(A) details or assignments of personnel, who shall be qualified subject-matter experts and strategic planners, and who shall serve on full-time assignments of not less than 1 year;

(B) relevant information, research, intelligence, and analysis; and

(C) such other resources and assistance as the Division may request for the purpose of carrying out the responsibilities outlined in this section.

(v) To the extent permitted by law, agencies designated in subsection (a)(ii) of this section are encouraged to detail or assign their employees to the Division on a non-reimbursable basis.

(vi) The Division, within 120 days of the date of this order, shall submit to the USCTOC a report describing a process that the USCTOC can implement on an ongoing basis and as necessary to identify and prioritize the most significant TOC threats in alignment with policy priorities established by the President through the National Security Council.

Sec. 4. *Report.* The Director of National Intelligence, within 120 days of the date of this order and annually thereafter, shall submit a report to the President through the Assistant to the President for National Security Affairs assessing the Intelligence Community's posture with respect to TOC-related collection efforts, including recommendations on resource allocation and prioritization.

Sec. 5. *Definitions.* For the purposes of this order:

(a) the term ''Intelligence Community'' has the meaning ascribed to it under 50 U.S.C. 3003(4); and

(b) the term ''transnational criminal organizations'' refers to groups, networks, and associated individuals who operate transnationally for the purpose of obtaining power, influence, or monetary or commercial gain, wholly or in part by illegal means, while advancing their activities through a pattern of crime, corruption, or violence, and while protecting their illegal activities through a transnational organizational structure and the exploitation of public corruption or transnational logistics, financial, or communication mechanisms.

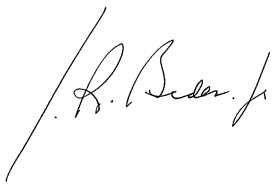
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(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.



THE WHITE HOUSE,
December 15, 2021.

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Rules and Regulations

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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2021–BT–STD–0016]

RIN 1904–AE85

Energy Conservation Program: Definition of Showerhead

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: On July 22, 2021, the U.S. Department of Energy (''DOE'') published a notice of proposed rulemaking (''NOPR'') to revise the current definition of ''showerhead'' adopted in the December 16, 2020, final rule (''December 2020 Final Rule'') by reinstating the October 2013 definition of ''showerhead,'' withdraw the December 2020 final rule's interpretation of the term ''showerhead,'' and withdraw the associated definition for ''body spray.'' DOE did not propose any changes to the definition of ''safety shower showerhead.'' In this final rule, DOE revises the current definition of ''showerhead'' adopted in the December 2020 final rule by reinstating the October 2013 definition of ''showerhead'' as the Department finds that it is more consistent with the purposes of the Energy Policy and Conservation Act, as amended (''EPCA''). In addition, DOE removes the current definition of ''body spray'' adopted in the December 16, 2020 final rule. Finally, DOE maintains the definition of ''safety shower showerhead'' adopted in the December 2020 final rule.

DATES: The effective date of this rule is January 19, 2022.

ADDRESSES: 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-0016.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.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. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–2588. Email: *Amelia.Whiting@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

The following section briefly discusses the statutory authority underlying this final rule, as well as the relevant historical background related to showerheads, the subject of this final rule.

A. Authority

Title III of Energy Policy and Conservation Act, as amended (''EPCA''), (42 U.S.C. 6291 *et seq.*) sets forth a variety of provisions designed to improve energy efficiency and, for certain products, water efficiency.[1] Part B of Title III[2] establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles,'' which includes showerheads (with the exception of safety shower showerheads)—the subject of this rulemaking. (42 U.S.C. 6292(a)(15)) Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

B. Background

EPCA defines a showerhead as ''any showerhead (including a handheld showerhead), except a safety shower showerhead.'' (42 U.S.C. 6291(31)(D)) In addition to defining ''showerhead,'' Congress established a maximum water use threshold of 2.5 gpm applicable to ''any showerhead.'' (42 U.S.C. 6295(j)(1)). The definition of ''showerhead'' and the water conservation standard for showerheads were added to EPCA by the Energy

[1] All references to EPCA in this final rule refer to the statute as amended through 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 redesignated as Part A.

Policy Act of 1992 (Pub. L. 102–486 (Oct. 24, 1992)) (''EPAct 1992'').

Until 2013, DOE regulations did not contain a separate definition for ''showerhead.'' (*See* 78 FR 62970) (Oct. 23, 2013) On May 19, 2010, DOE published in the **Federal Register** a Notice of Availability of a proposed interpretive rule regarding the definition of ''showerhead.'' 75 FR 27926 (''2010 Draft Interpretive Rule'') In the 2010 Draft Interpretive Rule,[3] DOE discussed how there was uncertainty about how the EPCA definition of ''showerhead'' applies to the diversified showerhead product offerings. *Id.* at 1. To address this uncertainty, DOE proposed to define a ''showerhead'' as ''any plumbing fitting that is designed to direct water onto a bather.'' *Id.* at 2 (footnote omitted). As such, DOE stated it would ''find a showerhead to be noncompliant with EPCA's maximum water use standard if the showerhead's standard components, operating in their maximum design flow configuration, *taken together* use in excess of 2.5 gpm.'' *Id.* at 3.

On March 4, 2011, DOE formally withdrew the draft interpretive rule and issued showerhead enforcement guidance.[4] (''2011 Enforcement Guidance'') In the 2011 Enforcement Guidance, DOE explained that it had received several complaints alleging that certain showerhead products exceeded EPCA's 2.5 gpm standard. DOE stated that it had learned that some had come to believe that a showerhead that expels water from multiple nozzles constituted not a single showerhead, but rather multiple showerheads and thus could exceed the maximum permitted water use by a multiple equal to the number of nozzles on the showerhead. *Id.* at 1. Following a review of the record from the 2010 Draft Interpretive Rule, DOE concluded that the term ''any showerhead'' has been and continues to be sufficiently clear such that no interpretive rule was needed. *Id.* at 2. Specifically, DOE stated that ''multiple spraying components sold together as a single unit designed to spray water onto a single bather constitutes a single showerhead for the purpose of the maximum water use standard.'' *Id.* DOE used its discretion and addressed the misunderstanding of how to measure compliance with the standard by providing a two-year enforcement grace period to allow manufacturers to sell any remaining noncompliant products. *Id.* at 2–3.

On May 30, 2012, DOE proposed to revise the test procedure for showerheads and other products and to change the regulatory definition of showerheads. 77 FR 31742 (''May 2012 NOPR''). DOE proposed to adopt definitions for four terms related to showerheads—''fitting'', ''accessory'', ''body spray'', and ''showerhead''—in order to address certain provisions of the revised American Society of Mechanical Engineers/American National Standards Institute (''ASME/ANSI'') test procedures that were not contemplated in the versions referenced by the existing DOE test procedure, and to establish greater clarity with respect to product coverage. 77 FR 31742, 31747.[5] Specifically, DOE proposed to define ''showerhead'' as ''an accessory, or set of accessories, to a supply fitting distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, including body sprays and hand-held showerheads, but excluding safety shower showerheads.'' 77 FR 31742. 31755. The proposed definition clarified that DOE considered a ''body spray'' to be a showerhead for the purposes of regulatory coverage. 77 FR 31742, 31747.

Responding to comments on the May 2012 NOPR, DOE issued on April 8, 2013 a supplemental notice of proposed rulemaking (''SNOPR'') in which DOE proposed a revised definition of ''showerhead'' and withdrew its proposal to include ''body sprays'' in the definition of ''showerhead'' in light of concerns raised by commenters and DOE's need to further study the issue. 78 FR 20832, 20834–20835, 20841 (''April 2013 SNOPR''). The SNOPR's modified definition of ''showerhead'' removed the term ''accessory'' from the definition based on comments about the use of the term. 78 FR 20832, 20834. Under the proposed modified definition, a ''showerhead'' is ''a component of a supply fitting, or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, including hand-held showerheads, but excluding safety shower showerheads.'' 78 FR 20832, 20834. DOE also requested comment on whether to define the term ''safety shower showerhead'' to address which products qualify for exclusion from coverage under EPCA and DOE regulations. 78 FR 20832, 20835, 20840.

On October 23, 2013, DOE issued a final rule amending test procedures for showerheads and other products and adopting definitions for products, including showerheads. 78 FR 62970 (''October 2013 Final Rule''). In this final rule, DOE adopted in substance the modified definition of ''showerhead'' proposed in the April 2013 SNOPR. 78 FR 62970, 62986. The October 2013 Final Rule defined ''showerhead'' as ''a component or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, excluding safety shower showerheads.'' *Id.* at 78 FR 62986. DOE did not finalize the definition of ''body spray'' proposed in the May 2012 NOPR. *Id.* at 78 FR 62973. DOE also declined to adopt a definition of ''safety shower showerhead'', and explained that it was unable to identify a definition that would clearly distinguish these products from the showerheads covered under EPCA. *Id.* at 78 FR 62974.

On August 13, 2020, DOE proposed revising the definition of a ''showerhead'' to be consistent with the most recent ASME standard. 85 FR 49284 (''August 2020 NOPR''). DOE also proposed to adopt definitions of ''body spray'' and ''safety shower showerhead'' and to clarify whether the current test procedure would apply to the proposed definitional changes. *Id.* at 85 FR 49285. In addition, DOE proposed to amend the test procedure for showerheads to address the testing of a single showerhead within a multiheaded showerhead. *Id.* at 85 FR 49292.

On December 16, 2020, DOE published a final rule amending the definition of ''showerhead'' and adopting definitions for ''body spray'' and ''safety shower showerhead.'' 85 FR 81341. Specifically, the December 2020 Final Rule amended the meaning of ''showerhead'' to restate the statutory definition and explicitly define the term through incorporation of the ASME definition to mean ''an accessory to a supply fitting for spraying onto a bather, typically from an overhead position.'' *Id.* at 85 FR 81342, 81359. In the December 2020 Final Rule's definition, DOE interpreted the new definition to mean that each ''showerhead'' included in a product with multiple showerheads would be considered separately for purposes of determining standards compliance. *Id.* at 85 FR 81342. In addition, DOE established a definition for ''body spray'', citing the need to address ambiguity about whether body sprays were considered showerheads

[3] Available at *www.regulations.gov/document?D=EERE-2010-BT-NOA-0016-0002.*

[4] Available at *www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.*

[5] DOE also proposed to adopt a definition for ''hand-held showerhead'' in the May 2012 NOPR. 77 FR 31742, 31747. This final rule does not reference that discussion, as DOE is not proposing any edits to the existing definition of ''hand-held showerhead.''

under the October 2013 Final Rule. *Id.* at 85 FR 81342, 81350. DOE defined the term ''body spray'' as ''a shower device for spraying water onto a bather from other than the overhead position. A body spray is not a showerhead.'' *Id.* at 85 FR 81359. Lastly, DOE defined the term ''safety shower showerhead'' by incorporating by reference the definition of ''safety shower showerhead'' from the ANSI/International Safety Equipment Association (''ISEA'') Z358.1–2014,[6] such that a ''safety shower showerhead'' is ''a showerhead designed to meet the requirements of ISEA Z358.1.'' *Id.* at 85 FR 81359. The December 2020 Final Rule determined that leaving the term ''safety shower showerhead'' undefined would cause confusion as to which products are excluded from the definition of ''showerhead.'' *Id.* at 85 FR 81351. DOE did not finalize the test procedure amendments that had been proposed in the August 2020 NOPR. *Id.* at 85 FR 81351.

On January 20, 2021, the President issued Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' 86 FR 7037 (Jan. 25, 2021) (''E.O. 13990''). Section 1 of that Order lists a number of policies related to the protection of public health and the environment, including reducing greenhouse gas (''GHG'') emissions and bolstering the Nation's resilience to the impacts of climate change. *Id.* at 86 FR 7041. Section 2 of the Order instructs all agencies to review ''existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies].'' *Id.* Agencies are directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions. *Id.*

While E.O. 13990 triggered the Department's re-evaluation of the December 2020 Final Rule, DOE relies upon the analysis presented below, based upon EPCA, to revise the definition ''showerhead'' and to withdraw the definition of ''body spray'' in the July 2021 NOPR and in this final rule. On July 22, 2021, DOE issued a NOPR (''July 2021 NOPR'') in which it proposed to revise the definition of ''showerhead'' adopted in the December 2020 Final Rule by reinstating the prior definition of ''showerhead.'' 86 FR 38594. Further, DOE tentatively determined that, in reinstating the prior definition of ''showerhead,'' all components attached to a single supply fitting (*i.e.,* all nozzles or spraying components within a product containing multiple nozzles or spraying components) would be considered part of a single showerhead for determining compliance with the 2.5 gpm standard. *Id.* In addition, DOE proposed to withdraw the current definition of ''body spray'' adopted in the December 2020 Final Rule. *Id.* Finally, DOE did not propose any changes to the definition of ''safety shower showerhead'' adopted in the December 2020 Final Rule. *Id.*

DOE invited comment on all aspects of July 2021 NOPR, including data and information to assist in evaluating whether the definition of ''showerhead'' from the October 2013 Final Rule should be reinstated. *Id.* at 86 FR 38594. On August 31, 2021, DOE held a webinar to present the substance of the July 2021 NOPR and afford interested parties an opportunity to present comments.[7]

DOE received comments in response to the July 2021 NOPR from the interested parties listed in Table I.1.DOE received two comments that were not within the scope of the rulemaking.[8]

TABLE I.1—WRITTEN COMMENTS RECEIVED IN RESPONSE TO JULY 2021 NOPR

Commenter(s)	Reference in this Final Rule	Commenter type
Alliance for Water Efficiency (''AWE''); Amy Vickers and Associates, Inc.; Arizona Municipal Water Users Association; Athens-Clarke County Public Utilities Dept. (GA); Best Management Partners; Center for Water-Efficient Landscaping; Citizens Water Advocacy Group; City of Bend, OR; City of Durham, NC; City of Flagstaff, AZ; City of Hays, KS; City of Mesa, AZ; City of Round Rock, TX; City of Santa Rosa, CA; City of Westminster, CO; Connecticut Water Company; Dickinson Associates; Foothill Municipal Water District (CA); Houston Public Works (TX); Maine Water Company; Metropolitan North Georgia Water Planning District; Monterey Peninsula Water Management District (CA); Municipal Water District of Orange County (CA); National Wildlife Federation; PHCC–National Association; Regional Water Authority (CA); Rancho California Water District; San Antonio Water System (TX); San Jose Water (CA); Seattle Public Utilities (WA); SJWTX (TX); Southern Nevada Water Authority; Tucson Water (AZ); Walnut Valley Water District (CA); Water Demand Management, LLC.	AWE *et al*	Efficiency Organizations, Municipal Utilities and Governments, Trade Associations.
Anonymous Anonymous	Anonymous	Individual.
Appliance Standards Awareness Project (''ASAP''), Alliance for Water Efficiency, American Council for an Energy-Efficient Economy, Consumer Federation of America, and Natural Resources Defense Council.	Joint Advocates	Efficiency Organizations.
California Energy Commission	CEC	State.
California Investor-Owned Utilities (Pacific Gas and Electric Company, San Diego Gas and Electric, Southern California Edison).	CA IOUs	Utilities.
Competitive Enterprise Institute, FreedomWorks Foundation, Consumers' Research, Citizens Against Government Waste, Caesar Rodney Institute, Project 21, Texas Public Policy Foundation, The Cornwall Alliance for the Stewardship of Creation, 60 Plus Association, Roughrider Policy Center, Americans for Prosperity, Committee for a Constructive Tomorrow.	CEI *et al*	Policy Organizations.
Andrew Doty	Doty	Individual.
Dan Glucksman	Glucksman	Individual.
Kevin Halligan	Halligan	Individual.
Katherine Hekstra	Hekstra	Individual.

[6] ANSI/ISEA Z358.1–2014, ''American National Standard for Emergency Eyewash and Shower Equipment.''

[7] The webinar presentation and transcript are available in the docket at *www.regulations.gov/docket/EERE-2021-BT-STD-0016/document.*

[8] *See* Comment Nos. 9, and 24).

TABLE I.1—WRITTEN COMMENTS RECEIVED IN RESPONSE TO JULY 2021 NOPR—Continued

Commenter(s)	Reference in this Final Rule	Commenter type
Alicia Johnston	Johnston	Individual.
Shane Kelley	Kelley	Individual.
Metropolitan North Georgia Water Planning District	the District	Municipal Government.
Northwest Power and Conservation Council	NPCC	Efficiency Organization.
Plumbing Manufacturers International	PMI	Trade Association.
James Ramer	Ramer	Individual.
James Southerland	Southerland	Individual.
Marl Walters	Walters	Individual.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[9]

II. Synopsis of the Final Rule

Following a review of the December 2020 Final Rule and the comments received in response to the August 2020 NOPR, relevant authorities, and comments received in response to the July 2021 NOPR, DOE is withdrawing the December 2020 Final Rule's definition of ''showerhead,'' and is reinstating the October 2013 Final Rule's definition of ''showerhead.'' *See* 78 FR 62970, 62986. As such, DOE defines the term ''showerhead'' as ''a component or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, excluding safety shower showerheads.'' DOE is also withdrawing the December 2020 Final Rule's interpretation that each ''showerhead'' included in a product with multiple showerheads would be considered separately for purposes of determining standards compliance. Whereas in the December 2020 Final Rule DOE stated that while water conservation is obviously a purpose of EPCA, the definitional changes follow congressional reliance on the ASME standard. DOE has reconsidered this balance and has come to a different policy conclusion that water conservation is a more important EPCA purpose and should be weighed more heavily when amending the definition of a covered product than consistency with ASME (with which DOE has no statutory obligation to align its definition). The Department finds that the definition of ''showerhead'' as presented in this final rule better effectuates EPCA's water conservation purposes. This final action will also provide consumers the benefits derived from water savings that will accrue over time with this return to the definition of ''showerhead'' that existed prior to the December 2020 Final Rule.

DOE is also withdrawing the definition of ''body spray'' adopted in the December 2020 Final Rule. DOE finds that the current definition of ''body spray'' is inconsistent with the express purpose of EPCA to conserve water by improving the water efficiency of certain plumbing products and appliances as the current definition may lead to increased water use. Further, the definition of ''body spray'' does not best address the relationship between body sprays and showerheads. This is because the only difference between the definitions of ''body spray'' and ''showerhead'' is the installation location, as shown by the similar treatment of the two products in the marketplace. Finally, DOE is maintaining the definition of ''safety shower showerhead,'' as leaving the term undefined may cause confusion about what products are subject to the energy conservation standards.

III. Discussion

A. Reinstatement of the October 2013 Final Rule's Definition of ''Showerhead''

In the July 2021 NOPR, DOE tentatively determined that EPCA's definition of showerhead is ambiguous and that the December 2020 Final Rule's definition of ''showerhead'' is not consistent with EPCA's purposes to conserve water by improving water efficiency of certain plumbing products and appliances and to improve energy efficiency of major appliances and consumer products. 86 FR 38594, 38597; (*See also* 42 U.S.C. 6201) DOE also tentatively determined that: Congressional intent does not require DOE to adopt the ASME definition for ''showerheads;'' that the October 2013 Final Rule did not effectively ban multi-headed showerheads from the market; and that the December 2020 Final Rule's definition of ''showerhead'' is inconsistent with EPCA's purposes, and falls within the National Technology Transfer and Advancement Act of 1995 (''NTTAA'') and OMB Circular A–119 exception to the use of voluntary consensus standards. *Id.* As such, DOE proposed to withdraw the December 2020 Final Rule's definition of ''showerhead'' and to reinstate the definition of ''showerhead'' from the October 2013 Final Rule. *Id.*

Based on the discussion in the following sections and the analysis presented in the July 2021 NOPR, DOE is reinstating the pre-December 2020 Final Rule definition of ''showerhead'' as proposed in the July 2021 NOPR. In response to the July 2021 NOPR, PMI, the CA IOUs, the Joint Advocates, and CEC supported DOE's reevaluation of the December 2020 Final Rule and urged the finalization of the proposed rule. (PMI, No. 22 at pp.1–2; CA IOUs, No. 20 at p. 1; Joint Advocates, No. 23 at pp.1, 3; CEC, No. 19 at pp. 1–2; PMI, Public Meeting Transcript at p.6; CA IOUs, Public Meeting Transcript at p.4) AWE, *et al.,* the District, and NPCC also supported DOE's proposal to reinstate the prior definition of ''showerhead.'' (AWE, *et al.,* No. 21 at p. 1; the District, No. 16 at pp.1–2; NPCC, No. 12 at p. 1; AWE, Public Meeting Transcript at p.7) Additionally, Hekstra and ASAP commented in support of this rulemaking. (Hekstra, No. 17; ASAP, Public Meeting Transcript at p. 4) However, CEI *et al.* opposed re-instatement of the definition of showerhead as established in the October 2013 Final Rule on the grounds that it is incompatible with the law and detrimental to consumers. (CEI *et al.,* No. 18 at p. 2)

1. EPCA's Definition of ''Showerhead'' Is Ambiguous

In the July 2021 NOPR, DOE tentatively determined that the term ''showerhead'' is ambiguous. 86 FR 38594, 38597–38598. EPCA defines the term ''showerhead'' as ''any showerhead (including a handheld showerhead), except a safety shower showerhead.'' (42 U.S.C. 6291(31)(D)) Congress adopted this definition of showerhead

[9] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to amend the definition of showerhead. (Docket No. EERE–2021–BT–STD–0016, which is maintained at *www.regulations.gov*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

in 1992 as part of the Energy Policy Act. Thereafter, however, between 1992 and 2010, the designs of showerhead diversified into a myriad of products including waterfalls, shower towers, rainheads, and shower systems.[10] In the 2010 Draft Interpretive Rule, DOE noted that it had become aware of uncertainty in how the EPCA definition and standard applies to such products. *Id.* As such, DOE issued the draft interpretive rule to ''make clear to all stakeholders'' DOE's interpretation of the definition of ''showerhead'' with respect to the 2.5 gpm maximum water use requirement. *Id.* at 1–2.

Similarly, in the 2011 Enforcement Guidance, DOE explained that it had learned that some had come to believe that a showerhead that expels water from multiple nozzles constituted not a single showerhead, but rather multiple showerheads and thus could exceed the maximum permitted water use.[11] DOE further acknowledged that absence of enforcement could have contributed to that misunderstanding. *Id.* at 2. While DOE acknowledged such confusion, DOE withdrew the 2010 Draft Interpretive Rule in the 2011 Enforcement Guidance document based on its conclusion that the term ''any showerhead'' has been, and continues to be, sufficiently clear such that no interpretive rule is needed. *Id.* In the 2011 Enforcement Guidance, DOE stated that multiple spraying components sold together as a single unit designed to spray water onto a single bather constitute a single showerhead for purpose of the maximum water use standard. *Id.* DOE provided manufacturers a two-year grace period to sell any remaining noncompliant products and to adjust product designs for compliance with EPCA and DOE regulations. *Id.* at 3.

Consequently, the ambiguity of the word ''showerhead'' in EPCA is underscored by its history. DOE's statements in both the 2010 Draft Interpretive Rule and the 2011 Enforcement Guidance illustrate that confusion existed among manufacturers about what constituted a showerhead under the statutory definition. The diversification of the marketplace as it pertains to ''showerheads'' and the confusion about what products were considered a showerhead by manufacturers following inclusion of the term in EPCA, as amended by EPAct 1992, further illustrate that the statutory definition of ''showerhead'' is ambiguous. In the July 2021 NOPR, DOE stated that it believes that any ambiguity in the statutory meaning should be explicated by a regulatory definition that is consistent with EPCA's purposes. 86 FR 38594, 38598.

In response to the July 2021 NOPR, commenters highlighted the circular nature of the statutory definition of ''showerhead.'' CEI *et al.* commented that the statutory definition of showerhead is circular—the definition of the term includes the term being defined (*i.e.,* showerhead is a showerhead). Further, CEI *et al.* argued that the December 2020 Final Rule concluded that the statutory uncertainty was largely resolved when the per-showerhead approach was adopted by ASME, even though the July 2021 NOPR asserted ongoing doubt. (CEI *et al.,* No. 18 at p. 2) And Hekstra agreed that consumers and manufacturers appreciate clarity and a circular definition is not clear. (Hekstra, No. 17 at p. 1).

DOE agrees that the statutory definition of ''showerhead'' is a circular definition, which further illustrates the ambiguity of a term that is defined by itself. Further, contrary to CEI *et al.'s* assertion that the statutory uncertainty was resolved in the December 2020 Final Rule, the December 2020 Final Rule stated that ambiguity exists regarding what is considered a ''showerhead'' under EPCA and, in that rule, DOE said it was clarifying what constitutes a ''showerhead.'' 85 FR 81341, 81344. As outlined in the previous discussion, DOE continues to find that the statutory definition of ''showerhead'' is ambiguous for the reasons presented in the July 2021 NOPR and in this final rule. Ambiguity in the statutory meaning is appropriately resolved by a regulatory definition that furthers EPCA's purposes consistent with that statute.

2. The December 2020 Final Rule's Definition of Showerhead Is Inconsistent With EPCA's Purposes

As outlined in the July 2021 NOPR, Congress included a statement of purpose in EPCA that sets forth seven purposes related to energy. Most relevant to the Energy Conservation Program, one of the primary purposes of EPCA is ''to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses.'' (42 U.S.C. 6201(4); Pub. L. 94–163 (Dec. 22, 1975)); *see* 86 FR 38594, 38598. The EPAct 1992 amended EPCA by adding plumbing products, including showerheads, to the products covered by the Energy Conservation Program. (Pub. L. 102–486 (Oct. 24, 1992)) In doing so, EPAct 1992 also added to EPCA the purpose of conservation of water ''by improving the water efficiency of certain plumbing products and appliances,'' in addition to the purpose of energy savings. (42 U.S.C. 6201(8))

In the 2010 Draft Interpretive Rule, DOE explained that all components that are supplied together and function from one inlet form a single showerhead for purposes of the maximum water use standards under EPCA.[12] DOE stated that neither the statutory definition nor the test procedures for showerheads treat a showerhead differently based upon the shape, size, placement, or number of sprays or openings it may have. *Id.* at 2. Further, DOE highlighted that the test procedure contemplates that the regulated showerhead fitting may have additional ''accessory'' water outlets and specifies that all standard accessories must be attached and set at maximum flow during testing. *Id.* DOE clarified that a showerhead is determined to be noncompliant if the standard components, operating in their maximum design flow configuration taken together use in excess of 2.5 gpm. *Id.* at 3. (emphasis omitted) DOE stated that this approach furthers the goal of EPCA to ''conserve water by improving the water efficiency'' of showerheads. *Id.* In DOE's 2011 Enforcement Guidance, DOE articulated a modified interpretation of the statutory definition of ''showerhead'' from the definition proposed in the 2010 Draft Interpretive Rule. DOE stated that multi spraying units sold together as a single unit designed to spray water onto one bather are considered a single showerhead.[13] DOE explained that all sprays and nozzles should be turned onto the maximum flow setting to determine water use. *Id.* DOE found this approach is consistent with the industry standard, the statutory language, and Congressional intent to establish a maximum water use requirement. *Id.* These previous statements by DOE illustrate that a definition of ''showerhead'' that includes a multi-headed showerhead is consistent with EPCA's purpose of water conservation.

While the 2020 rulemaking acknowledged that water conservation is among EPCA's purposes, it did not fully account for how its definition of ''showerhead'' would comport with this purpose of EPCA. 85 FR 81341, 81353. In the July 2021 NOPR, DOE stated that the definition of ''showerhead''

[10] See *https://www.regulations.gov/document?D=EERE-2010-BT-NOA-0016-0002.*

[11] See *https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.*

[12] See *https://www.regulations.gov/document?D=EERE-2010-BT-NOA-0016-0002.*

[13] See *https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.*

established in the December 2020 Final Rule allows each nozzle within a showerhead with multiple nozzles to be separately subject to the standard, and thereby allows water flow at a multiple of that standard and the related increase of energy for water heating. 86 FR 38594, 38598.

As discussed in the July 2021 NOPR, the contemplated treatment of showerheads in the 2010 Draft Interpretive Rule, the articulated interpretation in the 2011 Enforcement Guidance, and the regulatory definition established in the October 2013 Final Rule (*i.e.,* all components attached to a single supply fitting/inlet are a single showerhead) further the goal of EPCA to ''conserve water by improving the water efficiency'' of showerheads. 86 FR 38594, 38598. In treating all components attached to a single supply fitting/inlet as a shower head, the 2.5 gpm standard applies to the combined water flow of all such attached components.

In response to the July 2021 NOPR, commenters discussed the statutory interpretation of the term ''showerhead.'' AWE *et al.* quoted the definition of the term ''showerhead'' from *Merriam-Websters.com,* which defines the term as ''a fixture for directing the spray of water in a bathroom shower.'' AWE *et al.* stated that the definition of showerhead in the 2013 Rule appropriately aligns with this understanding. AWE *et al.* further stated that the December 2020 Final Rule meant that a person taking a shower from a multi-nozzle product would be using multiple showerheads at once—a concept that is awkward under the common, ordinary usage of the word showerhead. (AWE *et al.,* No. 21 at p. 2) AWE *et al.* explained that objects that are sold as a set together, installed together, and used together constitute a single product from the consumer's point of view and the usage of these objects simultaneously for the function of showering demonstrates the collection of them—the nozzles all together—is the single product known as a showerhead. (AWE *et al.,* No. 21 at p. 3) CEC stated that the October 2013 definition more clearly defines the term showerhead to mean any showerhead, other than a safety showerhead, must meet the maximum flow rate of 2.5 gpm. Specifically, CEC explained that DOE's interpretation of the term in the December 2020 final rule is not justified or a permissible construction of the statute and measuring the water flow of all sprayers on a multi-nozzle device at the same time is the only meaningful interpretation of the statutory and regulatory structure of showerhead. (CEC, No. 19 at p. 3)

Conversely, CEI *et al.* argued that the most likely intent of the statutory definition is that the 2.5 gpm restriction is applicable to each individual showerhead, otherwise the statute would have used the term shower instead. (CEI *et al.,* No. 18 at p. 2)

AWE *et al.* and CEC's comments discussing the general understanding of the term ''showerhead'' further confirm DOE's positions outlined in the 2010 Draft Interpretive Rule and the 2011 Enforcement Guidance that all components/units sold together as a single unit are considered a single showerhead. CEI *et al.* suggests that the term ''showerhead'' applies to each individual showerhead, while the term ''shower'' applies to a collection of showerheads. The term ''shower'' is generally understood to mean the location in which plumbing fixtures (*e.g.,* showerhead, tub faucet, body spray) are installed to allow for the act of showering. These comments further illustrate that the term ''showerhead'' is ambiguous, as discussed in section III.A.1. As these comments and statements illustrate that the term ''showerhead'' can comprise a multi-headed showerhead and is consistent with EPCA's purpose of water conservation.

In response to the July 2021 NOPR, commenters discussed the impacts of the current definition of ''showerhead.'' NPCC stated that the definitions of ''showerhead'' adopted in the December 2020 Final Rule provide two significant loopholes to compliance with the standard inconsistent with the purposes of EPCA, with real significant consequences for energy and water conservation. (NPCC, No. 12 at pp.1–2) NPCC estimated that the December 2020 Final Rule definition of ''showerhead'' could significantly increase water use per shower and significantly impact consumption of electricity as well as natural gas. (NPCC, No. 12 at p. 2) The Joint Advocates stated that the definition of ''showerhead'' that was finalized in the December 2020 Final Rule goes against the purposes of EPCA and allows for showerheads to use an unlimited amount of water. Additionally, the Joint Advocates stated that the current definition of ''showerhead'' would allow for excessive water use and result in increased costs for consumers. (Joint Advocates, No. 23 at p.1) The CA IOUs stated that the December 2020 Final Rule introduced the prospect of limitless water usage in many showerhead products. (CA IOUs, No. 20 at p.1) Hekstra commented that the 2020 definition created a loophole that needs to be closed to meet the goal of creating a system that reduces the amount of water used per minute by the average shower user. (Hekstra, No. 17)

CEC stated that the climate and environmental damages, such as harm from increased emissions, worse air quality, unnecessary energy demand, and water availability, resulting from the December 2020 Final Rule are felt across state lines. (CEC, No. 19 at p.2) CEC stated that the definition included in the December 2020 Final Rule results in an increase in water and energy use nationwide by allowing multi-sprayer devices to use more than the maximum flow rate, and is not a permissible construction of the statute. (CEC, No. 19 at p.3)

AWE *et al.* referenced its prior comments in which it estimated that the current definition could increase annual energy consumption by 25 trillion British thermal units for each gpm increase in shower flow rate, and together with the increased annual domestic water use, could increase annual water and energy bills for American consumers by an estimated $1.14 billion. (AWE *et al.,* No. 21 at p. 4) AWE *et al.* explained that the U.S. is experiencing serious water shortages and the December 2020 Final Rule only serves to increase the consumption of drinking water that will have severe impacts on water supplies across the country. Further, AWE *et al.* stated that the December 2020 Final Rule could increase residential water consumption upwards of 160 gallons annually by allowing multiple showerhead systems to increase flows from the previous 2.5 gpm. AWE *et al.* also noted the pressure on water utilities will continue to grow, due to population increases in areas like the West, where water is scare, and climate change, which is causing long-term declines in rainfall in many regions. The increased water consumption under the December 2020 Final Rule will increase water utility costs as it becomes necessary to provide new water supplies, and therefore may increase customer bills, as the costs for procuring needed new water supplies is passed onto consumers. (AWE *et al.,* No. 21 at pp.2–3) AWE stated that the December 2020 Final Rule would potentially waste billions of gallons of water, increase energy use and power plant emissions, and raise consumer water bills. Further, with much of the country struggling with drought, these 2020 changes could further compromise water supply availability. (AWE, Public Meeting Transcript at p. 7)

CEI *et al.* asserted that EPCA requires DOE to balance energy and/or water

conservation against other factors important to consumers, including costs and other consumer protections. (CEI *et al.,* No. 18 at p. 3) CEI *et al.* argued that the proposed rule did not provide evidence that it would result in significant water savings as required by statute. CEI *et al.* further stated that without evidence of widespread adoption of multi-head showers with a maximum flow rate above 2.5 gpm, the agency has not shown that reimposing the restrictions on them would result in significant water savings. CEI *et al.* also argued that showers are adjustable and even with models that have maximum flow rate above 2.5 gpm, users will not necessarily use that level of water flow for every shower—the highest settings in such showerhead would only be used occasionally and such use would likely be shorter in duration. CEI *et al.* continued that the insignificance of the water savings undercuts the climate change rationale for the Proposed Rule. (CEI *et al.,* No. 18 at p. 5) Finally, CEI *et al.* stated that the July 2021 NOPR's critique of the December 2020 Final Rule is based on the misleading belief that the statutory provisions prioritize efficiency above everything else. (CEI *et al.,* No. 18 at p.6)

Anonymous suggested that if less water is coming out of their shower per minute, a consumer may take longer showers. (Anonymous, No. 5 at p. 1) Similarly, Southerland argued that restricting the water flow from a showerhead will not ''save'' water because if water flow is restricted, a person will take a longer shower defeating the purpose of the limited water flow. (Southerland, No. 2)

DOE has considered these comments in this rulemaking as they relate to the December 2020 Final Rule's definition of ''showerhead.'' DOE continues to believe that EPCA's purpose should be considered when amending the definition of a covered product. As this rulemaking does not amend the water conservation standards for showerheads, DOE is not required to conduct the analysis required by 42 U.S.C. 6295(o) suggested by CEI *et al.* Further, DOE continues to consider all relevant statutory provisions, including those related to consumer protection, which are discussed in section IV.4. DOE agrees with commenters that if maintained, the December 2020 Final Rule ''showerhead'' definition will likely increase water usage and increase associated energy use. These increases would be contrary to EPCA's purposes of reducing water and energy consumption. As such, DOE has determined that the December 2020 Final Rule's definition of ''showerhead'' should be withdrawn.

Also, in response to the July 2021 NOPR, DOE received comments about the prior 2013 definition of ''showerhead.'' The NPCC stated that the reinstated definition of ''showerhead'' would return stability to the consumption and efficiency aspects of the showerhead standard. Further, NPCC explained that the Northwest has about 10 million showerheads, and reinstating this definition will ensure significant electricity, natural gas, and water savings are not lost. (NPCC, No. 12 at p. 2) The District stated that the proposed withdrawal better fits with the purpose of the EPCA by improving the energy efficiency and water efficiency of consumer products. Further, the District commented that efficient shower fixtures reduce water usage not only per household, but also on a regional scale. This reduction in demand helps conservation efforts especially in regions experiencing frequent droughts and other water-conscious communities that would be detrimentally impacted by unnecessary additional use of water. (The District, No. 16 at pp.1–2) The Joint Advocates stated that the October 2013 definition will not result in excessive water use and with several regions across the country facing droughts and water shortages, it is important now more than ever to reduce water demand and conserve energy. (Joint Advocates, No. 23 at p. 1) Hekstra stated that the 2013 definition will reduce the amount of water used by those that wish to have multiple showerheads in one shower. (Hekstra, No. 17)

AWE *et al.* commented that DOE's proposal to reinstate the definition from the 2013 Rule will better effectuate EPCA's water conservation purposes. (AWE *et al.,* No. 21 at p.2) AWE *et al.* reiterated the significant water and energy savings from the existing definition of ''showerhead'' and that the cumulative savings over 10 years from 2.5 gpm showerheads could supply up to 1 million homes with water and 670,000 homes with energy for a year. AWE *et al.* also stated that the replacement of older, high-flow showerheads provides 11 billion gallons per year in water savings and 5 trillion Btu per year in energy savings in the United States. (AWE *et al.,* No. 21 at p. 4)

CEC explained that conserving water is especially important because 90 percent of the Western United States is experiencing drought conditions and 54 percent is in ''extreme drought.'' CEC also noted that California has seen more than 7,200 fire incidents and more than 2 million acres burned, including devastating fires such and that it is imperative to use every available tool to address the unnecessary and inefficient use of energy and water, including and especially improving energy and water conservation standards. (CEC, No. 19 at pp.1–2) The CA IOUs stated that over 95 percent of California's landmass is currently impacted by severe drought, so it is critical for its state that DOE ensure showerhead water efficiency is protected and strengthened. (CA IOUs, Public Meeting Transcript at p.3) And Kelley noted the importance of conserving valuable resources. (Kelley, No. 11)

DOE has considered the comments received in response to the July 2021 NOPR and agrees with the commenters that the definition of ''showerhead'' from the October 2013 Final Rule and the associated interpretation provided water and energy savings and protected the environment. As discussed above in this section, DOE continues to find that the history of the definition of ''showerhead'' and the comments in response to July 2021 NOPR illustrate that the term ''showerhead'' can comprise a multi-headed showerhead and is consistent with EPCA's purpose of water conservation. Further, DOE has determined that if maintained, the December 2020 Final Rule ''showerhead'' definition will likely increase water usage and increase associated energy use and as such the current definition of ''showerhead'' should be withdrawn.

As such, DOE is withdrawing the definition of showerhead finalized in the December 2020 Final Rule and re-instating the definition established in the October 2013 Final Rule, which as discussed, appropriately addresses the water conservation purpose of EPCA.

3. Reliance on ASME for the Definition of ''Showerhead'' Is Not Required

In the July 2021 NOPR, DOE explained that it tentatively departed from the view expressed in the December 2020 Final Rule that it would be more consistent with Congressional intent to rely on ASME for the definition of ''showerhead.'' 86 FR 38594, 38600. DOE stated that DOE does not believe Congress required reliance on the ASME definition. *Id.*

As discussed previously in this document, Congress established the definition of ''showerhead'' in EPAct 1992, along with the provisions related to definitions, standards, test procedures, and labeling requirements for plumbing products. (Pub. L. 102–486; Oct. 24, 1992 Sec. 123) EPAct 1992 and EPCA define the term

''showerhead'' as ''any showerhead (including a handheld showerhead), except a safety shower showerhead.'' (42 U.S.C. 6291(31)(D)) In the same paragraph, Congress provided explicit direction to define the terms ''water closet'' and ''urinal'' in accordance with ASME A112.19.2M, but did not provide such instructions with respect to ''showerhead.'' (*Cf.* Sec. 123(b)(5) of Pub. L. 102–486) DOE has learned since the July 2021 NOPR that ASME A112.18.1M–1989 did not contain a definition for showerheads, but it did contain requirements for showerheads. Congress adopted the ASME standards only for the water conservation standards, test procedures, and labeling requirements, specified ASME A112.18.1M–1989 as the applicable standard, and required DOE to adopt the revised version of the standard, unless it conflicted with the other requirements of EPCA. (42 U.S.C. 6295(j)(1) and (3); 42 U.S.C. 6293(b)(7); 42 U.S.C. 6294(a)(2)(E)) While Congress could not rely on a definition of ''showerhead'' in ASME A112.18.1M–1989 in defining the term, Congress could have required DOE to adopt a definition of ''showerhead'' as defined in any revised version of the ASME A112.18.1M–1989 as it did with requirements for standards and test procedures related to standards. Congress defined ''showerhead'' and did not explicitly require DOE to amend the definition of ''showerhead'' in conformity with the applicable ASME standard.

Further, the mere fact that the terms immediately preceding showerhead are ''ASME'' and ''ANSI'' does not suggest that Congress intended for DOE to rely on the ASME definition. EPCA directly references ASME A112.18.1M–1989, or a revised version of the standard approved by ANSI, for showerhead test procedures, energy conservation standards, and labeling requirements, but noticeably does not direct DOE to adopt a definition of ''showerhead'' from an amended version of the industry standard. Had Congress intended for DOE to apply the definition of ''showerheads'' from the industry standard, it would have provided the necessary reference. DOE received a comment only from CEC on this issue. CEC stated that DOE correctly concludes that Congress did not require DOE to rely on ASME for the definition of showerheads. (CEC, No. 19 at p. 3).

Based on the discussion in the preceding paragraphs and presented in the July 2021 NOPR, DOE maintains its decision that it is not required to define ''showerhead'' according to the ASME definition and that Congress intended DOE to have flexibility to define the term.

4. The Reinstated Definition of ''Showerhead'' Does Not Effectively Ban Multi-Headed Showerheads

As discussed in the July 2021 NOPR, EPCA provides that the Secretary is prohibited from prescribing an amended or new standard if the Secretary finds that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4)); 86 FR 38594, 38601.

In the August 2020 NOPR, DOE proposed to adopt an amended definition of ''showerhead'' that complies with the Congressional directive to preserve performance characteristics and features that were available on the market at the time DOE originally acted to eliminate them. 85 FR 49298, 49291. DOE explained that it cannot regulate or otherwise act to remove products with certain performance characteristics and features from the market given the prohibition in 42 U.S.C. 6295(o)(4). 85 FR 49282, 49290. In the December 2020 Final Rule, DOE further explained that considering two, three, or eight showerheads in a given product to be a ''feature'' is consistent with DOE's previous rulemakings and determinations of what constitutes a feature. 85 FR 81341, 81347. DOE further stated that following the 2011 Enforcement Guidance, which DOE stated appeared to effectively ban the vast majority of products with multiple ''showerheads'' from the market, DOE codified in DOE regulations its effective ban on products with multiple showerheads from the market. 85 FR 49284, 49291. DOE acknowledged, as is the case with the August 2020 definitional proposed rule, that the October 2013 Final Rule was not a standards rulemaking and did not comply with the statutory requirements of a standards rulemaking. 85 FR 81341, 81347. DOE stated, however, that the effect was the same in that multi-headed showerhead products, while not entirely eliminated from the market, were significantly reduced in availability as a result of the 2011 Enforcement Guidance. *Id.*

In the July 2021 NOPR, DOE revisited its application of section 6295(o)(4) of EPCA in the context of the ''showerhead'' definition. 86 FR 38594, 38601. As discussed in the July 2021 NOPR, the ''unavailability'' provision of section 6295(o)(4) of EPCA applies to the establishment and amendment of standards. Further, assuming arguendo that DOE did amend the water conservation standard or that the rule had the effect of a water conservation standard, the October 2013 Final Rule did not eliminate multi-headed showerheads from the market. DOE reviewed its certification database and found that currently there are 7,704 basic models of showerheads, with multi-headed showerheads continuing to account for 3% of all basic models. Therefore, 42 U.SC. 6295(o)(4) was not applicable in the October 2013 Final Rule as DOE did not amend the standard for showerheads, nor did the rule eliminate multi-headed showerheads from the market as there are currently over 231 basic models on the market. Further, as multi-headed showerheads have not been eliminated from the market, DOE is not determining whether multi-headed showerheads provide a functionality/performance characteristic. *Id.* at 86 FR 38602.

CEI *et al.* stated that EPCA forbids any standard that compromises product features and performance. (CEI *et al.,* No. 18 at p. 3) CEI *et al.* argued that the law only requires a showing that at least one model including such feature was generally available at the time the standard was promulgated, and that Congress could have explicitly overridden the consumer protections in the law and categorically outlawed any and all shower configurations that allow more than 2.5 gpm in total, and that the statute did not clearly do so. (CEI *et al.,* No. 18 at p. 4) Finally, CEI *et al.* further stated that although DOE reasserted that any changes to the definition of showerhead are not a new or amended standards rulemaking, the reinterpretation has the effect of changing the standard and as such must comply with the pro-consumer provisions in the statute. (CEI *et al.,* No. 18 at p. 4) CEI *et al.* also stated that while multi-showerhead units can be manufactured as long as they do not use more than 2.5 gpm in total, such models are unlikely to deliver desired performance and thus would not meet the statutory requirements of being ''substantially the same''. (CEI *et al.,* No. 18 at pp. 4–5)

In support of the July 2021 NOPR, PMI explained that its members have spent millions of dollars on research and development, manufacturing, third-party certification, packaging, marketing, and distribution of water-efficient showerheads to meet the

October 2013 Final Rule definition and that such-products are high-performing plumbing products. (PMI, No. 22 at p. 2) PMI further stated that its member companies did not produce, sell or distribute modified showerheads to meet the new definition of showerhead that was put in place in the December 2020 Final Rule. (*Id.*)

As explained in the December 2020 Final Rule and the July 2021 NOPR, DOE's previous definitional changes and rulemakings for showerheads were not standards rulemakings nor is DOE establishing or amending standards for showerheads. Therefore DOE is not determining whether multi-headed showerheads provide a functionality/performance characteristic. (*See* 42 U.S.C. 6295(o)(4)) Even assuming *arguendo,* as in the July 2021 NOPR (86 FR 38594, 53602), that DOE did amend the water conservation standard or that the rule had the effect of a water conservation standard, the definition established in the October 2013 Final Rule did not eliminate multi-headed showerheads from the market. A review of the market prior to the December 2020 Final Rule illustrated that three percent of the 7,221 basic models of showerheads are multi-headed showerheads. *See* 85 FR 49284, 49293. While the information DOE used to determine the number of multi-headed showerheads in the July 2021 NOPR is no longer available,[14] DOE has conducted a general review of models currently on the retail market, which indicates that showerheads with multiple nozzles/spray components, continue to be available. Given that multi-headed showerheads continue to be available in the market, this action does not reduce performance nor remove any features from the market as asserted by CEI.

CEI *et al.* also expressed concern about the performance quality of multi-headed showerheads required to meet the 2.5 gpm standard for the whole system. (*See* CEI, No. 18 at pp. 4–5) PMI explained that that its members have been able to produce high-performing showerheads consistent with the October 2013 Final Rule. (*See* PMI, No. 22 at p. 2) If the provision at 42 U.S.C. 6295(o)(4) were applicable to this rulemaking, which as discussed it is not, CEI *et al.* have not established by a preponderance of evidence the unavailability of showerheads with multiple nozzles/spray components, as required by EPCA. The October 2013 Final Rule definition, *i.e.,* the definition reinstated by this final rule, did not eliminate multi-head shower heads from the market. As such, the definition adopted in this final rule is consistent with the Congressional directive to preserve performance characteristics and features.

5. The Definition of ''Showerhead'' Falls Within the NTTAA and OMB Circular A–119 Exception to Adherence to Voluntary Consensus Standards Because It Is Inconsistent With EPCA and Impractical

Section 12(d)(1) of the NTTAA requires that Federal departments ''use technical standards that are developed or adopted by voluntary consensus standards bodies, except when the use of the technical standards is inconsistent with applicable law or otherwise impractical.'' (Pub. L. 104–113, 110 Stat. 783 (Mar. 7, 1996), as amended by Public Law 107–107, Div. A, Title XI, section 115, 115 Stat. 1241 ((Dec. 28, 2001) (codified at 15 U.S.C. 272 note)). Similarly, OMB Circular A–119 directs Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impractical. (Section 1 of OMB Circular A–119; *www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.*)

In the December 2020 Final Rule, DOE stated that the definition of ''showerhead'' adopted in that final rule is consistent with the requirements of the NTTAA and the associated OMB Circular A–119. 85 FR 81341, 81342. DOE explained that EPCA does not preclude DOE from using industry standards and that the statutory text of EPCA does not make compliance with OMB Circular A–119 inconsistent with applicable law or otherwise impracticable. *Id.* at 85 FR 81348. DOE further stated that it disagrees that the ASME definition frustrates and is inconsistent with the requirements of EPCA. *Id.*

As part of DOE's reconsideration of the December 2020 Final Rule, DOE tentatively determined in the July 2021 NOPR, in light of the comments provided during the rulemaking for the December 2020 Final Rule, that it is not appropriate to rely on the consensus industry standards as they relate to showerheads in accordance with the NTTAA and OMB Circular A–119 because the December 2020 Final Rule definition of ''showerhead'' based on ASME consensus industry standards is inconsistent with EPCA and is impractical. 86 FR 38594, 38602–38632. DOE did not receive comment to the July 2021 NOPR regarding the NTTAA and OMB Circular A–119 exception.

For the reasons set forth in the July 2021 NOPR, DOE finds that it should not adopt an industry standard here, as it would conflict with EPCA's requirements and be impractical. (*See* 15 U.S.C. 272 note; OMB Circular A–119 section 5.c.[15]) DOE's determination in the December 2020 Final Rule did not properly weigh the ASME definition of ''showerhead'' in the context of the purposes of EPCA, as it pertains to the NTTAA and OMB Circular A–119. Upon reconsideration, adopting the ASME industry standards for the definition of ''showerhead'' in the present context conflicts with EPCA and is impractical because it does not serve the purposes of water and energy conservation. And the ''showerhead'' definition and interpretation in the December 2020 Final Rule is inconsistent with EPCA and is impractical because it would permit increased water usage and increased associated energy use, directly contrary to EPCA's purposes. As such, the definition of ''showerhead'' is within the exception of NTTAA and OMB Circular A–119.

6. Additional Comments/Issues

DOE received a comment regarding the applicability of EPCA's anti-backsliding provision. AWE *et al.* stated that on its face, the December 2020 Final Rule change amended the standard applicable to showerheads, and did so in a way that increased the ''maximum allowable water use'' of showerheads. They argue therefore that the 2020 Rule thus violated EPCA's ''anti-backsliding'' rule, 42 U.S.C. 6295(o)(1). (AWE *et al.,* No. 21 at p. 1) AWE *et al.* further argued that the December 2020 Final Rule rationalized that DOE had not established the previous interpretation through a standards rulemaking. AWE asserted that the anti-backsliding rule does not require, as a predicate, that there was a previous standards-setting rulemaking. Instead, AWE stated that the 2.5-gpm standard was established by Congress, just as EPCA establishes many other initial conservation standards, and DOE established the pre-2020 status quo in an appropriate way—explaining its interpretation through a guidance document, reiterating that interpretation

[14] For the December 2020 Final Rule, DOE determined the percentage of showerheads that are multi-headed showerheads using a retailer website. However, the same retailer website no longer provides the information needed to calculate an updated percentage. In addition, CCMS does not distinguish multi-headed showerheads from other showerheads.

[15] DOE incorrectly referred to the wrong section of OMB Circular A–119 (section 6.a.2.) in the August 2021 NOPR. 86 FR 38594, 38603. The correct citation is used in this document.

in the 2013 rulemaking, and confirming it in a regulatory definition. AWE further stated that regardless of whether the process involved a standards-setting rule, the outcome was certain: Until December 2020, a multiple-nozzle product was allowed to flow only at a maximum rate of 2.5 gpm. AWE *et al.* suggested that DOE is therefore obligated to revoke the 2020 Rule, because that Rule is simply contrary to EPCA and unlawful. (AWE *et al.,* No. 21 at p.2)

DOE agrees with AWE, *et al.* that the December 2020 Final Rule amendment of the definition of ''showerhead'' could lead to increased water use. As discussed in section III.2., DOE also agrees with AWE, *et al.* that the definition of ''showerhead'' in the December 2020 Final Rule is inconsistent with EPCA's purposes of energy and water conservation. Further, DOE is withdrawing the definition of 'showerhead' adopted in the December 2020 Final Rule and returning to the definition from the October 2013 Final Rule. However, EPCA's anti-backsliding provision prohibits DOE from prescribing ''any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.'' (42 U.S.C. 6295(o)(1)) The adoption of new or revised definitions for products, including ''showerheads'', does not implicate the anti-backsliding provisions because it is not a standard nor does it alter the current standard. This final rule only amends the definition of ''showerhead'' and does not amend the standards for showerheads, which were established by Congress in EPCA. (*See* 42 U.S.C. 6295(j)(1))

DOE also received comments generally opposed to the regulation of the water flow of showerheads. (*See* Doty, No. 3 at p. 1; Southerland, No. 2 at p. 1; Walters, No. 4 at p. 1) Ramer commented that the proposed definition will place a higher cost, due to testing, for showerhead manufacturers and consumers. (Ramer, No. 10 at p. 1) Halligan asked whether a grace period would be provided to allow businesses and building owners to retrofit existing models. (Halligan, No. 8 at p. 1) As discussed in section II.B., Congress established the definition of ''showerhead'' in EPAct 1992 and tasked DOE with implementing the provisions related to definitions, standards, and test procedure requirements for plumbing products. (Pub. L. 102–486; Oct. 24, 1992 Sec. 123) Further, the definition adopted in this final rule and the statutory standard apply to products as manufactured, not products already installed. (*See generally* 42 U.S.C. 6302)

A commenter also questioned whether the December 2020 Final Rule's definition of ''showerhead'' really limited DOE's capabilities in the water conservation effort. (Johnston, No. 7 at p. 1) As discussed in section IV.A.II, the December 2020 Final Rule's definition for ''showerhead'' would increase water and energy use.

B. Withdrawal of DOE's Current Definition of ''Body Spray''

DOE adopted a definition for ''body spray'' in the December 2020 Final Rule, concluding that the definition of ''showerhead'' in the October 2013 Final Rule did not specifically include or exclude body sprays and that this omission may have introduced uncertainty for regulated parties and that therefore it is appropriate to clarify that body sprays are not showerheads. 85 FR 81341, 81350. DOE defined the term ''body spray'' as ''a shower device for spraying water onto a bather from other than the overhead position. A body spray is not a showerhead.'' 85 FR 81341, 81359. DOE also stated that leaving the scope of products not subject to EPCA's energy conservation standard undefined, and potentially subjecting manufacturers of body sprays to DOE standards, causes more confusion than establishing a regulatory definition. 85 FR 81341, 81350.

In the July 2021 NOPR, DOE revisited the definition of ''body spray,'' including the comments received in the rulemaking to the December 2020 Final Rule. In the July 2021 NOPR, DOE tentatively determined that the definition of ''body spray'' and the interpretation that body sprays are not a showerhead does not effectively address the relationship between these two products. 86 FR 38594, 38603. The 2018 ASME standard, as well as the 2012 ASME standard, treat the products similarly, and the only difference between the definitions of ''showerhead'' and ''body spray'' is the installation location. Further, the market review conducted by the CA IOUs during the rulemaking for the December 2020 Final Rule indicates that these two products are not treated differently in the marketplace.[16] Given the similar treatment by the industry standard and the market, as well as the lack of discernable differences between the products, DOE tentatively determined that the current definition does not best address the relationship between these two products. *Id.* In addition, DOE stated that the current definition of ''body spray'' may result in excessive water use that is inconsistent with EPCA's purposes. *Id.* While DOE explained in the December 2020 Final Rule that leaving the term ''body sprays'' undefined introduced uncertainty into the market about whether those products needed to comply with the 2.5 gpm standard, the research done by CA IOUs shows that products with body sprays complied with the energy conservation standard. *Id.* As such, DOE tentatively determined that the current definition of ''body spray'' should be withdrawn. *Id.*

In response to the July 2021 NOPR, DOE received comments expressing support for the withdrawal of the recently codified definition of ''body spray'' from the ASAP, CEC, NPCC, CA IOUs, AWE *et al.,* the District, and the Joint Advocates. (CEC, No. 19 at p. 3; NPCC, No. 12 at p. 2; CA IOUs, No. 20 at p. 1; AWE *et al.,* No. 21 at p. 3; the District, No. 16 at p. 2; Joint Advocates, No. 23 at p. 2; ASAP, Public Meeting Transcript at p. 5)

Specifically, CEC stated that the December 2020 Final Rule established an ambiguous definition for ''body spray'' that relies solely on manufacturer intent and consumer installation decisions, rather than discernable technical differences between the products. (CEC, No. 19 at p. 3) CEC added that this change to how DOE treats body sprays created a significant loophole for manufacturers to develop and sell devices that perform the same function as a showerhead, but are not required to meet the maximum 2.5 gpm flow rate simply because of ''manufacturer intent'' or device placement. (*Id.* at pp. 3–4) AWE *et al.* stated that withdrawing the definition of ''body spray'' is consistent with the purposes of the EPCA and will comply with current ASME A112.18.1/CSA B125.1 standard. (AWE *et al.,* No. 21 at p.3) AWE *et al.* also explained that the body spray exclusion constitutes a significant loophole, allowing a product to be sold, installed, and used with water flow far in excess of the statutory standard, just because the water approaches the bather from a different angle. (*Id.*) Further, the Joint Advocates explained that industry standards and market research show that body spray and showerhead products are technically comparable and are often treated similarly in the market, with the only difference being the location of installation and as such, body spray products should not be explicitly

[16] *See* Docket No. EERE–2020–BT–TP–0002–0084 at pp.3–5.

excluded from meeting the 2.5 gpm standard. (Joint Advocates, No. 23 at p. 2) ASAP also stated that the definition of ''body spray'' would result in a loophole since a body spray could be installed in pretty much any orientation. (ASAP, Public Meeting Transcript at p. 6)

Commenters also discussed the impacts of the current ''body spray'' definition on energy and water conservation. CEC also stated that by realigning its definition with the October 2013 Final Rule, DOE will reduce confusion and uncertainty in the market, resulting in energy and water conservation nationwide. (CEC, No. 19 at p. 4) The Joint Advocates explained that the current definition of ''body spray'' has the potential to result in excessive water use by allowing products that meet this definition to be exempt from any energy conservation standards. (Joint Advocates, No. 23 at p. 2)

As described in the July 2021 NOPR and reiterated by commenters in response to the July 2021 NOPR, industry standards and the marketplace treat ''showerheads'' and ''body sprays'' similarly with the only difference being in the installation location. Further, DOE continues to agree with the commenters' concerns about the increased water and energy use of the existing definition of ''body spray.'' Having considered the comments received and based on the discussion presented in the preceding paragraphs and in July 2021 NOPR, DOE is withdrawing the current definition of ''body spray.''

C. Safety Shower Showerhead

In the December 2020 Final Rule, DOE established a definition for the term ''safety shower showerhead.'' 85 FR 81341, 81351. Specifically, DOE defined ''safety shower showerhead'' to mean ''a showerhead designed to meet the requirements of ANSI/ISEA Z358.1 (incorporated by reference, see § 430.3).'' 85 FR 81341, 81352; *see also* 10 CFR 430.2.

In the July 2021 NOPR, DOE did not propose to amend the definition of ''safety shower showerhead'' and continued to find that leaving the scope of products not subject to EPCA's energy conservation standard undefined causes confusion and is inappropriate. 86 FR 38594, 38603. Further, DOE continued to find that: What is meant by a ''safety shower showerhead'' or emergency shower is understood in the regulated industry; that it is unlikely that manufacturers of showerheads intended for use by residential consumers would design a showerhead to meet the specifications of the ANSI standard in order to avoid compliance with DOE standards; and that the definition and performance criteria in the definition of ''safety shower showerhead'' addressed concerns noted by the commenters in the 2020 rulemaking and distinguish a showerhead from a safety shower showerhead. *Id.* at 86 FR 38603–38604. Accordingly, DOE tentatively determined that retaining the definition of ''safety shower showerhead'' was necessary and appropriate. *Id.* at 86 FR 38604.

In response to the July 2021 NOPR, DOE received comments expressing support for maintaining its definition of a ''safety shower showerhead'' as codified by the 2020 Final Rule from CA IOUs, CEC, ASAP, AWE *et al.,* and PMI. (CA IOUs, No. 20 at p. 1; CEC, No. 19 at p. 4; ASAP, Public Meeting Transcript at p.4; AWE *et al.,* No. 21 at p. 3; PMI, No. 22 at p. 2; PMI, Public Meeting Transcript at p. 6) Hekstra requested that there is a definition of ''safety shower showerhead.'' Hekstra explained that a manufacturer cannot ensure they are within or without the exception of a safety shower showerhead if they do not know what one is. (Hekstra, No. 17) Glucksman asked whether the definition of ''showerhead'' applies to work and eye wash safety stations or if the July 2021 NOPR applies only to consumer-based showers. (Glucksman, No. 06 at p. 1)

CEC supported the retention of the definition of ''safety shower showerheads,'' but commented that that the definition for ''safety shower showerheads'' presents a potential loophole in that the ANSI/ISEA Z358.1–2014 specifications do not prohibit these devices from operating in a ''partially on'' state, and therefore manufacturers could develop products that meet the requirements of ANSI/ISEA Z358.1–2014, but that could also operate in a ''partially on'' state that resembles a non-compliant showerhead. (CEC, No. 19 at p. 4) CEC stated that it has not identified any such products on the market, but CEC recommended that DOE monitor sales to ensure manufacturers are not exploiting this potential loophole and consider amendments to the definition. (*Id.*) The Joint Advocates recommended that DOE further improve the definition of ''safety shower showerhead'' to eliminate the possibility of circumvention of federal water efficiency requirements by exploiting perceived ambiguities in the federal definition of showerhead. The Joint Advocates commented future products could conceivably be designed to both meet the ANSI/ISEA standard's requirements *and* be capable of providing a shower for bathing at flow rates well above the federal standard. (Joint Advocates, No. 23 at p. 2) The Joint Advocates recommended that DOE require that safety shower showerheads both meet the ANSI/ISEA standard's requirements and also be ''designed and marketed exclusively for emergency shower applications.'' (*Id.*)

The comments by Glucksman and Hekstra illustrated the continuing need to have a definition for the term ''safety shower showerhead.'' Consistent with the CEC and the Joint Advocates' observations, DOE is not aware of products on the market certified to ANSI/ISEA Z358.1–2014 that allow for operation at a reduced flowrate appropriate for normal bathing. Section 4.2 of ANSI/ISEA Z358.1–2014 specifies that the valve for a safety shower showerhead ''shall be simple to operate and shall go from 'off' to 'on' in 1 second or less.'' The specification for the ''off'' to ''on'' operation of the valve makes it unlikely that a value with an intermediate setting that provides reduced flow (*i.e.,* reducing the flowrate from 20 gpm specified in the industry standard to a flowrate acceptable for normal bathing) would comply with the definition of ''safety shower showerhead.'' Further, the testing procedures for ANSI/ISEA certification of emergency showers in Section 4.4.1 of ANSI/ISEA Z358.1–2014 also requires verification that the valve ''fully opens in one second or less and that it stays open,'' indicating that valve must be open for the duration of the operation, in turn not allowing for any reduced flow rates. Therefore, DOE finds it unlikely that manufacturers would introduce safety shower showerheads that allow for operation at a reduced flow due to the risk of inadvertent operation of the product at a reduce flow in an emergency situation. As such, DOE is not amending the definition of ''safety shower showerhead.''

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule constitutes a ''significant regulatory action'' under section 3(f) of Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was subject to review under E.O. 12866 by the Office of Information and Regulatory Affairs (OIRA) at OMB.

This rule provides important benefits to consumers, producers, and society. Clear definitions, as finalized in this

rule, are beneficial to resolve ambiguity for manufacturers and consumers. And because returning to the October 2013 definition of ''showerhead,'' withdrawing the current definition of ''body spray,'' and maintaining the current definition of ''safety shower showerhead'' better effectuate EPCA's water and energy conservation purposes, this rule also reinforces to manufacturers and the public that DOE's overarching goal in implementing EPCA is water and energy conservation.

By returning to the definition of ''showerhead'' and to the interpretation of ''body spray'' that existed prior to the December 2020 Final Rule, the rule provides consumers and society the benefits derived from the water and energy savings of DOE's previous approach to these terms. Consumers have access in the market to high-performing showerheads, including multi-headed showerheads, that meet the definitions finalized here, and so this action does not reduce performance or remove from the market any features that are currently available. DOE expects that these benefits to consumers and society will materialize over the long term as DOE believes that manufacturers have no near-term plans to produce, sell, or distribute modified showerheads that would use more water in ways inconsistent with the definitions being re-adopted in this rule.

DOE has weighed the benefits (decreased water usage, increased clarity, and consumer energy savings) against the potential costs, and has determined that the benefits of adopting this definition change outweigh the costs, and that achieving these benefits for consumers and society effectuates the purposes of EPCA.

B. Review Under the Regulatory Flexibility Act

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

DOE reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certifies that the final rule will not have significant economic impact on a substantial number of small entities. The factual basis for this certification is set forth in the following paragraphs.

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 regulation use size standards codes established by the North American Industry Classification System (''NAICS'') that are available at: *www.sba.gov/document/support--table-size-standards.* Plumbing equipment manufacturers are classified under NAICS 332913 ''Plumbing Fixture Fitting and Trim Manufacturing,'' and NAICS 327110 ''Pottery, Ceramics, and Plumbing Fixture Manufacturing.'' The SBA sets a threshold of 1,000 employees or fewer for an entity to be considered a small business within these categories.

This final rule withdraws the current definition of showerhead and reinstates the prior definition of showerhead. It also withdraws the definition of body sprays. Finally, this final rule retains the definition of safety shower showerhead. DOE has not found any showerheads that have been introduced into the market by any manufacturers, large or small, since the December 2020 Final Rule became effective that certified compliance on the basis of the revised definitions in the December 2020 Final Rule, as compared to the definition established in the October 2013 Final Rule. All certified showerheads in DOE's Compliance Certification Database [17] (''CCMS'') have flow rates no greater than 2.5 gpm and would meet the definition established in the October 2013 Final Rule. Additionally, in response to the July 2021 NOPR, PMI stated that its member companies did not produce, sell, or distribute modified showerheads to meet the new definition of showerhead that was put in place in the December 2020 Final Rule. (PMI, No. 22 at p. 2) As such, DOE has not found any evidence that any manufacturer, large or small, has introduced any showerhead model that relied on the definition of showerhead that was put in place in the December 2020 Final Rule. Based on the foregoing, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

[17] *www.regulations.doe.gov/certification-data.* Last accessed on November 30, 2021.

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of showerheads must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, 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 showerheads. (*See generally* 10 CFR part 429.) 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 time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This final rule withdraws the current definition of showerhead and reinstates the prior definition of showerhead. It also withdraws the definition of body sprays. Finally, this final rule retains the definition of safety shower showerhead. It does not amend the reporting requirement. Further as noted, DOE has not identified any showerheads that have been introduced into the market since the December 2020 Final Rule became effective for which certification is on the basis of the revised definitions in the December 2020 Final Rule, as compared to the definition established in the October 2013 Final Rule. Specifically, all certified showerheads in the CCMS have flow rates no greater than 2.5 gpm and PMI stated in their comments that its member companies, which comprises over 90 percent plumbing product, did not produce, sell or distribute modified showerheads based on the December 2020 Final Rule. (PMI, No. 22 at p. 2) Showerheads will not be required to recertify based solely on the amendment to the definitional amendments adopted in this final rule.

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

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this final action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

E. Review Under Executive Order 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 final rule and has 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 final 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 final 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 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 ''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.*

DOE has concluded that this final 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 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will 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 final rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under 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 final 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 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 significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action—which amends the definition of showerhead, withdraws the definition of body spray, and retains the definition of safety shower showerhead—will 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 final rule.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

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

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 December 14, 2021, by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 15, 2021.

Treena V. Garrett,

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

For the reasons set forth in the preamble, DOE amends 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 430.2 is amended by removing the definition of ''Body spray'' and revising the definition of ''Showerhead'', to read as follows:

§ 430.2 Definitions.

* * * * *

Showerhead means a component or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, excluding safety shower showerheads.

* * * * *

[FR Doc. 2021–27462 Filed 12–17–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 43

[Docket No. OCC–2019–0012]

FEDERAL RESERVE SYSTEM

12 CFR Part 244

[Docket No. OP–1688]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 373

RIN 3064–ZA07

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1234

[Notice No. 2021–N–14]

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 246

[Release No. 34–93768]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 267

[FR–6172–N–04]

Credit Risk Retention—Notification of Determination of Review

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); U.S. Securities and Exchange Commission (Commission); Federal Housing Finance Agency (FHFA); and Department of Housing and Urban Development (HUD).

ACTION: Determination of results of interagency review.

SUMMARY: The OCC, Board, FDIC, Commission, FHFA, and HUD (the agencies) are providing notice of the determination of the results of the

review of the definition of qualified residential mortgage, the community-focused residential mortgage exemption, and the exemption for qualifying three-to-four unit residential mortgage loans, in each case as currently set forth in the Credit Risk Retention Regulations (as defined below) as adopted by the agencies. After completing the review, the agencies have determined not to propose any change at this time to the definition of qualified residential mortgage, the community-focused residential mortgage exemption, or the exemption for qualifying three-to-four unit residential mortgage loans.

DATES: December 20, 2021.

FOR FURTHER INFORMATION CONTACT:

OCC: Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649–5490; Maria Gloria Cobas, (202) 649–5495, Senior Financial Economist, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Flora H. Ahn, Special Counsel, (202) 452–2317, David W. Alexander, Senior Counsel, (202) 452–287, or Matthew D. Suntag, Senior Counsel, (202) 452–3694, Legal Division; Sean Healey, Lead Financial Institution Policy Analyst, (202) 912–4611, Division of Supervision and Regulation; Karen Pence, Deputy Associate Director, Division of Research & Statistics, (202) 452–2342; Nikita Pastor, Senior Counsel, Division of Consumer & Community Affairs (202) 452–3692; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

FDIC: Rae-Ann Miller, Senior Deputy Director, (202) 898–3898; Kathleen M. Russo, Counsel, (703) 562–2071, *krusso@fdic.gov;* Phillip E. Sloan, Counsel, (202) 898–8517, *psloan@fdic.gov,* Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

Commission: Arthur Sandel, Special Counsel, (202) 551–3850, in the Office of Structured Finance, Division of Corporation Finance; or Chandler Lutz, Economist, (202) 551–6600, in the Office of Risk Analysis, Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

FHFA: Ron Sugarman, Principal Policy Analyst, Office of Capital Policy, (202) 649–3208, *Ron.Sugarman@fhfa.gov,* or Peggy K. Balsawer, Associate General Counsel, Office of General Counsel, (202) 649–3060, *Peggy.Balsawer@fhfa.gov,* Federal Housing Finance Agency, Constitution Center, 400 7th Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

HUD: Kurt G. Usowski, Deputy Assistant Secretary for Economic Affairs, U.S. Department of Housing & Urban Development, 451 7th Street SW, Washington, DC 20410; telephone number 202–402–5899 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Credit Risk Retention Regulations are codified at 12 CFR part 43; 12 CFR part 244; 12 CFR part 373; 17 CFR part 246; 12 CFR part 1234; and 24 CFR part 267 (the Credit Risk Retention Regulations). The Credit Risk Retention Regulations require the OCC, Board, FDIC and Commission, in consultation with the FHFA and HUD, to commence a review of the following provisions of the Credit Risk Retention Regulations no later than December 24, 2019: (1) The definition of qualified residential mortgage (QRM) in section _.13 of the Credit Risk Retention Regulations; (2) the community-focused residential mortgage exemption in section _.19(f) of the Credit Risk Retention Regulations; and (3) the exemption for qualifying three-to-four unit residential mortgage loans in section _.19(g) of the Credit Risk Retention Regulations (collectively, the subject residential mortgage provisions).

Notification announcing the commencement of the review was published in the **Federal Register** on December 20, 2019 (84 FR 70073). Notification announcing the agencies' decision to extend to June 20, 2021, the period for completion of the review and publication of notification disclosing determination of the review was published in the **Federal Register** on June 30, 2020 (85 FR 39099). On July 22, 2021, the agencies published another notification in the **Federal Register**, announcing their decision to extend the period to complete the review further to December 20, 2021 (86 FR 38607).

The agencies have completed their review of the subject residential mortgage provisions and this notification discloses the agencies' determination as a result of the review.

Overview

Section 15G of the Securities Exchange Act, as added by section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), required the Board, FDIC, OCC (collectively, the Federal banking agencies) and the Commission, together with, in the case of the securitization of any ''residential mortgage asset,'' HUD and FHFA, to jointly prescribe regulations that (i) require a securitizer to retain not less than five percent of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security (ABS), transfers, sells, or conveys to a third party, and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain under section 15G and the agencies' implementing rules.[1] Section 941 of the Dodd-Frank Act also provides that a securitizer shall not be required to retain any part of the credit risk for an asset that is transferred, sold, or conveyed through the issuance of ABS interests by the securitizer, if all of the assets that collateralize the ABS interests are QRMs, as that term is jointly defined by the agencies. Section 941 provides that the definition of QRM can be ''no broader than'' the definition of a ''qualified mortgage'' (QM) as that term is defined under section 129C of the Truth in Lending Act (TILA),[2] as amended by the Dodd-Frank Act, and regulations adopted thereunder.[3] The agencies decided to align the definition of QRM with the definition of QM.[4] The Credit Risk Retention Regulations define QRM to mean a QM, as defined under section 129C of TILA and Regulation Z issued thereunder at 12 CFR part 1026, as amended from time to time.

As part of the Credit Risk Retention Regulations, the agencies are required to review the definition of QRM periodically to assess developments in the residential mortgage market, including the results of the statutorily required five-year review by the Consumer Financial Protection Bureau (CFPB) of the ability-to-repay rules and the QM definition. In conducting the review (the commencement of which was announced on December 20, 2019) and reaching their conclusions, the agencies considered what has been learned since 2014 about whether the loan and borrower characteristics specified in the QRM definition are predictive of a lower risk of default and also assessed how mortgage credit access conditions have changed since 2014, using data from the date on which the Credit Risk Retention Regulations were announced, October 22, 2014, through December 31, 2019 (the review period). Among other things, the agencies analyzed Fannie Mae and Freddie Mac (the Enterprises) and non-Enterprise loan-level mortgage

[1] *See* 15 U.S.C. 78o–11(b), (c)(1)(A) and (c)(1)(B)(i).

[2] 15 U.S.C. 1639c.

[3] *See* 15 U.S.C. 78o–11 (e)(4)(C).

[4] *See* 79 FR 77740 (Dec. 24, 2014).

origination and performance data (including data on originations, defaults, and loan and borrower characteristics), held discussions with market participants, and reviewed academic research, policy research prepared by research and advocacy organizations, and the results of the CFPB's Ability-to-Repay and Qualified Mortgage Rule Assessment Report issued in 2019.[5] The analysis also considered the effects on default risk of additional loan and borrower characteristics not included in the QRM definition.

The analysis confirmed that the loan and borrower characteristics specified in the QM definition in effect during the review period were predictive of a lower risk of default. In addition, the agencies found that, while credit conditions have improved since 2014, they remain tight relative to longer-term norms.[6]

After analyzing those data, reviewing those analyses and considering the importance of maintaining broad access to credit, the agencies have decided, at this time, not to propose to amend the definition of QRM, the community-focused residential mortgage exemption, or the exemption for qualifying three-to-four unit residential mortgage loans.[7]

Public Comments

In response to the notification of commencement of the review, which included a request for comment, the agencies received one comment (on behalf of 37 organizations) prior to the end of the comment period. The comment requested that the agencies defer the review until after the CFPB completed its then-proposed rulemaking to make changes to the QM definition, which would automatically modify the QRM definition to the extent no changes are made to the definition.[8]

In response, the agencies note that the review is intended to consider the definition of QRM in light of changes in mortgage and securitization market conditions and practices and how the QRM definition has affected residential mortgage underwriting and securitization of residential mortgage loans under evolving market conditions during the review period. The CFPB did not issue the final QM changes until December 10, 2020, well after the review period.[9]

In June 2021, the agencies received a second comment letter (on behalf of six organizations), expressing support for the continued alignment of the definitions of QRM and QM.[10]

Definition of QRM

The agencies' decision in 2014 to equate the QRM and QM definitions in the Credit Risk Retention Regulations was based on two main factors. First, the Dodd-Frank Act mandated that the definition of QRM ''tak[e] into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default.'' [11] Second, the Dodd-Frank Act specified that the QRM definition could not be broader than the QM definition, and the agencies were concerned that a QRM definition that was narrower than the QM definition could exacerbate already-tight mortgage credit conditions existing at that time.

In the current review of the definition of QRM, the agencies considered whether the loan and borrower characteristics specified in the QM definition are predictive of a lower risk of default and how mortgage credit conditions have changed since 2014. The agencies confirmed that the QRM definition that was in effect for the review period—with the requirement that debt-to-income (DTI) ratios generally not exceed 43 percent—was predictive of lower default rates.

The agencies used loan-level mortgage origination and performance data on Enterprise and non-Enterprise loans in the review.[12] The agencies followed the performance of loans originated between 2012 and 2015 and found that, after four years, loans with a DTI ratio greater than 43 percent were more likely to have become 90-days delinquent than loans with lower DTI ratios. The review also confirmed that the measurement of DTI had improved from when the analysis was last conducted, with a greater proportion of full documentation mortgage loans in the dataset in 2019 than in 2014. In the review, the agencies also considered the effects of additional loan and borrower characteristics on default risk.[13]

The agencies also considered whether the QRM definition, as aligned with the QM definition, affected the availability of credit. While credit conditions had improved since 2014, they remained tight during the review period relative to longer-term norms.[14] However, the agencies determined that the QRM definition did not appear to be a material factor in credit conditions during the review period, in part because so much of the market was funded through Enterprise and Ginnie Mae securitizations.[15] More generally, the agencies concluded from the review that risk retention remains an effective tool for aligning the interests of securitizers, originators, and investors, and reducing default risk on certain loans. In addition, the Credit Risk Retention Regulations do not appear to be weighing materially on mortgage credit availability.

Finally, the agencies considered whether the QRM definition, as aligned with the QM definition, affected the securitization market. As the agencies anticipated, the QRM definition contributed to the bifurcation of the

[5] Available at *https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf.*

[6] Measures of mortgage credit availability, such as those produced by the Urban Institute (*www.urban.org*), suggest that credit availability during the review period was tight relative to levels in the early 2000s. Tight credit conditions generally refer to periods of reduced availability of credit.

[7] The Credit Risk Retention Regulations require the agencies to conduct a review of the subject residential mortgage provisions upon the request of any agency, specifying the reason for such request. Accordingly, the agencies may conduct a further review of the subject residential mortgage provisions at any time.

[8] The letter noted that an advance notice of proposed rulemaking had been issued by the CFPB and that the CFPB was expected to follow with a notice of proposed rulemaking.

[9] The agencies nonetheless reviewed what were, at the time of the review, the CFPB's changes to the general definition of a QM (from a definition based, in part, on debt-to-income (DTI) to one based on loan pricing). Based upon the information provided by the CFPB to support the changes, the agencies concluded that these changes, if implemented, were not likely to significantly affect the overall impact of the QRM definition on the mortgage market.

[10] While this comment letter also praised the agencies for delaying the issuance of the review determination until the CFPB changes were finalized, as noted above, the agencies did not delay the issuance of their determination to consider those changes as those changes occurred outside of the review period.

[11] 15 U.S.C. 78o–11(e)(4)(B).

[12] Mortgage servicing data from the Enterprises was used for this analysis, and the Commission staff contributed its analysis using mortgage servicing data from CoreLogic.

[13] The agencies confirmed that loan-to-value (LTV) ratio and credit score, which the agencies considered in the 2014 rulemaking but did not incorporate into the QRM definition, also predict default.

[14] Measures of mortgage credit availability, such as those produced by the Urban Institute, suggest that credit availability during the review period was tight relative to levels in the early 2000s.

[15] The Enterprises are subject to risk retention, but benefit from a provision in the Credit Risk Retention Regulations that allows their full guarantee of principal and interest on mortgage backed securities to count as an eligible form of risk retention while they are under conservatorship or receivership and have capital support from the U.S. Treasury. In contrast to the Enterprises, Ginnie Mae, a wholly owned U.S. Government corporation within HUD, is exempt from risk retention pursuant to statutory direction in the Dodd-Frank Act. See 15 U.S.C. 78o–11(c)(1)(G)(ii) and (e)(3)(B).

According to estimates by Inside Mortgage Finance and the Urban Institute, the annual share of the dollar volume of first-lien mortgage originations that were either acquired by the Enterprises or securitized through an FHA or VA program has ranged from about 62 to 76 percent over the period 2015 to 2020(*https://www.urban.org/sites/default/files/publication/104602/july-chartbook-2021_2.pdf*).

private-label securitization market between securitizations of ''prime/jumbo'' loans [16] which typically meet the characteristics of QM and are, therefore, exempt from risk retention as QRM, and securitizations of ''non-QM'' loans that are not QRM and, therefore, generally not exempt from risk retention. However, according to industry sources, the market for securitizations of non-QM loans was quite competitive through the end of 2019, which suggests that risk retention did not materially affect the ability of issuers in this market to obtain capital needed for mortgage originations.[17]

In light of the foregoing, the agencies are not proposing to amend the definition of QRM at this time.

Community-Focused Residential Mortgages

Community-focused residential mortgages are mortgages made by community development financial institutions (CDFIs), community housing development organizations, certain non-profits, or certain secondary financing providers, or through a state housing finance agency (HFA) program. These entities frequently make mortgage loans using flexible underwriting criteria that are not compatible with the TILA ability-to-repay requirements. To ensure continued borrower access to these loan programs, the CFPB exempted these loans from the TILA ability-to-repay requirement and, as a result, such loans are unable to be made as QMs. Similarly, the agencies provided a separate exemption for these loans from the risk retention requirement. The agencies justified this exemption by citing the ''strong underwriting procedures to maximize affordability and borrower success in keeping their homes'' and noted that the exemption ''serve[s] the public interest because these entities have stated public mission purposes to make safe, sustainable loans available primarily to [low-to moderate-income] communities.'' [18] In the years since adoption of the Credit Risk Retention Regulations, only a few CDFIs have used this exemption.[19] While HFAs have not used this exemption, discussions with market participants revealed that private securitization could become a more attractive option if a state HFA needed to issue bonds in excess of its tax-exempt allotment. Therefore, the agencies, at this time, are not proposing to amend the exemption for community-focused residential mortgages.

Three-to-Four Unit Residential Mortgages

Mortgages that are collateralized by three-to-four-unit properties are defined as ''business purpose'' loans rather than consumer credit transactions under TILA, and as such are not subject to the ability-to-repay requirement, and are unable to qualify as QMs. The agencies recognized that securitization markets typically pool mortgages collateralizing three-to-four-unit residential mortgages with other residential mortgage loans. The agencies also provided an exemption for three-to-four-unit residential mortgages that otherwise would qualify as QMs to ensure that credit did not contract to this part of the market. The number of mortgages collateralized by three-to-four-unit properties, and the percentage of such mortgages funded through private-label securitizations, is small.[20] The exemption also does not appear to be spurring any significant speculative activity in the securitization market and, at the same time, these properties are a source of affordable housing. Therefore, the agencies are not proposing to amend this exemption at this time.

Michael J. Hsu,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on December 14, 2021.

James P. Sheesley,

Assistant Executive Secretary.

Dated: December 14, 2021.

By the Securities and Exchange Commission.

Vanessa A. Countryman,

Secretary.

Sandra L. Thompson,

Acting Director, Federal Housing Finance Agency.

By the Department of Housing and Urban Development.

Lopa P. Kolluri,

Principal Deputy Assistant Secretary for Housing, Federal Housing Commissioner.

[FR Doc. 2021–27561 Filed 12–17–21; 8:45 am]

BILLING CODE 4210–67;4810–33; 6210–01; 6714–01;2011–018070–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 228

[Regulation BB; Docket No. R–1763]

RIN 7100–AG 25

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064–AF79

Community Reinvestment Act Regulations

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

ACTION: Joint final rule; technical amendment.

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

DATES: Effective January 1, 2022.

FOR FURTHER INFORMATION CONTACT:

Board: Amal S. Patel, Counsel, (202) 912–7879, or Cathy Gates, Senior Project Manager, (202) 452–2099, Division of Consumer and Community Affairs; or Gavin L. Smith, Senior Counsel, (202) 452–3474, or Cody M. Gaffney, Attorney, (202) 452–2674, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

FDIC: Patience R. Singleton, Senior Policy Analyst, Supervisory Policy Branch, Division of Depositor and Consumer Protection, (202) 898–6859; or Richard M. Schwartz, Counsel, Legal

[16] These securitizations are typically collateralized by jumbo mortgages that are ineligible for purchase by the Enterprises because they exceed the conventional loan limits set by the FHFA and by prime loans that are offered to highly qualified borrowers. These mortgages typically meet the QRM standards.

[17] *See, e.g.,* ''On the Rise: Trading Desks Focusing on Non-QM Paper.'' *Inside MBS & ABS,* Inside Mortgage Finance Publications, 2019.30, 6.

[18] 79 FR 77602, 77694 (December 24, 2014).

[19] The agencies identified seven securitizations that relied upon this exemption since 2019; these securitizations funded approximately $610 million in community-focused residential mortgages.

[20] Based on data reported under the Home Mortgage Disclosure Act (HMDA), there were about 35,000 such purchase originations in 2018 and 2019 combined, and of these, less than 2 percent appear to have been funded through private-label securitizations.

Division, (202) 898–7424, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background and Description of the Joint Final Rule

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

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

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

The threshold for small banks was revised most recently in December 2020 and became effective January 1, 2021. 85 FR 83747 (Dec. 23, 2020). The current CRA regulations provide that banks that, as of December 31 of either of the prior two calendar years, had assets of less than $1.322 billion are small banks. Small banks with assets of at least $330 million as of December 31 of both of the prior two calendar years and less than $1.322 billion as of December 31 of either of the prior two calendar years are intermediate small banks. 12 CFR 228.12(u)(1) and 345.12(u)(1). This joint final rule revises these thresholds.

During the 12-month period ending November 2021, the CPI–W increased by 4.73 percent. As a result, the Agencies are revising 12 CFR 228.12(u)(1) and 345.12(u)(1) to make this annual adjustment. Beginning January 1, 2022, banks that, as of December 31 of either of the prior two calendar years, had assets of less than $1.384 billion are small banks. Small banks with assets of at least $346 million as of December 31 of both of the prior two calendar years and less than $1.384 billion as of December 31 of either of the prior two calendar years are intermediate small banks. The Agencies also publish current and historical asset-size thresholds on the website of the Federal Financial Institutions Examination Council at *http://www.ffiec.gov/cra/.*

Administrative Procedure Act and Effective Date

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

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

Accordingly, the Agencies' rules provide no discretion as to the computation or timing of the revisions to the asset-size criteria. For this reason, the Agencies have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. The effective date of this joint final rule is January 1, 2022. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. Because this rule adjusts asset-size thresholds consistent with the procedural requirements of the CRA rules, the Agencies conclude that it is not substantive within the meaning of the APA's delayed effective date provision. Moreover, the Agencies find that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because their current rules already provide notice that the small and intermediate small asset-size thresholds will be adjusted as of December 31 based on 12-month data as of the end of November each year.

Regulatory Flexibility Act

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

Paperwork Reduction Act of 1995

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

Riegle Community Development and Regulatory Improvement Act of 1994

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (12 U.S.C. 4802) requires that each Federal banking agency, in determining the effective date and administrative

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

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

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

compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[4] In addition, new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[5]

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

Congressional Review Act

FDIC

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

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

List of Subjects

12 CFR Part 228

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

12 CFR Part 345

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

Federal Reserve System

12 CFR Chapter II

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

PART 228—COMMUNITY REINVESTMENT (REGULATION BB)

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

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

■ 2. Section 228.12 is amended by revising paragraph (u)(1) to read as follows:

§ 228.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.384 billion. *Intermediate small bank* means a small bank with assets of at least $346 million as of December 31 of both of the prior two calendar years and less than $1.384 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

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

PART 345—COMMUNITY REINVESTMENT

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

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

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

§ 345.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.384 billion. *Intermediate small bank* means a small bank with assets of at least $346 million as of December 31 of both of the prior two calendar years and less than $1.384 billion as of December 31 of either of the prior two calendar years.

* * * * *

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

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on December 14, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–27439 Filed 12–17–21; 8:45 am]

BILLING CODE 6210–01– 6714–01– P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0214; Project Identifier 2018–CE–064–AD; Amendment 39–21839; AD 2021–24–18]

RIN 2120–AA64

Airworthiness Directives; Viking Aircraft Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Viking Air Limited Model DHC–3 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as fatigue damage of the wing strut lug fitting components and the fuselage to wing strut attachment (tie-bar). This AD requires determining service life limits

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

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

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

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

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

for the wing strut fitting on the main spar and for the tie-bar and following instructions for removal and replacement of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2022.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 24, 2022.

ADDRESSES: For service information identified in this final rule, contact Viking Air Limited Technical Support, 1959 De Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (North America) (800) 663–8444; fax: (250) 656–0673; email: *technical.support@vikingair.com;* website: *https://www.vikingair.com/support/service-bulletins.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0214.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0214; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the MCAI, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Aziz Ahmed, Aviation Safety Engineer, New York ACO Branch, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 287–7329; fax: (516) 794–5531; email: *aziz.ahmed@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Viking Air Limited Model DHC–3 airplanes. The NPRM published in the **Federal Register** on June 28, 2021 (86 FR 33916). The NPRM was prompted by MCAI originated by Transport Canada, which is the aviation authority for Canada. Transport Canada has issued AD CF–2017–29, dated August 24, 2017 (referred to after this as ''the MCAI''), to correct an unsafe condition for Viking Air Limited Model DHC–3 airplanes. The MCAI states:

> It has been determined that the current maintenance program does not adequately address potential fatigue damage of the wing strut lug fitting components or the fuselage to wing strut attachment (Tie Bar). Affected parts must be replaced before specified air time limits are reached to avoid fatigue cracking of the affected parts. Cracking which is not detected may compromise the structural integrity of the wing or the Tie-Bar.
>
> Fatigue damage occurs more rapidly on aeroplanes that are operated at higher gross weights. For that reason, the corrective actions of this [Transport Canada] AD must be accomplished sooner for aeroplanes that have been certified for operation at higher gross weights.
>
> Fatigue damage also occurs more rapidly on aeroplanes that are operated below 2000 feet above ground level (AGL) over land due to higher and more frequent gust and maneuvering loads. Low level flights over water are not known to produce increased fatigue damage on the DHC–3. For that reason, the corrective actions of this [Transport Canada] AD must be accomplished sooner for aeroplanes that have been operated at low altitudes over land.

This condition, if not addressed, could result in cracking and failure of the structural integrity of the wing or the tie-bar.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0214.

In the NPRM, the FAA proposed to require determining service life limits for the wing strut fitting on the main spar and for the tie-bar and following instructions for removal and replacement of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from two commenters. The commenters were Talkeetna Air Taxi Inc. (Talkeetna Air) and Rust's Flying Service/K2 Aviation (Rust's Flying Service). The following presents the comments received on the NPRM and the FAA's response to each comment.

Request Regarding Equivalent Air Time

Both commenters requested the FAA change the proposed method of calculating equivalent air time by doubling the total hours on each component. Talkeetna Air requested the FAA allow increased visual and non-destructive testing inspections instead. Talkeetna Air and Rust's Flying Service suggested the FAA allow operators to calculate by using the formula and estimating the altitudes at which an airplane has operated, as provided in the service information, instead of by assuming all operations occur below 2,000 feet. Rust's Flying Service stated it has data to verify the operating altitudes of its aircraft.

As the FAA explained in the NPRM, there is no regulatory requirement for owners or operators to record or maintain the operating altitude history of an airplane. As a result, this AD requires calculating the compliance time by assuming all operations occurred below 2,000 feet AGL (and therefore doubling the total hours). However, operators may request approval to determine equivalent air time differently as an alternative method of compliance under the provisions of paragraph (g)(1) of this AD. The FAA did not change this AD based on this comment.

Request Regarding Costs of Compliance

Talkeetna Air requested that the FAA adjust its estimated costs of compliance. The commenter stated that the hourly rate and number of estimated labor hours is too low for what would be required.

The FAA obtained the 300-hour labor time estimated in the NPRM from Viking Air Limited DHC–3 Otter Service Bulletin Number V3/0008, Revision NC, dated February 9, 2017. The FAA verified this number with Viking Air Limited and confirmed it is valid.

The FAA Office of Aviation Policy and Plans provides the labor rate of $85 per work-hour for the FAA to use when estimating the labor costs of complying with AD requirements.

The FAA did not change this AD based on this comment.

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Viking DHC–3 Otter Service Bulletin Number V3/0008, Revision NC, dated February 9, 2017. The service information specifies determining service life limits for the wing strut fitting on the main spar and for the tie-bar and contains instructions for removal and replacement. The FAA also reviewed De Havilland Aircraft of Canada, Limited DHC–3 Otter Service Bulletin Number 3/37, Revision B, dated October 8, 1982. The service information specifies instructions for removing and replacing the fuselage to wing strut attachment tie-bar. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Differences Between This AD and the MCAI

The MCAI requires calculating the compliance time by using a formula and estimating the altitudes at which an airplane has operated. The MCAI also instructs operators to assume operations below 2,000 feet AGL when the operating altitude of the airplane is unknown. Because the FAA has no regulatory requirement for owners or operators to record or maintain the operating altitude history of an airplane, this AD requires calculating the compliance time by assuming all operations occurred below 2,000 feel AGL.

Costs of Compliance

The FAA estimates that this AD affects 41 airplanes of U.S. registry.

The FAA also estimates that it would take about 300 work-hours per airplane to replace both the wing strut fitting and the tie-bar. The average labor rate is $85 per work-hour. Required parts would cost about $5,599 per airplane.

Based on these figures, the FAA estimates the cost of this AD on U.S. operators to be $1,275,059 or $31,099 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–24–18 Viking Air Limited: Amendment 39–21839; Docket No. FAA–2021–0214; Project Identifier 2018–CE–064–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 24, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Viking Air Limited Model DHC–3 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 5700, Wing Structure.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as fatigue damage of the wing strut lug fitting components or the fuselage to wing strut attachment (tie-bar). The FAA is issuing this AD to identify and correct potential fatigue damage of the wing strut lug fitting components of the fuselage to wing strut attachment. The unsafe condition, if not addressed, could result in cracking and failure of the structural integrity of the wing or the tie-bar.

(f) Actions and Compliance

Unless already done, do the following actions in paragraphs (f)(1) through (3) of this AD:

(1) *For all airplanes:* Within 3 months after the effective date of this AD, determine and record the number of equivalent air time hours on each wing and tie-bar by doubling the total hours time-in-service (TIS) accumulated on each part. If the total hours TIS of a tie-bar is unknown or cannot be determined, use the total hours TIS of the wing strut lug fitting on the main spar.

(2) *For airplanes with a maximum certificated gross weight that has never exceeded 8,000 pounds:* Remove from service each left-hand and right-hand wing strut fitting and tie-bar by following the Accomplishment Instructions in Viking DHC–3 Otter SB V3/0008, Revision NC, dated February 9, 2017, and the Replacement section of the Accomplishment instructions in De Havilland Aircraft of Canada, Limited DHC–3 Otter Service Bulletin Number 3/37, Revision B, dated October 8, 1982, at whichever of the following compliance times that occurs later:

(i) Before the part accumulates 40,000 equivalent air time hours, or

(ii) Within 12 months after the effective date of this AD.

(3) *For airplanes with a maximum certificated gross weight that has ever exceeded 8,000 pounds:* Remove from service each left-hand and right-hand wing strut fitting and tie-bar by following the Accomplishment Instructions in Viking DHC–3 Otter SB V3/0008, Revision NC, dated February 9, 2017, and the Replacement section of the Accomplishment instructions in De Havilland Aircraft of Canada, Limited DHC–3 Otter Service Bulletin Number 3/37, Revision B, dated October 8, 1982, at whichever of the following compliance times that occurs later:

(i) Before the part accumulates 32,200 equivalent air time hours, or

(ii) Within 12 months after the effective date of this AD.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, New York ACO 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 ACO Branch, send it to the attention of the person identified in paragraph (h)(1) of this AD.

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

(h) Related Information

(1) For more information about this AD, contact Aziz Ahmed, Aviation Safety Engineer, New York ACO Branch, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 287–7329; fax: (516) 794–5531; email: *aziz.ahmed@faa.gov.*

(2) Refer to Transport Canada AD CF–2017–29, dated August 24, 2017, for more information. You may examine the Transport Canada AD at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0214.

(i) Material Incorporated by Reference

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

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

(i) Viking DHC–3 Otter Service Bulletin Number V3/0008, Revision NC, dated February 9, 2017.

(ii) De Havilland Aircraft of Canada, Limited DHC–3 Otter Service Bulletin Number 3/37, Revision B, dated October 8, 1982.

Note to paragraph (i)(2)(ii): Although De Havilland Aircraft of Canada Limited DHC–3 Otter Service Bulletin Number 3/37, Revision B, dated October 8, 1982, is at revision B, the footer on pages 3 through 6 shows revision ''A,'' dated May 14, 1982.

(3) For both Viking and De Havilland Aircraft of Canada, Limited service information identified in this AD, contact Viking Air Limited Technical Support, 1959 De Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (North America) (800) 663–8444; fax: (250) 656–0673; email: *technical.support@vikingair.com;* website: *https://www.vikingair.com/support/service-bulletins.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on November 19, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–27409 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0834; Project Identifier MCAI–2021–00298–R; Amendment 39–21844; AD 2021–25–01]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Leonardo S.p.a. Model A109S and AW109SP helicopters. This AD was prompted by the discovery that rubber protection of certain electrical wiring had not been installed in the baggage avionics bay during production. This AD requires installing protective rubber borders on the edge of the baggage avionics bay frames, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 24, 2022.

ADDRESSES: For EASA material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.* For Leonardo Helicopters service information identified in this final rule, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://customerportal.leonardocompany.com/en-US/.* You may view this material 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. Service information that is incorporated by reference is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0834.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0834; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Hal Jensen, Aerospace Engineer, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 950 L'Enfant Plaza N SW, Washington, DC 20024; telephone (202) 267–9167; email *hal.jensen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0065, dated March 8, 2021 (EASA AD 2021–0065), to correct an unsafe condition for certain serial-numbered Leonardo S.p.A. Helicopters, formerly Finmeccanica S.p.A., AgustaWestland S.p.A., Agusta S.p.A., Model A109S and AW109SP helicopters.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Leonardo S.p.a. Model A109S and AW109SP helicopters as identified in EASA AD 2021–0065. The NPRM published in the **Federal Register** on September 30, 2021 (86 FR 54124). The NPRM was prompted by the discovery that rubber protection of certain electrical wiring had not been installed in the baggage avionics bay during production. The NPRM proposed to require installing protective rubber borders on the edge of the baggage avionics bay frames, as specified in EASA AD 2021–0065.

The FAA is issuing this AD to prevent chafing of electrical wiring, which if not addressed, could result in fire ignition and smoke in the baggage compartment and subsequent loss of control of the helicopter. See EASA AD 2021–0065 for additional background information.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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 reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0065 requires installing rubber protections on the electrical wiring in the baggage/avionics compartment.

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

Other Related Service Information

The FAA reviewed Leonardo Helicopters Alert Service Bulletin (ASB) No. 109S–100, dated February 2, 2021, for Model A109S helicopters, and Leonardo Helicopters ASB No. 109SP–142, also dated February 2, 2021, for Model AW109SP helicopters. This service information specifies procedures for installing protective rubber borders on the edge of the baggage avionics bay frames.

Costs of Compliance

The FAA estimates that this AD affects 3 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Installing protective rubber borders on the edge of the baggage avionics bay frames will take about 2 work-hours and parts will cost about $24 for an estimated cost of $194 per helicopter and $582 for the U.S. fleet.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–25–01 Leonardo S.p.a.: Amendment 39–21844; Docket No. FAA–2021–0834; Project Identifier MCAI–2021–00298–R.

(a) Effective Date

This airworthiness directive (AD) is effective January 24, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Leonardo S.p.a. Model A109S and AW109SP helicopters, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2021–0065, dated March 8, 2021 (EASA AD 2021–0065).

(d) Subject

Joint Aircraft Service Component (JASC) Code: 2497, Electrical Power System Wiring.

(e) Unsafe Condition

This AD was prompted by the discovery that rubber protection of certain electrical wiring had not been installed in the baggage avionics bay during production. The FAA is issuing this AD to prevent chafing of electrical wiring. The unsafe condition, if not addressed, could result in fire ignition and smoke in the baggage compartment and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2021–0065.

(h) Exceptions to EASA AD 2021–0065

(1) Where EASA AD 2021–0065 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(2) Where EASA AD 2021–0065 refers to its effective date, this AD requires using the effective date of this AD.

(3) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2021–0065.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2021–0065 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permit

Special flight permits are prohibited.

(k) 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 (l) 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.

(l) Related Information

For more information about this AD, contact Hal Jensen, Aerospace Engineer, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 950 L'Enfant Plaza N SW, Washington, DC 20024; telephone (202) 267–9167; email *hal.jensen@faa.gov.*

(m) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2021–0065, dated March 8, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0065, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.*

(4) 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. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0834.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on November 23, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–27390 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0951; Project Identifier AD–2021–01047–R; Amendment 39–21804; AD 2021–23–06]

RIN 2120–AA64

Airworthiness Directives; Various Model 234 and Model CH–47D Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for various Model 234 and Model CH–47D helicopters. This AD was prompted by two reports of mechanical failures of the longitudinal cyclic trim actuator (LCTA). This AD requires determining the maintenance history, and hours time-in-service (TIS) and number of lift cycles for each LCTA since last overhaul, and then requires initial and repetitive overhauls of each LCTA based on that maintenance and service history. This AD also prohibits installing an LCTA unless it meets certain requirements. Finally, this AD requires reporting certain information to the FAA. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 4, 2022.

The FAA must receive comments on this AD by February 3, 2022.

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.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0951; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: David Herron, Aerospace Engineer, Systems & Equipment Section, Seattle ACO Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: (206) 231–3554; email *david.herron@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA received two reports of mechanical failure of an LCTA, the function of which is to constrain and control the non-rotating swashplate. In both failures, which occurred on Model CH–47D helicopters, the flight crew was forced to make an emergency landing as they had difficulty controlling the helicopter. Model 234 and Model CH–47D helicopters both have the same LCTA installed, with two installed on each rotorcraft. Investigation as to the root cause of these failures has determined that inadequate maintenance overhaul procedures and scheduled overhaul intervals for this critical flight component with a single structural load path likely contributed to this unsafe condition. One event occurred due to excessive wear of the acme screw threads from degradation or lack of lubrication. The other event was due to metal fatigue leading to the fracture of the fourth stage spur gear shaft (part of the acme screw) caused by repetitive abnormal loading. The repetitive abnormal loading occurred because of the incorrect installation of a travel limit switch, which rendered the switch ineffective in removing power from the electric motor at the designed travel limit, thus allowing the electric motor to repetitively overstroke the actuator into a mechanical stop. While the failure modes were different, the failure effects were the same: Loss of the constraint and control normally provided by the LCTA. Failure of the LCTA, if not prevented, could result in loss of control of the rotor blades and subsequent loss of control of the helicopter or the rotor blades striking the fuselage. The FAA is issuing this AD to address the unsafe condition on these products.

The type certificate (TC) holder for Model 234 helicopters is Columbia Helicopters Inc. (TC previously held by Boeing Defense & Space Group), and the TC holders for Model CH–47D helicopters currently include Columbia Helicopters, Inc., Billings Flying Service, Inc., Tandem Rotor, LLC, and Unical Aviation, Inc. (originally

manufactured for military use). The FAA did not limit this AD to these TC holders because the FAA expects that additional TC holders of helicopters are subject to this same unsafe condition.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires, within 3 calendar days after the effective date of the AD, determining the hours TIS and lift cycles since last overhaul for each LCTA. If LCTA lift cycles cannot be determined, counting 6 lift cycles for each hour TIS is required. For purposes of this AD, a lift cycle is defined as takeoff from ground for flight, a lift of a new external load while in flight, or a lift of a new internal load while in flight (*e.g.,* fluid drawn into an internal tank).

If the last LCTA overhaul was not approved for return to service by a person that meets the requirements of 14 CFR part 43, or, if you are unable to establish hours TIS and lift cycles since last overhaul of an LCTA (*e.g.,* hours TIS and lift cycles for each LCTA were not tracked), this AD requires, within 10 calendar days after the effective date of the AD, and thereafter at intervals not to exceed 3,000 hours TIS or 18,000 lift cycles, whichever occurs first, overhauling that LCTA. For purposes of any overhaul required by this AD, the overhaul must include an inspection of each acme screw for wear and cracking, lubricating all drive threads and gears, and a test to ensure proper operation of the extend and retract travel limit switches.

If the last LCTA overhaul was approved for return to service by a person that meets the requirements of 14 CFR part 43, overhauling the LCTA as described in this AD is required within 500 hours TIS or 3,000 lift cycles since last overhaul, whichever occurs first; or within 90 days after the effective date of the AD, whichever occurs later. Thereafter, overhauling each LCTA at intervals not to exceed 3,000 hours TIS or 18,000 lift cycles, whichever occurs first, is required.

This AD also prohibits, as of the AD's effective date, installing any LCTA on any helicopter unless it has been approved for return to service by a person that meets the requirements of 14 CFR part 43 after an overhaul as described in this AD, and that LCTA has not been in service for more than 3,000 hours TIS or 18,000 lift cycles since that overhaul. Finally, this AD requires, within 10 calendar days after completing each LCTA overhaul required by this AD, reporting certain information to the FAA.

Interim Action

The FAA considers this AD to be an interim action. The FAA is currently considering requiring overhaul of the LCTA at different time intervals or takeoff and lift cycles. However, the planned compliance time for those actions would allow enough time to provide notice and opportunity for prior public comment on the merits of those actions. Additionally, the inspection reports that are required by this AD will enable the FAA to obtain better insight into the cause of the unsafe condition and to eventually develop final action to address the unsafe condition. Once final action has been identified, the FAA might consider further rulemaking.

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.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule because the LCTAs are critical flight control components with design elements that must be properly and regularly maintained to ensure continued safe flight of the identified rotorcraft. The two reported in-service events evidence a deficiency in the maintenance of the LCTAs that must be resolved. Additionally, the compliance time for some of the required actions is within 3 calendar days after the effective date of this AD, which is shorter than the time necessary for the public to comment and for publication of the final rule. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, 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, for the same reasons the FAA found good cause to forego notice and comment.

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–2021–0951 and Project Identifier AD–2021–01047–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 David Herron, Aerospace Engineer, Systems & Equipment Section, Seattle ACO Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: (206) 231–3554; email *david.herron@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 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

The FAA estimates that this AD affects 74 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Removing and reinstalling both LCTAs on each helicopter will take about 4 work-hours, with no parts costs, for an estimated cost of about $340 per helicopter or $25,160 for the U.S. fleet.

Overhauling both LCTAs on each helicopter will take about 56 work-hours, and parts costs will be about $200, for an estimated cost of about $4,960 per overhaul.

Reporting information to the FAA will take about 1 work hour per helicopter, for an estimated cost of about $85 per report.

Paperwork Reduction Act

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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:

2021–23–06 Various Model 234 and Model CH–47D Helicopters: Amendment 39–21804; Docket No. FAA–2021–0951; Project Identifier AD–2021–01047–R.

(a) Effective Date

This airworthiness directive (AD) is effective January 4, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Model 234 and Model CH–47D helicopters, regardless of type certificate holder, certificated in any category. Type certificate holders include, but are not limited to:

(1) Columbia Helicopters, Inc.,

(2) Billings Flying Service, Inc.,

(3) Tandem Rotor, LLC, and

(4) Unical Aviation, Inc.

(d) Subject

Joint Aircraft System Component (JASC) Code/Air Transport Association (ATA) of America Code: 6710, Rotor flight controls.

(e) Unsafe Condition

This AD was prompted by inadequate maintenance, which resulted in mechanical failure of the longitudinal cyclic trim actuator (LCTA). The FAA is issuing this AD to correct this unsafe condition, which if not addressed, could result in loss of control of the rotor blades and subsequent loss of control of the helicopter or the rotor blades striking the fuselage.

(f) Compliance

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

(g) Required Actions

(1) Within 3 calendar days after the effective date of this AD, determine the hours time-in-service (TIS) and lift cycles since last overhaul for each LCTA on your helicopter. If lift cycles cannot be determined, count 6 lift cycles for each hour TIS for each LCTA. For purposes of this AD, a lift cycle is defined as any of the following:

(i) Takeoff from ground for flight;

(ii) Lift of a new external load while in flight; or

(iii) Lift of a new internal load while in flight (*e.g.,* fluid drawn into an internal tank).

(2) If the last overhaul of any LCTA was not approved for return to service by a person that meets the requirements of 14 CFR part 43, or, if you are unable to establish hours TIS and lift cycles since last overhaul of an LCTA (*e.g.,* hours TIS and lift cycles for each LCTA were not tracked), within 10 calendar days after the effective date of this AD, and thereafter at intervals not to exceed 3,000 hours TIS or 18,000 lift cycles, whichever occurs first, overhaul that LCTA. For purposes of any overhaul required by this AD, the overhaul must include:

(i) An inspection of each acme screw for wear and cracking;

(ii) Lubricating all drive threads and gears; and

(iii) A test to ensure proper operation of the extend and retract travel limit switches.

(3) If the last overhaul of an LCTA was approved for return to service by a person that meets the requirements of 14 CFR part 43, overhaul the LCTA (to include the overhaul requirements specified in paragraphs (g)(2)(i) through (iii) of this AD) within 500 hours TIS or 3,000 lift cycles since last overhaul, whichever occurs first; or within 90 days after the effective date of this AD, whichever occurs later. Thereafter, overhaul each LCTA at intervals not to exceed 3,000 hours TIS or 18,000 lift cycles, whichever occurs first.

(4) As of the effective date of this AD, do not install any LCTA on any helicopter

unless it has been approved for return to service by a person that meets the requirements of 14 CFR part 43 after an overhaul that includes the overhaul requirements specified in paragraphs (g)(2)(i) through (iii) of this AD, and that LCTA has not been in service for more than 3,000 hours TIS or 18,000 lift cycles since that overhaul.

(5) Within 10 days after completing each LCTA overhaul required by this AD, provide the following information by email to *vaughn.n.schmitt@faa.gov* and *ian.a.hansen@faa.gov;* or by mail to Vaughn Schmitt and Ian Hansen, Aircraft Evaluation Group, Safety Standards Division, FAA, 10101 Hillwood Parkway, Fort Worth, TX 76177:

(i) Helicopter Owner/Operator name, email, address, and telephone number,

(ii) LCTA model, part number and serial number,

(iii) Months TIS since last LCTA overhaul,

(iv) Operating hours and lift cycles since last LCTA overhaul,

(v) Date and location of last LCTA overhaul,

(vi) LCTA repairs since last LCTA overhaul,

(vii) LCTA condition when removed,

(viii) LCTA reports of failures or degraded functions,

(ix) LCTA part replacements,

(x) Point of contact information for additional information,

(xi) Any additional notes or comments, and

(xii) Pictures, if available.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO 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 certification office, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@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

For more information about this AD, contact David Herron, Aerospace Engineer, Systems & Equipment Section, Seattle ACO Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: (206) 231–3554; email *david.herron@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued on December 6, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–27539 Filed 12–16–21; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1069; Project Identifier 2018–CE–039–AD; Amendment 39–21854; AD 2021–25–10]

RIN 2120–AA64

Airworthiness Directives; Daher Aerospace (Type Certificate Previously Held by SOCATA) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Daher Aerospace (type certificate previously held by SOCATA) (Daher) Model TBM 700 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The unsafe condition that is the subject of the MCAI is ice accumulation on the oil cooler air inlet duct fin. This AD requires modifying the oil cooler air induction duct. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 24, 2022.

ADDRESSES: For service information identified in this final rule, contact Daher Aerospace Inc., Pompano Beach Airpark, 601 NE 10 Street, Pompano Beach, FL 33060; phone: (954) 893–1400; website: *https://www.tbm.aero.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1069.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1069; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the MCAI, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Greg Johnson, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (720) 626–5462; fax: (816) 329–4090; email: *greg.johnson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Daher Model TBM 700 airplanes with certain oil cooler air induction ducts installed. The NPRM published in the **Federal Register** on August 18, 2021 (86 FR 46160). The NPRM was based on MCAI from the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union. EASA issued AD 2018–0133, dated June 22, 2018, and corrected June 25, 2018 (referred to after this as ''the MCAI''), to address the unsafe condition on certain Daher Model TBM 700 airplanes. The MCAI states:

> During flight testing in icing conditions, oil temperature increase was observed. Subsequent investigation determined that the loss of efficiency of the oil cooler system was due to ice accumulation on the engine air induction duct fins.
>
> This condition, if not corrected, could lead to uncommanded engine in-flight shut-down and reduced control of the aeroplane.
>
> To address this potential unsafe condition, DAHER AEROSPACE developed MOD 70–0616–79 for aeroplanes in production, removing the 4 upper fins of the oil cooler air induction duct to avoid ice accumulation, available for in-service aeroplanes through the SB [Daher Aerospace Service Bulletin 70–254, dated April 18, 2018].
>
> For the reasons described above, this [EASA] AD requires modification of the oil cooler air induction duct.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1069.

Although the unsafe condition statement in the MCAI identifies the cause as ice accumulation on the engine air induction fin, the FAA has determined that this does not accurately identify the affected air path. The affected area is the oil cooler air inlet duct fin.

In the NPRM, the FAA proposed to require modifying the oil cooler air

induction duct. The FAA is issuing this AD to prevent ice from accumulating on the oil cooler air induction duct fins, which could lead to an increase in oil temperature, uncommanded engine inflight shutdown, and reduced airplane control.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Daher Aerospace Service Bulletin SB 70–254, dated April 2018. The service information specifies procedures for removing the four upper fins of the oil cooler air induction duct and for re-identifying the oil cooler air induction duct with a new part number. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA also reviewed Daher Aerospace Service Bulletin SB 70–231, Revision 1, dated July 2018; and Daher Aerospace Service Bulletin SB 70–219, Revision 2, dated July 2018. The service information identifies the kit number and installation procedures for replacing the oil cooler air induction duct.

Costs of Compliance

The FAA estimates that this AD will affect up to 807 airplanes of U.S. registry. The FAA also estimates that it would take about 3 work-hours per airplane to comply with the requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $50 per airplane.

Based on these figures, the FAA estimates the total cost of this AD on U.S. operators to be $246,135 or $305 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–25–10 Daher Aerospace (Type Certificate Previously Held by SOCATA): Amendment 39–21854; Docket No. FAA–2020–1069; Project Identifier 2018–CE–039–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 24, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Daher Aerospace (type certificate previously held by SOCATA) Model TBM 700 airplanes, all serial numbers, certificated in any category, with an oil cooler air induction duct part number (P/N) T700A7920040001, T700H792000900000, T700H792001900000, T700H792001900200, T700H792001900400, or T700H792001900600 installed.

Note 1 to paragraph (c) of this AD: The applicable oil cooler air induction duct P/Ns may be installed in accordance with modification 70–0435–79; Daher Aerospace Service Bulletin SB 70–231, Revision 1, dated July 2018; or Daher Aerospace Service Bulletin SB 70–219, Revision 2, dated July 18, 2018.

(d) Subject

Joint Aircraft System Component (JASC) Code 7900, Engine Oil System (Airframe).

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The unsafe condition that is the subject of the MCAI is ice accumulation on the oil cooler air inlet duct fin. The FAA is issuing this AD to prevent ice from accumulating on the oil cooler air induction duct fins, which could lead to an increase in oil temperature, uncommanded engine inflight shutdown, and reduced airplane control.

(f) Compliance

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

(g) Modify the Oil Cooler Air Induction Duct

(1) Within 3 months after the effective date of this AD, remove the four upper fins of the oil cooler air induction duct and re-identify the oil cooler air induction duct in accordance with the Description of Accomplishment Instructions in Daher Aerospace Service Bulletin SB 70–254, dated April 2018.

(2) As of the effective date of this AD, do not install an oil cooler air induction duct P/N T700A7920040001, T700H792000900000, T700H792001900000, T700H792001900200, T700H792001900400, or T700H792001900600 on any airplane.

(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 certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD and email 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 Greg Johnson, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (720) 626–5462; fax: (816) 329–4090; email: *greg.johnson@faa.gov.*

(2) Refer to European Aviation Safety Agency (EASA) AD 2018–0133, dated June 22, 2018, and corrected June 25, 2018, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–1069.

(j) Material Incorporated by Reference

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

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

(i) Daher Aerospace Service Bulletin SB 70–254, dated April 2018.

(ii) [Reserved]

(3) For Daher Aerospace service information identified in this AD, contact Daher Aerospace Inc., Pompano Beach Airpark, 601 NE 10 Street, Pompano Beach, FL 33060; phone: (954) 893–1400; website: *https://www.tbm.aero.*

(4) You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on December 3, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–27408 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1060; Project Identifier MCAI–2021–00340–R; Amendment 39–21851; AD 2021–25–08]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.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 Leonardo S.p.a. Model AW189 helicopters. This AD was prompted by the determination that certain part-numbered fairings were never introduced into the main rotor (MR) tip lights kit design definition and were not certified for icing conditions. This AD requires replacing affected parts. This AD also prohibits, after modification of the helicopter as required, installing any affected part on any helicopter as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 4, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 4, 2022.

The FAA must receive comments on this AD by February 3, 2022.

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 EASA material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this material 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 the EASA material at the FAA, call (817) 222–5110. The EASA material is also available at *https://www.regulations.gov* by searching for and locating Docket FAA–2021–1060.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1060; 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 EASA AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0078, dated March 17, 2021 (EASA AD 2021–0078) to correct an unsafe condition for certain Leonardo S.p.A. (formerly Finmeccanica S.p.A, AgustaWestland S.p.A., Agusta S.p.A.; and AgustaWestland Philadelphia Corporation, formerly Agusta Aerospace Corporation) Model AW189 helicopters.

EASA AD 2021–0078 was prompted by a design review which identified that fairing part number (P/N) 8G3340A12532 left-hand (LH) and P/N 8G3340A12632 right-hand (RH) used during icing trials activity conducted for the certification of Full Ice Protection System and Limited Ice Protection System kits had never been introduced in the MR tip light kit P/N 8G3340F00411 design definition. The MR tip light kit P/N 8G3340F00411 is currently composed of two other fairing part numbers, P/N 8G3340A12531 LH and P/N 8G3340A12631 RH installed in the vicinity of each engine air intake. EASA AD 2021–0078 advises the fairing part numbers that are currently installed could cause significant ice accretion during operations in icing conditions.

The FAA is issuing this AD to address ice shedding ingestion by the engines,

which could lead to a double engine in-flight shut-down and consequent loss of control of the helicopter. See EASA AD 2021–0078 for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0078 specifies procedures for installation of rescue hoist kit removable parts (temporary actions) and replacement of affected parts with serviceable parts in accordance with the manufacturer's service information. EASA AD 2021–0078 prohibits installing any affected part after modification as required by the EASA AD. EASA AD 2021–0078 considers the modification a terminating action for the temporary actions required by the EASA AD.

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

Other Related Service Information

The FAA reviewed Leonardo Helicopters Alert Service Bulletin No.189–265, dated March 4, 2021. This service information provides instructions to install the rescue hoist kit ''removable'' parts as a temporary action until modification of the helicopter. This service information also provides instructions to install the MR tip light fairing modification P/N 8G3340P02411.

FAA's Determination

These products have been approved by the aviation authority of another country, and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in EASA AD 2021–0078 referenced above. The FAA is issuing this AD after evaluating all pertinent information and determining that the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2021–0078, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and EASA AD 2021–0078.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities to use this process. As a result, EASA AD 2021–0078 is incorporated by reference in this AD. This AD, therefore, requires compliance with EASA AD 2021–0078 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2021–0078 that is required for compliance with EASA AD 2021–0078 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1060.

Differences Between This AD and EASA AD 2021–0078

Service information referenced in EASA AD 2021–0078 specifies sending compliance forms to the manufacturer; this AD does not. Paragraph (2) of EASA AD 2021–0078 specifies a compliance time of 400 flight hours or 12 months, whichever occurs first. However, this AD requires a compliance time of 400 hours time-in-service after the effective date of this AD. This AD does not require compliance with paragraph (1) or paragraph (4) of EASA AD 2021–0078. EASA AD 2021–0078 paragraph (4) considers modification of the helicopter a terminating action for installing the rescue hoist kit ''removable'' parts on the helicopter. As this AD does not require installing the rescue hoist kit ''removable'' parts, this AD does not provide a terminating action for installing the rescue hoist ''removable'' parts.

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 currently no domestic operators of these products affected by the unsafe condition addressed by this AD. 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 relevant data, views, or arguments about this AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–FAA–2021–1060; Project Identifier MCAI–2021–00340–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the AD, 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 AD 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 AD.

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 Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act (RFA)

The requirements of the 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 notice and comment, RFA analysis is not required.

Costs of Compliance

There are no costs of compliance with this AD because there are currently no helicopters with this type certificate on the U.S. Registry that are affected by the unsafe condition addressed by this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this regulation:

(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.

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:

2021–25–08 Leonardo S.p.a.: Amendment 39–21851; Docket No. FAA–2021–1060; Project Identifier MCAI–2021–00340–R.

(a) Effective Date

This airworthiness directive (AD) becomes effective January 4, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Leonardo S.p.a. Model AW189 helicopters, certificated in any category, as identified in European Union Aviation Safety Agency AD 2021–0078, dated March 17, 2021 (EASA AD 2021–0078).

(d) Subject

Joint Aircraft System Component (JASC) Code 3300, Lighting System.

(e) Unsafe Condition

This AD was prompted by the determination that certain part-numbered fairings were never introduced into the main rotor tip lights kit design definition and were not certified for icing conditions. The FAA is issuing this AD to address ice shedding ingestion by the engines, which could lead to a double engine in-flight shut-down and consequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2021–0078.

(h) Exceptions to EASA AD 2021–0078

(1) Where EASA AD 2021–0078 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2021–0078.

(3) Where EASA AD 2021–0078 refers to flight hours (FH), this AD requires using hours time-in-service (TIS).

(4) This AD does not mandate compliance with paragraph (1) of EASA AD 2021–0078.

(5) Where paragraph (4) of EASA AD 2021–0078 specifies that modification of a helicopter is a terminating action for the requirements of paragraph (1) of EASA AD 2021–0078, this AD does not provide a terminating action for the requirements of paragraph (1) of EASA AD 2021–0078 because this AD does not mandate compliance with paragraph (1) of EASA AD 2021–0078.

(6) Where paragraph (2) of EASA AD 2021–0078 specifies a compliance time of within 400 flight hours or 12 months, whichever occurs first, this AD requires compliance within 400 hours TIS after the effective date of this AD.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2021–0078 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permits

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified (if the operator elects to do so), provided it is not flown into known icing conditions.

(k) 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 (l)(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.

(l) Related Information

(1) For more information about this AD, contact Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is

available at the addresses specified in paragraphs (m)(3) of this AD.

(m) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency AD 2021–0078, dated March 17, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0078, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) 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. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1060.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on December 2, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–27388 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

[Docket No. USPC–2021–01]

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The United States Parole Commission is revising its regulations to eliminate a policy of imposing the maximum permissible term of supervised release as a consequence of the revocation of an earlier supervised release term for offenders sentenced under the D.C. Code.

DATES: This final rule is effective December 20, 2021.

FOR FURTHER INFORMATION CONTACT: Helen H. Krapels, General Counsel, U.S. Parole Commission, 90 K Street NE, Third Floor, Washington, DC 20530, telephone (202) 346–7030. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: Based upon its experience with D.C. Code sentenced supervised releasees for over 20 years, the Commission is repealing its policy, codified at 28 CFR 2.218(e), of imposing the maximum permissible term of supervised release after revoking an earlier term of supervised release. On August 17, 2021, the Parole Commission published an interim rule with request for comments. 86 FR 45861. The Parole Commission has not received any comments and is publishing the final rule with no changes to the interim rule.

Under the revised regulation the Commission will retain the discretion to impose the maximum permissible term when it finds that the offender would benefit from a lengthier period of supervision, but there will no longer be a policy guiding that decision.

Executive Orders 12866 and 13563

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulation Planning and Review,'' section 1(b), Principles of Regulation, and in accordance with Executive Order 13565, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation. The Commission has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

This rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and they will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)

This rule is not a ''major rule'' as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E–Congressional Review Act, now codified at 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, this is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties, and does not come within the meaning of the term ''rule'' as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and parole.

The Final Rule

■ Accordingly, the U.S. Parole Commission adopts the interim rule amending 28 CFR part 2, which was published at 86 FR 45861 on August 17, 2021, as final without change.

Patricia K. Cushwa,

Chairman (Acting), U.S. Parole Commission.

[FR Doc. 2021–27448 Filed 12–17–21; 8:45 am]

BILLING CODE 4410–31–P

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

29 CFR Part 531

RIN 1235–AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal; Correction

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule; technical correction.

SUMMARY: In this final rule correction, the Department of Labor (Department) revises the **DATES** section of the final rule published on October 29, 2021 to make a technical correction, clarifying that in addition to 29 CFR 531.56(e) the Department is also withdrawing the revisions to 29 CFR 10.28(b)(2) that published on December 30, 2020.

DATES: This correction is effective December 28, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). *Accessible Format:* Copies of this rule correction may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov/agencies/whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION: The Department of Labor published a final rule in the **Federal Register** on October 29, 2021 titled Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 FR 60114. In that final rule, the Department finalized amendments to 29 CFR 10.28(b) and stated its intent to withdraw the 2020 Tip final rule's revisions to that section: ''Withdrawal of the 2020 Tip final rule's revisions to . . . § 10.28(b) is necessary in order to finalize this rule's changes to . . . 10.28. Accordingly, the Department finalizes its withdrawal of the dual jobs portions of the 2020 Tip final rule.'' 86 FR 60138. As published, however, the final rule contained an omission in the **DATES** section (86 FR 60114). Although the October 29, 2021 final rule was clear that the Department was finalizing its proposal to withdraw the 2020 Tip final rule amendments to both 29 CFR 531.56(e) and 29 CFR 10.28, the **DATES** section referred only to the withdrawal of the 2020 Tip final rule's amendments to § 531.56(e). This technical correction amends the **DATES** section of the October 29, 2021 final rule to reflect the Department's intent to also withdraw the 2020 Tip final rule's amendments to § 10.28. This action makes the necessary corrections in the **DATES** section of that final rule. The correction clarifies that, consistent with its statements in the October 29, 2021 final rule, the Department is withdrawing the 2020 revisions in amendatory instructions to both 29 CFR 531.56(e) and 10.28(b)(2). The **DATES** section contained in the **Federal Register** at 86 FR 60114 is hereby corrected.

Section 553(b)(3) of the Administrative Procedure Act (APA) provides that an agency is not required to publish a notice of proposed rulemaking and solicit public comments when the agency has good cause to find that doing so would be ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3). The Department finds that good cause exists to dispense with the notice and public comment procedures for this correction to its regulations, as it concludes that such procedures are unnecessary because this rule is not substantive and merely corrects a technical error in the October 29, 2021 final rule's **DATES** section. Section 553(d) of the APA also provides that substantive rules should take effect not less than 30 days after the date they are published in the **Federal Register** unless ''otherwise provided by the agency for good cause found[.]'' 5 U.S.C. 553(d)(3). Since this rule merely corrects a technical error in the October 29, 2021 final rule's **DATES** section and does not change the substance of the Department's regulations, the Department finds that it is unnecessary to delay the effective date of the rule. Therefore, it is effective December 28, 2021 (the effective date of the rule being corrected).

The Congressional Review Act (CRA) 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. *See* 5 U.S.C. 801(a)(1)(A)–(B). Notwithstanding this requirement, section 808 of the CRA provides throughout that a rule shall take effect at the time determined by the promulgating agency when the agency for good cause finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 808(2). As noted above, the Department has found that good cause exists to dispense with notice and public procedure for this final rule, as it concludes that such procedures are unnecessary. Therefore, the Department finds that good cause exists to make this correction to its regulations. *See* 5 U.S.C. 808(2). However, consistent with the CRA, the Department will submit to Congress and the Comptroller General the reports required by the Act. 5 U.S.C. 801(a)(1)(A)–(B).

Federal Register Correction

In Fr. Doc. 2021–23446, at 86 FR 60114 in the issue of Friday, October 29, 2021, on page 60114, in the first column, **DATES** is corrected to read as follows:

DATES: As of December 28, 2021, the Department is withdrawing the revision of 29 CFR 10.28(b)(2) (in amendatory instruction 2) and 531.56(e) (in amendatory instruction 11) that published on December 30, 2020 at 85 FR 86756; was delayed until April 30, 2021, on February 26, 2021, at 86 FR 11632; and was further delayed until December 31, 2021, on April 29, 2021, at 86 FR 22597. This final rule is effective December 28, 2021.

Signed this 9th day of December, 2021.

Jessica Looman,

Acting Administrator, Wage and Hour Division.

[FR Doc. 2021–27032 Filed 12–17–21; 8:45 am]

BILLING CODE 4510–27–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2021–0353; FRL–8916–02–R1]

Air Plan Approval; Connecticut; 2015 Ozone NAAQS Interstate Transport Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Connecticut as meeting the Clean Air Act (CAA) requirement that each State's SIP contain adequate provisions to prohibit emissions that will significantly contribute to nonattainment or interfere with maintenance of the 2015 8-hour ozone national ambient air quality standards (NAAQS) in any other state. This action is being taken in accordance with the CAA.

DATES: This rule is effective on January 19, 2022.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2021–0353. 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, *i.e.,* 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 at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact 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 legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Alison C. Simcox, Air Quality Branch, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail code 05–2), Boston, MA 02109–3912, tel. (617) 918–1684, email *simcox.alison@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Table of Contents

I. Background and Purpose

On August 30, 2021, EPA published a Notice of Proposed Rulemaking (NPRM) for the State of Connecticut. *See* 86 FR 48357. The NPRM proposed approval of a Connecticut SIP revision that addresses the CAA requirement prohibiting emissions from the state that significantly contribute to nonattainment or interfere with maintenance of the 2015 8-hour ozone NAAQS in other states. *See* CAA section 110(a)(2)(D)(i)(I) (the ''good neighbor provision''). The SIP revision was submitted to EPA by Connecticut on December 6, 2018. The rationale for EPA's proposed action is given in the NPRM and will not be repeated here. EPA received no public comments on the NPRM.

II. Final Action

EPA is approving a Connecticut SIP revision, which was submitted on December 6, 2018. This submission is approved as meeting CAA section 110(a)(2)(D)(i)(I) requirements that Connecticut's SIP includes adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.

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, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 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 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 February 18, 2022. 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.

Dated: December 13, 2021.

Deborah Szaro,

Acting Regional Administrator, EPA Region 1.

Part 52 of 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 H—Connecticut

■ 2. Section 52.370 is amended by adding paragraph (c)(126) to read as follows:

§ 52.370 Identification of plan

* * * * *

(c) * * *

(126) Revisions to the State Implementation Plan submitted by the Connecticut Department of Energy and Environmental Protection on December 6, 2018.

(i) [Reserved]

(ii) Additional materials.

(A) The Connecticut Department of Energy and Environmental Protection document, ''Connecticut Good Neighbor SIP for the 2015 Ozone National Ambient Air Quality Standard.'' Final, December 6, 2018.

(B) [Reserved]

* * * * *

■ 3. Section 52.386 is amended by adding paragraph (f) to read as follows:

§ 52.386 Section 110(a)(2) infrastructure requirements.

* * * * *

(f) The Connecticut Department of Energy and Environmental Protection submitted the following infrastructure SIP on this date: 2015 ozone NAAQS—December 6, 2018 (CAA § 110(a)(2)(D)(i)(I) transport provisions). This infrastructure SIP is approved.

[FR Doc. 2021–27433 Filed 12–17–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 171

[EPA–HQ–OPP–2021–0831; FRL–9134–02–OCSPP]

RIN 2070–AL00

Pesticides; Certification of Pesticide Applicators; Extension to Expiration Date of Certification Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: The Environmental Protection Agency (EPA) is extending the expiration deadline of existing Federal, state, territory, and tribal certification plans. This deadline was established in 2017 when the EPA promulgated a final rule revising the Certification of Pesticide Applicators (CPA) regulations to improve the competency of certified applicators of restricted use pesticides (RUPs), increase protection for noncertified applicators using RUPs under the direct supervision of a certified applicator through enhanced pesticide safety training and standards for supervision of noncertified applicators, and establish a minimum age requirement for certified and noncertified applicators using RUPs under the direct supervision of a certified applicator. Federal, state, territory, and tribal certifying authorities with existing certification plans were required to revise their existing certification plans to conform with the updated Federal standards for the certification of applicators of RUPs and submit their revisions for EPA review in March 2020. The existing plans are set to expire on March 4, 2022, unless the revised plans are approved by the Agency. EPA is extending the existing plans' expiration deadline to November 4, 2022. This will allow additional time for proposed certification plan modifications to continue being reviewed and approved by EPA without interruption to federal, state, territory, and tribal certification programs or to those who are certified to use RUPs under those programs. The extension also provides EPA with additional time to issue a proposed rule and seek public comment on the need for extending the expiration date beyond November 4, 2022.

DATES:

Effective date: This interim final rule is effective on February 18, 2022.

Comment due date: Comments on the interim final rule must be received on or before January 19, 2022.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2021–0831, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets/about-epa-dockets.*

Due to the public health concerns related to COVID–19, 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: Carolyn Schroeder, Pesticide Re-Evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2376; email address: *schroeder.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you are a federal, state, territory, or tribal agency who administers a certification program for pesticides applicators. You may also be potentially affected by this action if you are: A registrant of RUP products; a person who applies RUPs, including those under the direct supervision of a certified applicator; a person who relies upon the availability of RUPs; someone who hires a certified applicator to apply an RUP; a pesticide safety educator; or

other person who provides pesticide safety training for pesticide applicator certification or recertification. 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:

- Agricultural Establishments (Crop Production) (NAICS code 111);
- Nursery and Tree Production (NAICS code 111421);
- Agricultural Pest Control and Pesticide Handling on Farms (NAICS code 115112);
- Crop Advisors (NAICS codes 115112, 541690, 541712);
- Agricultural (Animal) Pest Control (Livestock Spraying) (NAICS code 115210);
- Forestry Pest Control (NAICS code 115310);
- Wood Preservation Pest Control (NAICS code 321114);
- Pesticide Registrants (NAICS code 325320);
- Pesticide Dealers (NAICS codes 424690, 424910, 444220);
- Industrial, Institutional, Structural & Health Related Pest Control (NAICS code 561710);
- Ornamental & Turf, Rights-of-Way Pest Control (NAICS code 561730);
- Environmental Protection Program Administrators (NAICS code 924110); and
- Governmental Pest Control Programs (NAICS code 926140).

B. What is the Agency's authority for taking this action?

1. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

This action is issued under the authority of FIFRA, 7 U.S.C. 136–136y, particularly sections 136a(d), 136i, and 136w.

2. Administrative Procedure Act (APA)

The APA provides that when an agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(3)(B).

EPA has determined that there is good cause for extending the expiration date for the existing certification plans without prior proposal and opportunity for comment for the following reasons:

- EPA's review and approval efforts, beginning in March 2020, were significantly hampered by the COVID–19 public health emergency, which created unforeseen circumstances that impacted EPA's ability to coordinate effectively with the state, territory, and tribal agencies and to provide early feedback to these certifying authorities during the two-year review and approval period. These impacts have also affected the state, territory, and tribal agencies' ability to respond to EPA's feedback and have significantly limited the amount of time these certifying authorities have to respond to such feedback. These issues resulted in EPA's review and approval process falling behind schedule. While slightly more than half of the 67 total plans have been reviewed by EPA to date, the Agency does not anticipate that all reviews will have been returned to the certifying authorities until February 2022. As a result, there is insufficient time for many of the certifying authorities to address all comments prior to March 4, 2022. See also the discussion in Unit II.B. and C.
- Even though EPA was aware that the review and approval process was falling behind schedule due to COVID–19 resource constraints at both the federal level and within the state, territory, and tribal agencies that develop, implement, and enforce these plans, EPA lacked the authority to develop changes to this regulatory deadline before October 1, 2021. Section 7(a)(2) of the Pesticide Registration Improvement Act of 2018 (PRIA 4) (Pub. L. 116–8; 133 Stat. 578), enacted on March 8, 2019, prohibited EPA from revising or developing revisions to the certification rule prior to October 1, 2021, thereby limiting EPA's ability to adjust the regulatory deadline until now. This extension provides EPA and the certifying authorities an opportunity to complete the review and approval process that was hampered by the COVID–19 pandemic and for certifying authorities to begin implementation of the modified certification plans without a lapse in coverage, ensuring that the increased protections required by the 2017 rule (Ref. 1) are fully realized. See also the discussion in Unit II.D.
- Rulemaking requirements, which in this case also include FIFRA rulemaking requirements that delay the effective dates of FIFRA rules and prescribe external reviews of the draft rulemaking within prescribed time periods, make it impracticable to complete a standard notice and comment rulemaking between the October 1, 2021 end of the PRIA 4 prohibition and the March 4, 2022 expiration date. See also the discussion in Unit II.D. and V.
- The expiration of state, territory, tribal, and federal agency certification programs would have significant adverse impacts on the certifying authorities, the economy, public health, and the environment. Applicator certifications under programs with expired plans would no longer be valid, significantly impairing access to and use of RUPs in many parts of the country, which in turn could pose potential risks to agriculture, commerce, and public health. Although difficult to quantify, the economy would be impacted by the shutdown of existing certification programs, including the potential economic impacts from limited availability of RUPs, and related limitations on training providers, certified individuals, and the program infrastructure established by the certifying agencies. Additionally, the Agency's ability to carry out its function of ensuring that applicators have been adequately trained and assessed for competency to use RUP products and the certifying authorities' ability to implement their certification programs within their jurisdiction will be significantly impacted should existing plans expire before EPA approves the revised certification plans. See also the discussion in Unit I.E.
- The extension of the regulatory deadline directly impacts those state, territory, tribal, and federal certifying agencies whose revised certification plans may not be approved by the regulatory deadline of March 4, 2022. While providing these entities a formal opportunity for comment on a proposed rule is impracticable for the reasons previously stated, certifying authorities have already expressed a need for more time to address EPA comments and have indicated their general support for the extension in communications with EPA. Given the urgent need for this rulemaking, EPA is issuing this rule as an interim final rule with post-promulgation public comment in order for the extension to be effective before the regulatory deadline of March 4, 2022.

In conclusion, for the reasons enumerated here, EPA is promulgating this interim final rule without a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B) because the Agency finds good cause that notice and public comment procedures are impracticable. In addition, EPA is also planning to issue a separate notice of proposed rulemaking (NPRM) in the near future to request comment on the potential need to further extend the regulatory deadline. EPA intends to address comments in response to this interim final rule and the NPRM concurrently and to publish a final rule.

C. What action is the Agency taking?

This interim final rule is revising the expiration date for existing certification plans at 40 CFR 171.5(c) from March 4, 2022, to November 4, 2022. While EPA anticipates that all plans will have been reviewed and returned to the certifying authorities for further revision by February 2022, this revision will allow for certifying authorities that need more time to respond to EPA comments and prepare approvable certification plans, and more time for EPA to work with the certifying authorities to assure that their proposed certification plan modifications meet current federal standards. Although significant progress has been made in the development of revised plans and EPA's subsequent reviews, COVID–19 resource constraints have impacted the time certifying authorities have had to respond to EPA's comments and Agency's ability to work with certifying authorities to assure that their plans are approvable by the March 2022 deadline. Further collaboration is still needed between EPA and the certifying authorities to finalize and approve plans. EPA intends to work expeditiously toward approving and supporting the implementation of plans that meet the current federal standards during the extension and intends to provide periodic notifications to the public when those approvals have occurred. No other changes to the certification standards and requirements specified in 40 CFR part 171 are being made in this rulemaking.

In addition to this interim final rulemaking, EPA is planning to issue a separate notice of proposed rulemaking (NPRM) for public comment on the potential need to further extend the expiration date for existing plans beyond November 4, 2022. Any additional extension pursued by the Agency will be informed by both the progress on plan reviews and approvals made during this extension period and by the public comments on this interim final rule and the NPRM.

D. Why is the Agency taking this action?

EPA finds that the deadline extension is an urgent need and necessary to assure that certified applicators will continue to be authorized to use RUPs without interruption and to provide certifying authorities with additional time to review and respond to EPA comments on their plans. The extension will also provide additional time for EPA to work more closely with the certifying authorities to address any remaining feedback and work toward approving their revisions. This extension also provides the Agency an opportunity to propose a longer-term extension through standard notice and comment rulemaking procedures. Without the deadline extension, modified certification programs that are not approved by the regulatory deadline of March 4, 2022, will expire, and applicators formerly trained and certified under such plans will no longer be allowed to use RUPs.

E. What are the incremental impacts of this action?

Incremental impacts of extending the regulatory deadline are generally positive because the extension provides certifying entities and EPA with more time to ensure that modified plans meeting the minimum federal requirements are in place, while failure to extend the regulatory deadline would likely have significant adverse impacts on the certifying authorities, the economy, public health, and the environment (see discussion in Unit I.B.2.).

EPA uses information from the 2017 certification rule (Ref. 1), which mandates the March 4, 2022 expiration of existing certification plans unless EPA approves revised certification plans, to assess the incremental economic impacts of this interim final rule which extends this deadline from March 4, 2022, to November 4, 2022. The impacts of the extension are that the implementation costs borne by the certifying authorities will be expended over an additional period of time and some of the costs to commercial and private applicators may be delayed. Some of the benefits of the rule (*e.g.,* reduction in acute illnesses from pesticide poisoning) are foregone as the implementation of some plans may be delayed while EPA works with the certifying authorities toward approval of their revised certification plans.

1. Cost to Certifying Authorities

The 2017 rule provided a compliance period for certifying authorities to develop, obtain approval, and implement any new procedures, regulations, or statutes to meet the new federal standards. The 2017 rule further provided that existing plans could remain in effect after March 4, 2022, only to the extent specified in EPA's approval of a modified certification plan; EPA did not explicitly set a date for full implementation of the new programs. Certifying authorities can begin implementing their revisions to their programs when they are approved by EPA; portions of revised certification programs may be implemented in advance of plan approvals when in compliance with the 2017 rule requirements. All certifying authorities submitted their draft revised certification plans to EPA by the March 2020 deadline and the draft plans are presently undergoing review at EPA. Shortly after the March 2020 deadline, the COVID–19 public health emergency disrupted the normal progress of the EPA's review and approval of the draft plans. EPA and certifying authorities could not put the amount of effort into this part of the rule implementation that was originally anticipated, as they had to divert their resources to addressing pandemic-related issues. Thus, only part of the cost to certifying authorities estimated in the 2017 rule has presently been spent and some of the cost will be expended during the additional extension period. Therefore, this interim final rule is not expected to significantly change the costs to certifying authorities estimated in the 2017 Economic Analysis (EA) (Ref. 2).

2. Cost to Certified Applicators

The other sectors affected by the 2017 rule (*e.g.,* commercial and private applicators) are not incurring any costs until revised certification plans take effect. Once the revised plans take effect, the 2017 EA estimated that commercial applicators and private applicators would incur annualized costs of $16.2 million and $8.6 million, respectively, to meet the new certification standards. Some of these costs could be delayed as revised programs are approved and implemented over a longer period of time.

3. Potentially Delayed Benefits of the 2017 Rule

The delay in the approval of revised certification plans may also delay some benefits that would have otherwise accrued if certification plans were approved and implemented by the deadline established in the 2017 rule, as assessed in the 2017 EA. In 2017, EPA estimated that implementing the new federal certification requirements would reduce acute illness caused by exposure to RUPs, based on an analysis of pesticide incidents assuming that about 20% of poisonings are reported (a plausible estimate based on the available literature regarding occupational injuries or chemical poisoning incidents). Incidents may result in harms to applicators, persons in the vicinity, and the environment. Reported incidents most commonly cite exposure to the applicator or farmworkers in adjacent areas. Based on avoided medical costs and lost wages, the annualized benefits of the rule were estimated to be between $51.1 and $94.4

million. In addition, EPA expected that improved training would also reduce chronic illness among applicators from repeated RUP exposure and would benefit the public from better protections from RUP exposure when occupying treated buildings or outdoor spaces, consuming treated food products, and reducing the impact on non-target plants and animals. To the extent that this rule delays implementation of the 2017 rule, it will delay accrual of some of those benefits.

Not all the benefits of certification program revisions will be delayed, however, since some programs have been or will be able to start implementing changes sooner. Certifying authorities can begin implementing their revisions to their programs as soon as they are approved by EPA, some of which are anticipated to be approved in early 2022. In some jurisdictions, portions of revised certification programs are presently being implemented and in compliance with or exceeding the 2017 rule requirements, such as imposing minimum age requirements and updating manuals and exam administration procedures, so some benefits are already being realized in advance of full plan approvals. Additionally, some certifying authorities were forced to make changes to their existing certification programs to accommodate COVID–19-related protocols. Any changes that were made to existing plans to make these accommodations were required to be consistent with the new requirements and standards established in the 2017 rule.

Without the extension, however, the benefits of the 2017 rule would not be fully realized. The impact of plans expiring absent EPA's approval of modified plans has far-reaching implications across many business sectors, including but not limited to the agricultural sector, importation and exportation business, and structural pest control (*e.g.,* termite control), and could potentially impact all communities and populations throughout the U.S. in various ways as discussed in Unit I.E.4. In addition to the potential delay of benefits that would result from this extension, EPA and certifying authorities have already invested significant resources in the preparation and review of plan modifications that would fully implement the 2017 rule. It is EPA's considered judgement that the sunk cost of these investments, taken together with the significant costs of not extending the deadline as discussed in Unit I.E.4., outweigh the delayed benefits. EPA will continue to work expeditiously with certifying authorities to review and approve plans on a rolling basis. EPA's ongoing collaboration with the certifying authorities, which was significantly impacted by the COVID–19 pandemic, will result in modified plans that are protective of the environment and human health, including the health of certified pesticide applicators and those under their direct supervision, and will ensure that certified applicators are trained to prevent bystander and worker exposures as contemplated in the 2017 rule.

4. Costs of Not Extending the Deadline

If the regulatory deadline is not extended, it is likely that EPA will be unable to approve many of the state, territory, tribal, and other federal agency certification programs, resulting in termination of these programs. EPA would have to take responsibility for administering certification programs for much of the country. A gap in coverage will likely exist between when certification programs expire and when EPA can fully implement EPA-administered certification programs, resulting in RUPs being unavailable for use in many places during the 2022 growing season and potentially through the end of 2022 or longer. It is also unlikely that EPA's certification programs would offer the same availability and convenience as those offered by state, territorial, and tribal certifying authorities, so it is likely that some applicators would face higher costs or be unable to obtain certification to apply RUPs. Additionally, once the EPA-administered certification plans are in place, they may in some cases be less protective than state plans would be, as many state plans include requirements that are more protective than the EPA requirements and these benefits will be lost if the deadline is not extended and EPA takes over many of the country's certification programs.

Additionally, EPA would be forced to expend time and resources in establishing the infrastructure to administer these certification programs, which would further delay coordination with certifying authorities whose plans were either approved and would be in the process of being implemented, or are awaiting approval. This is likely to cause significant disruption for agricultural, commercial, and governmental users of RUPs, and could have consequences for pest control in a broad variety of areas, including but not limited to the control of public health pests (*e.g.,* mosquito control programs), pests that impact agriculture and livestock operations, structural pests (*e.g.,* termites), pests that threaten state and national forests, and pests in containerized cargo. Applicators could lose work and income. Further, the expiration of certification plans could lead to confusion and potential enforcement issues when certifications that were formerly valid suddenly expire. It is also unlikely that EPA's certification programs could offer the depth of specialization found in many state, territorial and tribal certifying programs, which may be tailored to the particular pest control and human health needs commonly found in these localities. Thus, applicators certified under EPA programs would only be assessed for competency at the minimum federal standards and may not receive the specialized training that state, territorial, and tribal certifying authorities often provide. In addition, many states require professional applicators to be trained and licensed to apply general use pesticides and it is unclear to what extent states would be able to support those programs if they were to lose authority to certify RUP applicators.

F. Request for Comments

The Agency invites certifying authorities, certified applicators, and the public to provide their views on the extension of the expiration date to November 4, 2022. Additionally, in advance of the planned NPRM seeking further extension of this deadline, commenters are encouraged to provide feedback on the need for, or concerns over, further extending the expiration date of existing plans and the appropriate length of a longer extension if warranted. Comments on this interim final rule will also be considered in the development of that rulemaking.

G. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your

comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Background

A. January 2017 Final Rule

In January 2017, EPA finalized a rule that revised the Certification of Pesticide Applicators regulations at 40 CFR part 171 (certification or CPA rule) (Ref. 1). The certification rule sets standards of competency for persons who use RUPs and establishes a framework for certifying authorities to administer pesticide applicator certification programs. One of the stated purposes of the 2017 rule is to ensure that persons using RUPs are competent to use these products without causing unreasonable adverse effects to themselves, the public, or the environment.

In updating the CPA regulations, EPA revised the regulation to enhance the following: Commercial and private applicator competency standards, exam and training security standards, standards for noncertified applicators working under the direct supervision of a certified applicator, tribal applicator certifications, and the requirements for submission, approval, and maintenance of state, tribal, territory, federal agency, and EPA-administered certification plans. The final rule also revised the regulation by adding categories of certification for commercial and private applicators, adding a recertification interval and criteria for recertification programs administered by certifying authorities, and establishing a minimum age for both certified applicators and noncertified applicators who use RUPs under direct supervision of certified applicators.

For federal agency plans, the final rule deleted the section on Government Agency Plans (GAP) in the old 40 CFR 171 and codified the existing policy on review and approval of federal agency certification plans prior to the 2017 rule. For tribal agency plans, the final rule offered tribal governments three options not previously provided for certifying applicators in Indian country. A tribe may choose to allow persons holding currently valid certifications issued under one or more specified state, tribal, or federal agency certification plans to apply RUPs within the tribe's Indian country, develop its own certification plan for certifying private and commercial applicators, or take no action, in which case EPA may, in consultation with the tribe(s) affected, implement an EPA-administered certification plan within the tribe's Indian country. EPA currently administers (Ref. 3), and has proposed updates to (Ref. 4), a federal certification program covering Indian country not otherwise covered by an individual tribal certification plan.

Under the 2017 rule, existing certification plans approved by EPA before the effective date of the rule (March 6, 2017) would remain in effect until March 4, 2020. If a certifying authority submitted an amended certification plan to EPA for approval by the March 2020 deadline, the existing certification plan would continue to remain in effect until EPA has reviewed and responded to the amended certification plan, but not beyond March 4, 2022, unless EPA authorizes further extension in its approval of an amended certification plan. EPA will specify in its approval of a plan how long the existing plan may remain in effect while the certifying authority prepares and completes implementation of its amended certification plan. EPA will base each certifying authority's implementation period on the circumstances of that jurisdiction.

B. Attempted Changes to the 2017 Rule's Effective Date and Efforts To Meet the Regulatory Deadlines

In a series of **Federal Register** notices published in 2017 (Refs. 5, 6, and 7), EPA attempted to delay the effective date of the 2017 rule until May 22, 2018 in order to reconsider the merits of the rule. Litigation over the effective date resulted in the delay rules being vacated and the original effective date of March 4, 2017, being restored (Ref. 8). While efforts to begin outreach and implementation of the certification rule continued during this process, such as EPA's course for regulatory agencies in April 2017 (Ref. 9), some of the Agency's efforts to develop and provide guidance and support materials on the Agency's expectations regarding the revised certification plans slowed down, and some certifying authorities delayed efforts to update their certification plans under the expectation that the three-year window to revise and submit modified certification plans was not going to start until May 22, 2018, if at all. The uncertainty about whether the rule was effective and its potential fate upon reconsideration caused EPA and the certifying authorities to lose some of the time the rule had allotted for collaboration in advance of the March 2020 submission deadline.

Despite some of the early delays, EPA and the certifying authorities were productive during the remaining two years, with significant collaborative efforts on an individual level between the certifying authorities and EPA Regional Offices, as well as in-person group settings with the certifying authorities and EPA staff (Ref. 10). These efforts resulted in all certifying authorities submitting their draft certification plan revisions to EPA by the March 2020 deadline established in regulation. As a result, all plans that were approved by EPA prior to March 6, 2017, continue to remain in effect while EPA reviews and works with the certifying authorities toward approval of their certification plans. These existing certifications plans are set to expire on March 4, 2022, unless the modified plans are approved by EPA and the approved plan specifies the time needed to fully implement the revisions identified.

C. Impact of the COVID–19 Public Health Emergency on EPA's Review and Approval Process

When EPA selected a two-year period from March 2020 to March 2022 for evaluating and approving modified plans in the 2017 rule, the Agency had anticipated that significant engagement would continue with the certifying authorities during the review period to ensure that their draft certification plans meet or exceed the minimum requirements. EPA also expected that the proposed plans would need further modification before they could be approved by EPA. Additionally, EPA expected in 2017 that a number of plans would have been submitted earlier than the regulatory deadline for submission, thereby resulting in the reviews being spread out over a longer period of time instead of the two-review review period. However, due in part to the loss of early collaboration time and delays as described in Unit II.B., most of the plans were submitted on or shortly before the regulatory deadline, and some of the work that would have been done by EPA and certifying authorities before plan submission was shifted into EPA's review period, thereby increasing the level of effort for both EPA and certifying authorities during this two-year period. Despite these issues, EPA anticipated and planned for much of the additional work after submission to be completed by May 2021, with final review and approvals to follow shortly thereafter.

However, while EPA was prepared for this influx of plans, shortly after the March 2020 submission deadline, the COVID–19 public health emergency arose. This significantly impacted the certifying authorities' resources and ability to address EPA comments in a timely manner, as resources shifted to address pressing public health needs related to COVID–19. Additionally, EPA

necessarily redirected some of the staff and resources dedicated to certification plan reviews to address emerging COVID–19 related issues. Examples include providing support to the existing certification programs to adapt to the COVID–19 crisis (Ref. 11), as well as addressing a number of COVID–19-related issues impacting farmworker pesticide safety under the Agricultural Worker Protection Standard (WPS) at 40 CFR 170 such as health concerns around in-person training and reduced availability of respiratory protection equipment (Ref. 12, 13, 14, and 15). EPA staff involved in plan reviews also spent considerable time early in the pandemic to help respond to public inquiries (both in Spanish and English) regarding COVID–19 and pesticide products that may be effective at killing the virus, among other support efforts within the Agency at the time.

COVID–19 also drew certifying authorities' resources away from pursuing compliance with the 2017 rule in various ways, such as the need to accommodate social distancing in their applicator training and testing procedures. To support these efforts, EPA staff frequently met with state and regional staff and issued guidance (Ref. 11) to ensure that these program changes were consistent with the new federal requirements while meeting their needs during the pandemic. This resulted in delayed reviews and EPA feedback on the new certification plans. While EPA anticipates that all plans will have been reviewed and returned to the certifying authorities with comments by February 2022, the early impacts of COVID–19 on available resources and plan reviews have significantly limited the amount of time that many certifying authorities have had to address EPA's comments prior to the March 2022 deadline.

D. PRIA 4 Restriction

In 2017, EPA published a document in the **Federal Register** stating that the Agency had initiated rulemaking to reconsider the minimum age requirements under 40 CFR 171 (Ref. 16). As indicated in Unit I.B.2., negotiations around the PRIA 4 reauthorization resulted in the mandate requiring EPA to carry out and implement the 2017 rule as finalized and prohibited the Agency from revising or developing revisions to the CPA regulations prior to October 1, 2021, thereby halting the reconsideration of the minimum age requirements and any other potential changes to the certification rule until that date. In accordance with PRIA 4, EPA has been working with the certifying authorities to revise and complete the review and approval process of their certification plans by the deadlines established in 40 CFR 171.5.

However, the COVID–19 public health emergency has negatively impacted both the Agency's ability to review and approve plans in a timely manner and has impacted the certifying authorities' ability to respond to Agency comments quickly and effectively as discussed in Unit II.C. While EPA has been aware that the review and approval of plans was behind schedule for the reasons previously described, EPA was prohibited from undertaking any effort to amend the certification rule to extend the expiration date for the existing plans until October 1, 2021, when the PRIA 4 prohibition against revising or developing revisions expired.

FIFRA imposes additional requirements that add to the complexity of rulemaking. One requirement, 7 U.S.C. 136w(a)(2)(A) and (B), requires up to 60 days of review by the Secretary of Agriculture for proposed rules and 30 days for final rules (see Unit V). Another requirement, 7 U.S.C. 136w(a)(4), provides that a rule does not become effective until 60 days after it has been promulgated. When FIFRA rulemaking requirements and the PRIA 4 prohibition are considered together, EPA did not have sufficient time to comply with conventional notice and comment rulemaking procedures and applicable executive orders.

III. Provisions of This Interim Final Rule

A. Need for Extending the Existing Plans' Expiration Date

An extension of the expiration date for existing certification plans is needed to ensure that federal, state, territory, and tribal agencies have sufficient time to revise their certification plans in response to EPA's feedback on their draft certification plans. Absent an extension of this deadline, it is likely that a significant number of state, territory, tribal, and other federal agency certification programs will terminate, causing severe disruption for agricultural, commercial, and governmental users of RUPs. Failure to extend the regulatory deadline, and the resulting expiration of many certification programs, would significantly limit access to certification, thereby limiting access to RUPs that are necessary for various industries that rely upon pest control.

If EPA is unable to act expeditiously to extend the regulatory deadline, many existing certification plans that remain in effect pending EPA's review of submitted certification plan modifications will expire on March 4, 2022, in which case 7 U.S.C. 136i(a) requires that EPA provide RUP applicator certification programs in states (including territories) where a state certification plan is not approved. If EPA were to take on the burden of administering certification programs for much of the country, it would draw resources away from other important Agency priorities, including implementation of certification plans that are approved before the March 2022 deadline. In addition, it would take significant time and resources to set up the infrastructure for such federal certification programs and to train, test, and certify applicators, which would likely result in RUP use being curtailed in affected states. It is unlikely that EPA would be able to establish these federal certification programs before the start of the 2022 growing season, which would have potentially devastating impacts on the agricultural sector in many parts of the country. Moreover, once EPA-administered state certification programs are established, it is unlikely that they would operate at the same capacity as existing state programs, but rather, would provide fewer and less localized opportunities for applicators to satisfy certification requirements. As a result, significant adverse effects are expected on the pest control industry if current plans expire, as existing certifications will no longer be valid and will need to be replaced with federal certifications, likely creating economic and public health ramifications in a wide range of sectors such as agricultural commodity production, public health pest control, and industrial, institutional, and structural pest control. RUP access in this scenario would be minimal for most, if not all, of the 2022 growing season, and significant disruptions could extend even further.

B. New Deadline for Certification Plan Approvals

Under this interim final rule, the deadline for amended certification plans to be approved without interruption of the existing certification plans provided in 40 CFR 171.5(c) is being changed from March 4, 2022, to November 4, 2022. This additional time is necessary to assure that all the certifying authorities have enough time to present approvable certification plans, and for EPA to work more closely with the state, territory, and tribal agencies on necessary modifications, and ultimately approve their certification plans. As some certifying authorities are close to completing their revisions and receiving

EPA approval on their plans, EPA anticipates that some certification plan approvals will begin in early 2022 and will continue through the revised November 4, 2022 deadline. EPA anticipates that notice of certification plan approvals will be periodically provided to the public in batched notices in the **Federal Register** and on EPA's website as they are approved.

The extension in this interim final rule will also provide EPA with additional time to issue a separate NPRM seeking further extension of the deadline, providing stakeholders an opportunity to submit comments on the need for an additional extension to the expiration date for existing plans, and to include in their comments specific information detailing the necessity for or concerns over such an extension. EPA will be seeking this additional comment, because EPA did not have sufficient time to propose an extension prior to the regulatory deadline and is interested in seeking additional information to determine an appropriate length of time for such an extension. During this upcoming comment period in the following proposed rule, EPA expects that certifying authorities and other interested stakeholders will be able to provide more information on the efforts, issues, and concerns within each certifying authorities' jurisdiction and the potential impacts of delayed certification plans should plans require additional review time beyond November 4, 2022.

IV. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Pesticides; Certification of Pesticide Applicators; Final Rule. **Federal Register**. 82 FR 952, January 4, 2017 (FRL–9956–70).
2. EPA. Economic Analysis of the Final Amendments to 40 CFR part 171: Certification of Pesticide Applicators [RIN 2070–AJ20]. December 6, 2016. Docket ID No. EPA–HQ–OPP–2011–0183–0807.
3. EPA. Final EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides Within Indian Country; Notice of Implementation. Notice. **Federal Register**. 79 FR 7185, February 6, 2014 (FRL–9904–18).
4. EPA. EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides Within Indian Country; Proposed Revisions; Notice of Availability and Request for Comment. **Federal Register**. 85 FR 12244, March 2, 2020 (FRL–10005–59).
5. EPA. Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017. **Federal Register**. 82 FR 8499, January 26, 2017 (FRL–9958–87–OP).
6. EPA. Further Delay of Effective Dates for Five Final Regulations Published by Environmental Protection Agency between December 12, 2016 and January 17, 2017. **Federal Register**. 82 FR 14324, March 20, 2017 (FRL–9960–28–OP).
7. EPA. Pesticides: Certification of Pesticide Applicators; Delay of Effective Date. **Federal Register**. June 2, 2017 (82 FR 25529) (FRL–9963–34).
8. *Pineros y Campesinos Unidos del Noroeste, et al.,* v. *Pruitt, et al.,* Case No. 17–CV–03434 (N.D. Cal. filed June 4, 2017); 293 F. Supp. 3d 1062 (N.D. Cal. 2018).
9. EPA. 2017 Pesticide Regulatory Education Programs. Course: Pesticide Applicator Certification. Baltimore, MD. April 4–6, 2017.
10. EPA. 2019 Pesticide Regulatory Education Program Applicator Certification Rule PREP. Crystal City, VA. April 29–May 2, 2019.
11. EPA. Memorandum: Guidance regarding the Certification of Pesticide Applicators during the COVID–19 Public Health Emergency. July 27, 2020.
12. EPA. Memorandum: Guidance on Satisfying the Annual Pesticide Safety Training Requirement under the Agricultural Worker Protection Standard during the COVID–19 Emergency. June 18, 2020.
13. EPA. Memorandum: Statement Regarding Respiratory Protection Shortages and Reduced Availability of Respirator Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID–19 Public Health Emergency. June 1, 2020.
14. EPA. Memorandum: Amendment to the June 1, 2020, Statement Regarding Respiratory Protection Shortages and Reduced Availability of Respirator Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID–19 Public Health Emergency. May 6, 2021.
15. EPA. Memorandum: Termination of the June 1, 2020 Statement/May 6, 2021 Amendment Regarding Respiratory Protection Shortages and Reduced Availability of Respirator Fit Testing Related to Pesticide Uses Covered by the Agricultural Worker Protection Standard during the COVID–19 Public Health Emergency. August 10, 2021.
16. EPA. Pesticides; Certification of Pesticide Applicators Rule; Reconsideration of the Minimum Age Requirements. **Federal Register**. December 19, 2017 (82 FR 60195) (FRL–9972–11).

V. FIFRA Review Requirements

In accordance with FIFRA section 25(a), EPA submitted a draft of this interim final rule to the United States Department of Agriculture (USDA) and to the appropriate Congressional Committees.

USDA responded without comments. The FIFRA Scientific Advisory Panel (SAP) waived review of this interim final rule, concluding that the interim final rule does not contain issues that warrant scientific review by the SAP.

VI. Statutory and Executive Order Reviews

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

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

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) and was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been reflected in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection activities or burden subject to OMB review and approval under the PRA, 44 U.S.C. 3501 *et seq.* Burden is defined in 5 CFR 1320.3(b). OMB has previously approved the information collection activities contained in the existing regulations and associated burden under OMB Control Numbers 2070–0029 (EPA ICR No. 0155) and 2070–0196 (EPA ICR No. 2499). An agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA, 5 U.S.C. 601 *et seq.* The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to

notice and comment requirements, because the Agency has invoked the APA ''good cause'' exemption under 5 U.S.C. 553(b). See Unit I.B.2. for additional discussion about the ''good cause'' finding for this action.

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the States, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This interim final rule will not impose substantial direct compliance costs on Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045, because it does not concern an environmental health risk or safety risk.

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

This is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve technical standards. As such, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14008: Tackling the Climate Crisis at Home and Abroad

In accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14008 (86 FR 7619, January 27, 2021), EPA finds that this action will not result in disproportionately high and adverse human health, environmental, climate-related, or other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts during this administrative action to extend the expiration date. This extension will provide EPA and the certifying authorities an opportunity to finalize the revised certification plans, ensuring that the increased protections identified in the 2017 rule are realized for all affected populations. EPA will continue to work expeditiously with certification authorities to review and approve plans on a rolling basis. This engagement, which was impacted by the COVID–19 pandemic, will ensure the modified plans are appropriately protective of certified pesticide applicators and those under their direct supervision, and will ensure that certified applicators are trained to prevent bystander and worker exposures.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 171

Environmental protection, Applicator competency, Agricultural worker safety, Certified applicator, Pesticide safety training, Pesticide worker safety, Pesticides and pests, Restricted use pesticides.

Dated: December 14, 2021.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

Therefore, for the reasons set forth in the preamble, EPA amends 40 CFR part 171 as follows:

PART 171—CERTIFICATION OF PESTICIDE APPLICATORS

■ 1. The authority citation for part 171 is revised to read as follows:

Authority: 7 U.S.C. 136–136y.

§ 171.5 [Amended]

■ 2. Amend § 171.5 by revising paragraph (c) to read as follows:

* * * * *

(c) *Extension of an existing plan during EPA review of proposed revisions.* If by March 4, 2020, a certifying authority has submitted to EPA a proposed modification of its certification plan pursuant to subpart D of this part, its certification plan approved by EPA before March 6, 2017 will remain in effect until EPA has approved or rejected the modified plan pursuant to § 171.309(a)(4) or November 4, 2022, whichever is earlier, except as provided in paragraph (d) of this section and § 171.309(b).

* * * * *

[FR Doc. 2021–27373 Filed 12–17–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.: 201214–0338; RTID 0648–XB654]

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

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

ACTION: Notification of quota transfer.

SUMMARY: NMFS announces that the Commonwealth of Virginia is transferring a portion of its 2021 commercial summer flounder quota to the State of Rhode Island. This adjustment to the 2021 fishing year quota is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised 2021

commercial quotas for Virginia and Rhode Island.

DATES: Effective December 17, 2021, through December 31, 2021.

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, (978) 281–9225.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.110. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102 and final 2021 allocations were published on December 21, 2020 (85 FR 82946).

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

Virginia is transferring 25,016 lb (11,347 kg) to Rhode Island through mutual agreement of the states. This transfer was requested to repay landings made by an out-of-state permitted vessel under a safe harbor agreement. The revised summer flounder quotas for 2021 are: Virginia, 2,349,045 lb (1,065,509 kg) and Rhode Island, 1,886,566 lb (855,732 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.162(e)(1)(i) through (iii), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: December 13, 2021.

Ngagne Jafnar Gueye,

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

[FR Doc. 2021–27389 Filed 12–17–21; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 86, No. 241
Monday, December 20, 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 431

[EERE–2019–BT–STD–0044]

RIN 1904–AE41

Energy Conservation Program: Energy Conservation Standards for Commercial Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of proposed determination and request for comment.

SUMMARY: The Energy Policy and Conservation Act (''EPCA''), as amended, prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including commercial clothes washers (''CCWs''). EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would result in significant conservation of energy. In this notification of proposed determination (''NOPD''), DOE has initially determined that amended energy conservation standards for commercial clothes washers do not need to be amended and requests comment on this proposed determination and the associated analyses and results.

DATES:

Meeting: DOE will hold a webinar on Tuesday, February 8, 2022, from 12:30 p.m. to 4:30 p.m. See section VII, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

Comments: Written comments and information are requested and will be accepted on or before February 18, 2022.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2019–BT–STD–0044 and/or RIN number 1904–AE41, by any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email:* to *CommClothesWashers2019STD044@ee.doe.gov.* Include docket number EERE–2019–BT–STD–0044 and/or RIN number 1904–AE41 in the subject line of the message.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section VII of this document.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing coronavirus 2019 (''COVID–19'') pandemic. DOE is currently suspending receipt of public comments via postal mail and hand delivery/courier. 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.

Docket: The docket, which includes **Federal Register** notices, webinar attendee lists and transcripts, 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-2019-BT-STD-0044.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section VII, ''Public Participation,'' for further information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

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For further information on how to submit a comment or review other public comments and the docket contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Synopsis of the Proposed Determination

Title III, Part C [1] of EPCA [2] established the Energy Conservation Program for Certain Industrial Equipment. (42 U.S.C. 6311–6317) Such equipment includes CCWs, the subject of this NOPD. (42 U.S.C. 6311(1)(H))

DOE is issuing this NOPD pursuant to the EPCA requirement that not later than 6 years after issuance of any final rule establishing or amending a standard, DOE must publish either a notification of determination that standards for the equipment do not need to be amended, or a notice of proposed rulemaking (''NOPR'') including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6316(a); 42 U.S.C. 6295(m))

For this proposed determination, DOE analyzed CCWs subject to standards specified in 10 CFR 431.156(b).

DOE first analyzed the technological feasibility of more energy and water efficient CCWs. For those CCWs for which DOE determined higher standards to be technologically feasible, DOE estimated energy savings that would result from potential energy conservation standards by using the same approach as when it conducts a national impacts analysis. DOE also considered the estimated impacts of amended energy conservation standards on manufacturers of CCWs. Based on the results of the analyses, summarized in section 0 of this document, DOE has tentatively determined that current standards for CCWs do not need to be amended.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed determination, as well as some of the historical background relevant to the establishment of standards for CCWs.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part C of EPCA (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, section 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. This equipment includes CCWs, the subject of this document. (42 U.S.C. 6311(1)(H)) EPCA prescribed initial standards for this equipment and directed DOE to conduct additional cycles of rulemakings to determine whether the established standards should be amended. (42 U.S.C. 6313(e))

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316).

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of covered equipment. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered equipment must use the Federal test procedures as the basis for: (1) Certifying to DOE that their equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6316(a); 42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that equipment (42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(s)) With respect to CCWs, EPCA requires that the test procedure for CCWs be the same as the test procedures established by DOE for residential clothes washers (''RCWs''). (42 U.S.C. 6314(a)(8)) Those test procedures appear at title 10 of the Code of Federal Regulations (''CFR'') part 430 subpart B appendix J2, *Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-automatic Clothes Washers* (''appendix J2'').

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6316(a) and 42 U.S.C. 6316(b); 42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6316(a) (applying the preemption waiver provisions of 42 U.S.C. 6297))

DOE must periodically review its already established energy conservation standards for covered equipment no later than 6 years from the issuance of a final rule establishing or amending a standard for covered equipment. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)) This 6-year look-back provision requires that DOE publish either a determination that standards do not need to be amended or a NOPR, including new proposed standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)) EPCA further provides that, not later than 3 years after the issuance of a final determination not to amend standards, DOE must publish either a notification of determination that standards for the equipment do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(3)(B)) DOE must make the analysis on which a determination is based publicly available and provide an opportunity for written comment. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(2))

A determination under the 6-year look-back provision that amended standards are not needed must be based on consideration of whether amended standards will result in significant conservation of energy, are technologically feasible, and are cost effective. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2))

[1] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[2] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

Under 42 U.S.C. 6295(o)(2)(B)(i)(II), an evaluation of cost-effectiveness requires DOE to consider savings in operating costs throughout the estimated average life of the covered equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered equipment that are likely to result from the standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(n)(2) and 42 U.S.C. 6295(o)(2)(B)(i)(II))

A NOPR proposing new or amended standards, must be based on the criteria established under 42 U.S.C. 6295(o). (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(B)) The criteria at 42 U.S.C. 6295(o) require that standards be designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified, and must result in significant conservation of energy. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) In deciding whether a proposed standard is economically justified, DOE must determine, after receiving public comment, whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (Secretary) considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

DOE is publishing this NOPD in satisfaction of the 6-year review requirement in EPCA.

B. Background

1. Current Standards

On December 15, 2014, DOE published a final rule (''December 2014 Final Rule'') to amend the standards for CCWs manufactured on or after January 1, 2018. 79 FR 74492. These standards are currently applicable and are codified in 10 CFR 431.156(b) and repeated in Table II.1.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS MANUFACTURED ON OR AFTER JANUARY 1, 2018

Equipment class	Minimum modified energy factor (''MEF_{J2}'') (cubic feet (''ft^3'')/kilo-watt-hour (''kWh'')/cycle)	Maximum integrated water factor (''IWF'') (gallons (''gal'')/ft^3/cycle)
Top-Loading	1.35	8.8
Front-Loading	2.00	4.1

2. History of Standards Rulemakings for Commercial Clothes Washers

As described in section II.A of this document, EPCA established standards for CCWs [3] and directed DOE to conduct two rulemakings to determine whether the established standards should be amended. (42 U.S.C. 6313(e)) DOE completed the first of these rulemakings by publishing a final rule on January 8, 2010 that amended energy conservation standards for CCWs manufactured on or after January 8, 2013. 75 FR 1122. DOE's most recent energy and water conservation standards for CCWs were published in the December 2014 Final Rule, which applied to CCWs manufactured on or after January 1, 2018. 79 FR 74492.

In support of the present review of the CCW energy conservation standards, DOE published a request for information (''RFI'') on July 24, 2020 (''July 2020 RFI''), which identified various issues on which DOE sought comment to inform its determination of whether the standards for CCWs need to be amended. 85 FR 44795.

DOE received comments in response to the July 2020 RFI from the interested parties listed in Table II.

TABLE II.2—WRITTEN COMMENTS RECEIVED IN RESPONSE TO JULY 2020 RFI

Organization(s)	Reference in this NOPD	Organization type
Whirlpool Corporation	Whirlpool	Manufacturer.
Appliance Standards Awareness Project, Alliance for Water Efficiency, American Council for an Energy-Efficient Economy, Natural Resources Defense Council, Northwest Power and Conservation Council.	Joint Commenters	Efficiency Organizations.
Association of Home Appliance Manufacturers and Coin Laundry Association	AHAM and CLA	Industry Associations.
GE Appliances	GEA	Manufacturer.
Pacific Gas and Electric Company, Southern California Edison, San Diego Gas & Electric Company.	California Investor-Owned Utilities (''CA IOUs'').	Investor-Owned Utilities.
Northwest Energy Efficiency Alliance	NEEA	Efficiency Organization.

[3] EPCA prescribed that CCWs manufactured on or after January 1, 2007, shall have a Modified Energy Factor of at least 1.26 and a Water Factor of no more than 9.5. (42 U.S.C. 6313(e)(1))

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[4]

III. General Discussion

DOE developed this proposed determination after considering comments, data, and information from interested parties that represent a variety of interests. This document addresses issues raised by these commenters.

For this NOPD, DOE evaluated whether amended standards are needed based on the whether such standards would result in significant conservation of energy, are technologically feasible, and are cost effective, as directed by EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Additionally, DOE considered whether such standards would be economically justified according to the statutory factors established in EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The results from this evaluation, discussed in section 0 of this document, provide the basis for DOE's initial determination that energy conservation standards for CCWs do not need to be amended.

A. Scope of Coverage

This NOPD covers CCWs as defined by EPCA and codified by DOE at 10 CFR 431.152. ''Commercial clothes washer'' is defined as a soft-mounted [5] front-loading or soft-mounted top-loading clothes washer that: (1) Has a clothes container compartment that (i) For horizontal-axis clothes washers, is not more than 3.5 cubic feet; and (ii) For vertical-axis clothes washers, is not more than 4.0 cubic feet; and (2) Is designed for use in (i) Applications in which the occupants of more than one household will be using the clothes washer, such as multi-family housing common areas and coin laundries; or (ii) Other commercial applications. 10 CFR 431.152. (*See also* 42 U.S.C. 6311(21))

NEEA and the CA IOUs recommended that DOE expand its scope of coverage to include larger CCWs with up to 8.0 ft^3 capacity. (NEEA, No. 8 at pp. 9–10; CA IOUs, No. 7 at pp. 1–2) NEEA stated that larger-capacity clothes washers (both soft-mount and hard-mount) are often employed in laundromats and multi-family buildings. (NEEA, No. 8 at p. 9) The CA IOUs cited data from the 2013–2019 CLA Annual Industry Surveys and concluded, based on the surveys, that laundromats are continuing a multi-year trend toward higher-capacity machines.[6] (CA IOUs, No. 7 at pp. 1–2) NEEA cited data from the CLA Annual Industry Survey published in 2019 (''2019 CLA Industry Survey'') indicating that 47 percent of clothes washers in laundromats have tub volumes larger than the capacity limits defined by DOE. (NEEA, No. 8 at p. 9) NEEA stated that these larger equipment enable consumers to wash larger loads and bulky items that do not fit into smaller machines. *Id.* NEEA estimated that expanding the scope of coverage up to 8 ft^3 could save 0.3 quads of energy. *Id.* at p. 10. NEEA stated that the DOE test procedure could address larger CCWs because DOE already has granted test procedure waivers for RCWs with up to 8.0 ft^3 capacity. *Id.*

NEEA and the CA IOUs also noted that the U.S. Environmental Protection Agency (''EPA'') includes larger CCWs in the ENERGY STAR Program. (NEEA, No. 8 at p. 10; CA IOUs, No. 7 at p. 2) NEEA asserted that covering larger-capacity clothes washers would provide equal treatment for all manufacturers, since businesses consider clothes washers of varying capacities for laundromats or multi-family housing, and some machines (*i.e.,* smaller-capacity models) are subject to standards, while others (*i.e.,* larger-capacity models) are not. (NEEA, No. 8 at p. 10) NEEA further cited the 2019 CLA Industry Survey and stated that 60 percent of laundromat owners list utility costs as one of the largest problems they face in their business. *Id.*

As noted, the EPCA definition for CCWs specifies that front-loading CCWs are no larger than 3.5 ft^3 and top-loading CCWs are no larger than 4.0 ft^3. Expansion of coverage beyond the statutorily-defined capacity limits is outside the scope of this proposed determination.

B. Equipment Classes

When evaluating and establishing energy conservation standards, DOE divides covered equipment into equipment classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6316(a); 42 U.S.C. 6295(q))

For CCWs, the current energy conservation standards specified in 10 CFR 431.156 are based on two equipment classes delineated according to the axis of loading: Top-loading and front-loading.

In the December 2014 Final Rule, DOE determined specifically that the ''axis of loading'' constituted a feature that justified separate equipment classes for top-loading and front-loading CCWs, and that ''the longer average cycle time of front-loading machines warrants consideration of separate equipment classes.'' 79 FR 74492, 74498. DOE stated that a split in preference between top-loading and front-loading CCWs would not indicate consumer indifference to the axis of loading, but rather that a certain percentage of the market expresses a preference for (*i.e.,* derives utility from) the top-loading configuration. 79 FR 74492, 74498–74499. DOE further noted that the separation of CCW equipment classes by location of access is similar in nature to the equipment classes for residential refrigerator-freezers, which include separate product classes based on the access of location of the freezer compartment (*e.g.,* top-mounted, side-mounted, and bottom-mounted), and for which the location of the freezer compartment provides no additional performance-related utility other than consumer preference. 79 FR 74492, 74499. In other words, the location of access itself provides a distinct consumer utility. *Id.*

In response to the June 2020 RFI, DOE received several comments regarding the CCW equipment classes.

The CA IOUs urged DOE to consider combining the top-loading and front-loading equipment classes for CCWs. (CA IOUs, No. 7 at pp. 5–6) The CA IOUs stated that the existence of separate equipment classes for top and front-loading CCWs prevents DOE from setting the most efficient energy and water standards possible—noting that standards for top-loading CCWs are less stringent than standards for front-loading CCWs. *Id.* In support of its assertion, the CA IOUs cited the 2013–2019 CLA Annual Industry Surveys that indicates that the CCW market is following a multi-year trend away from top-loading CCWs. *Id.* The CA IOUs also commented that a manufacturer had expressed support for the consolidation of RCW product classes in comments submitted in response to an RFI

[4] The parenthetical reference provides a reference for information located in the docket. (Docket No. EERE–2019–BT–STD–0044, which is maintained at *www.regulations.gov/docket/EERE-2019-BT-STD-0044*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

[5] ''Soft-mounted'' is a term used by industry to mean not required to be bolted to a steel or concrete slab.

[6] 2013–2019 Annual Industry Surveys. *Coin Laundry Association*. More information available to members at: *www.coinlaundry.org/*.

published August 2, 2019.[7] *Id.* The CA IOUs noted that the most recent ENERGY STAR Clothes Washer Specification consolidated requirements for top-loading and front-loading CCWs. *Id.* The CA IOUs also commented that, although DOE concluded in the December 2014 Final Rule that method of loading is a feature that provides distinct customer utility, benefits such as faster cycle time and lower first cost have become less differentiated between top-loading and front-loading CCWs. *Id.* The CA IOUs stated that method of loading alone is insufficient to justify a separate, lower standard under EPCA, and recommend that DOE reconsider consolidating classes. *Id.*

The Joint Commenters recommended that DOE eliminate the equipment class distinctions for top-loading and front-loading CCWs, stating that evaluating potential amended standards for a single, consolidated equipment class would allow for achieving greater savings. (Joint Commenters, No. 4 at p. 3) The Joint Commenters asserted that method of loading provides a distinct utility for purchasers of such equipment. *Id.*

DOE disagrees with the CA IOUs that a trend in decreasing top-loading versus front-loading sales indicates that the equipment classes should be combined. Rather, the continued availability and purchase of top-loading CCWs indicates that a portion of the market continues to express a preference for (*i.e.,* derives utility from) the top-loading configuration.

In response to the CA IOUs' comment that differences in cycle time and first cost between the two equipment classes have become smaller, DOE acknowledges, as in the December 2014 Final Rule, that differences in cycle times between top-loading and front-loading CCWs have diminished due to improvements in front-loading technology, and that as technology has progressed, cycle time has become a less meaningful differentiator between CCW equipment classes. 79 FR 74492, 74499. Furthermore, DOE does not separate equipment classes based on upfront costs that anyone, including the consumer, laundromat owner, or manufacturer, may bear. *Id.* at 79 FR 74498.

In response to the CA IOUs' and Joint Commenters' comments that method of loading alone does not provide a distinct utility and is insufficient to justify a separate standard, DOE reiterates its determination from the December 2014 Final Rule that method of loading provides specific utility that warrants separate equipment classes. 79 FR 74492, 74498–74499. DOE further reiterates its statement from the December 2014 Final Rule that it views utility as an aspect of the product (or equipment, in the case of CCWs) that is accessible to the layperson and is based on user operation, rather than performing a theoretical function. *Id.* DOE determines consumer utility on a case-by-case basis and determines what value a product (or equipment) could have based on the consumer base and the associated technology. *Id.* For example, front-loading CCWs are stackable[8] and can be useful in a concentrated laundromat or multifamily housing setting. *Id.* On the other hand, top-loading CCWs provide the utility of adding clothes during the wash cycle. *Id.*

DOE further reiterates that within each established equipment class, DOE has set the standard level at a level that achieves the maximum improvement in energy efficiency that the Secretary determined was technologically feasible and economically justified, as required by EPCA. *Id.* at 79 FR 74536. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A))

Finally, DOE notes that the EPCA criteria for establishing equipment classes do not apply to the ENERGY STAR program and that the ENERGY STAR equipment classes and qualification levels are established by EPA in a separate process that provides opportunities for stakeholder input.[9]

In this NOPD, DOE preliminarily maintains its conclusions from the December 2014 Final Rule that the method of loading is a feature that provides distinct consumer utility that justifies separate equipment classes under EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(q)) This NOPD analysis maintains separate equipment classes for top-loading and front-loading CCWs.

C. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6314(a)) Manufacturers of covered equipment must use these test procedures to certify to DOE that their equipment complies with energy conservation standards and to quantify the efficiency of their equipment. (42 U.S.C. 6316(a); 42 U.S.C. 6295(s); and 42 U.S.C. 6314(d))

As stated, EPCA requires that the test procedures for CCWs must be the same as the test procedures for RCWs. (42 U.S.C. 6314(a)(8)) Accordingly, DOE specifies at 10 CFR 431.154 that the test procedures for clothes washers at appendix J2 must be used to determine compliance with the standards for CCWs codified at 10 CFR 431.156(b).[10] Appendix J2 includes provisions for determining the modified energy factor (''MEF_{J2}'')[11] in ft^3/kWh/cycle and the integrated water factor (''IWF'') in gal/cycle/ft^3. CCWs manufactured on or after January 1, 2018 must meet current standards, which are based on MEF_{J2} and IWF as determined using appendix J2. 10 CFR 431.154 and 10 CFR 431.156(b).

NEEA encouraged DOE to update CCW standards based on expected test procedure updates. (NEEA, No. 8 at pp. 7–8) NEEA referenced comments from its own organization as well as other interested parties that have previously been submitted to DOE in response to a residential and commercial clothes washer test procedure RFI published on May 22, 2020 (''May 2020 TP RFI''):[12] A suggestion to incorporate a measure of cleaning performance in the test procedure; various changes to reduce test burden and increase representativeness; and a recommendation to consider an alternative energy metric. *Id.* NEEA further commented that changes to the CCW test procedure may warrant changes to the CCW standards. *Id.*

The Joint Commenters recommended that DOE's evaluation of potential CCW standards changes be based on an amended test procedure that better reflects real-world use. (Joint Commenters, No. 4 at p. 3) The Joint Commenters referenced their comments provided in response to the May 2020 TP RFI, which provided suggestions such as changing the Warm Wash/Cold Rinse temperature selection method, capturing the impact of cycle modifiers on energy and water use, and specifying

[7] 84 FR 37794. The CA IOUs referenced comment number 12 on that rulemaking, which can be found at *www.regulations.gov/docket/EERE-2017-BT-STD-0014.*

[8] In this context, ''stackable'' refers to the ability to stack a clothes dryer on top of a front-loading CCW, which conserves space inside a laundromat or multi-family housing laundry facility.

[9] Information on participation in the ENERGY STAR program for CCWs is available at *www.energystar.gov/products/commercial_clothes_washers/partners.*

[10] 10 CFR 431.154 also specifies that test procedures for clothes washers in appendix J1 to subpart B of part 430 (''appendix J1'') must be used to test CCWs to determine compliance with the energy conservation standards at 10 CFR 431.156(a). These standards were applicable to CCWs manufactured on or after January 8, 2013, and before January 1, 2018.

[11] Section 4.5 of appendix J2 defines the modified energy factor abbreviation as ''MEF.'' DOE defines the abbreviation ''MEF_{J2}'' at 10 CFR 431.152 to mean the modified energy factor as determined in section 4.5 of appendix J2.

[12] The May 2020 TP RFI is available online at *www.regulations.gov/docket/EERE-2016-BT-TP-0011.*

an average load size independent of capacity.[13] Additionally, the Joint Commenters commented that the test procedure is likely significantly underestimating drying energy for many clothes washers by providing what the Joint Commenters assert is an unrepresentative measurement of remaining moisture content (''RMC''). (Joint Commenters, No. 4 at p. 3)

DOE published a test procedure NOPR on September 1, 2021 (''September 2021 TP NOPR'') in which it responded to comments received in response to the May 2020 TP RFI, including the comments cited previously by NEEA and the Joint Commenters. 86 FR 49140. In the September 2021 TP NOPR, DOE has proposed amendments to the current appendix J2 test procedure as well as introduced a new test procedure that would be codified at appendix J to 10 CFR part 430 subpart B (''appendix J''), if finalized, and would be used for future evaluation of updated efficiency standards.

As discussed, EPCA requires that the test procedures for CCWs be the same as the test procedures established by DOE for RCWs. 42 U.S.C. 6314(a)(8). Use of appendix J2 is currently required for any representations of energy or water consumption of RCWs, including demonstrating compliance with the currently applicable energy conservation standards. Accordingly, DOE conducted the analysis presented in this document for CCWs based on energy and water use as measuring using appendix J2.

D. Technological Feasibility

1. General

In evaluating potential amendments to energy conservation standards, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the determination. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available equipment or in working prototypes to be technologically feasible. 10 CFR 431.4; sections 6(c)(3)(i) and 7(b)(1) of appendix A to 10 CFR part 430 subpart C (''Process Rule'').

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on equipment utility or availability; (3) adverse impacts on health or safety; and (4) unique-pathway proprietary technologies. 10 CFR 431.4; sections 6(c)(3)(ii)–(v) and 7(b)(2)–(5) of the Process Rule. Section IV.C of this document discusses the results of the screening analysis for CCWs, particularly the designs DOE considered, those it screened out, and those that are the basis for the higher efficiency levels considered in this proposed determination.

2. Maximum Technologically Feasible Levels

EPCA requires that in proposing an amended or new energy conservation standard, or proposing no amendment or no new standard for a type (or class) of covered equipment, DOE must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered equipment. (42 U.S.C. 6316(a); 42 U.S.C. 6295(p)(1)) Accordingly, DOE conducts an engineering analysis, through which it determines the maximum technologically feasible (''max-tech'') improvements in energy efficiency, using the design parameters for the most efficient equipment available on the market or in working prototypes. The max-tech levels that DOE determined for this analysis are described in section IV.D of this document.

E. Energy Savings

1. Determination of Savings

For each efficiency level (''EL'') evaluated, DOE projects energy savings from application of the EL to the equipment purchased in the 30-year period that begins in the assumed year of compliance with the potential standards (2024–2053). The savings are measured over the entire lifetime of the equipment purchased in the previous 30-year period. DOE quantifies the energy savings attributable to each EL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for the equipment would likely evolve in the absence of amended energy conservation standards. DOE uses the methodology from its national impact analysis (''NIA'') to estimate national energy savings (''NES'') from potential amended or new standards for CCWs. The methodology (described in section IV.G of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by equipment at the locations where they are used. In addition to the evaluation of energy savings and consumption, which is the basis for determining the significance of such savings, DOE also evaluated potential water savings and consumption.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in ''significant'' energy savings. (42 U.S.C. 6295(o)(3)(B)) Although the term ''significant'' is not defined in the EPCA, the U.S. Court of Appeals, for the District of Columbia Circuit in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), opined that Congress intended ''significant'' energy savings in the context of EPCA to be savings that were not ''genuinely trivial.''

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[14] For example, the United States has now rejoined the Paris Agreement and will exert leadership in confronting the climate crisis.[15] Additionally, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand.

In evaluating the significance of energy savings, DOE considers differences in primary energy and full-fuel cycle (''FFC'') [16] effects for different

[13] See comment number 10 in Docket number EERE–2016–BT–TP–0011. Available online at *www.regulations.gov/docket/EERE-2016-BT-TP-0011.*

[14] The numeric threshold for determining the significance of energy savings established in a final rule published on February 14, 2020 (85 FR 8626, 8670), was subsequently eliminated in a final rule published on December 13, 2021 (86 FR 70892). The effective date of this rule is January 12, 2022.

[15] *See* Executive Order 14008, 86 FR 7619 (Feb. 1, 2021) (''Tackling the Climate Crisis at Home and Abroad'').

[16] The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards. The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51281 (Aug.

Continued

covered products and equipment when determining whether energy savings are significant. Primary energy and FFC effects include the energy consumed in electricity production (depending on load shape), in distribution and transmission, and in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus present a more complete picture of the impacts of energy conservation standards.

Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

F. Cost Effectiveness

Under EPCA's 6-year-lookback review provision for existing energy conservation standards at 42 U.S.C. 6295(m)(1) (as referenced by 42 U.S.C. 6316(a)), cost-effectiveness of potential amended standards is a relevant consideration both where DOE proposes to adopt such standards, as well as where it does not. In considering cost-effectiveness when making a determination of whether existing energy conservation standards do not need to be amended, DOE considers the savings in operating costs throughout the estimated average life of the covered equipment compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered equipment that are likely to result from a standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(A) (*referencing* 42 U.S.C. 6295(n)(2))) Additionally, any new or amended energy conservation standard prescribed by the Secretary for any type (or class) of covered equipment shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A)) Cost-effectiveness is one of the factors that DOE must ultimately consider to support a finding of economic justification, if it is determined that amended standards are appropriate under the applicable statutory criteria. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(II))

G. Further Considerations

As stated previously, pursuant to EPCA, if DOE does not issue a notification of determination that energy conservation standards for CCWs do not need to be amended, DOE must issue a NOPR that includes new proposed standards. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(B)) The new proposed standards in any such NOPR must be based on the criteria established under 42 U.S.C. 6295(o). (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(B)) The criteria in 42 U.S.C. 6295(o) require that standards be designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the seven statutory factors listed in section II.A of this document. The additional analysis conducted in consideration of whether amended standards would be economically justified, specifically an analysis of potential manufacturer impacts, is presented in section IV.H of this document.

IV. Methodology and Discussion of Related Comments

This section describes the results of the analyses DOE has performed for this proposed determination with regard to CCWs. Separate subsections address each component of DOE's analyses. DOE used shipments projections and calculated national energy and water savings expected from potential efficiency conservation standards.

A. Energy and Water Use Metrics

As discussed, manufacturers are required to demonstrate compliance with the current energy conservation standards for CCWs codified at 10 CFR 431.156(b), which are based on the MEF_{J2} metric and the IWF metric defined in appendix J2. MEF_{J2} is defined as the clothes container capacity in ft^3 divided by the sum of (1) the per-cycle machine energy, (2) the per-cycle water heating energy, and (3) the per-cycle drying energy; expressed in kilowatt hours (''kWh''). A higher MEF_{J2} value indicates more efficient performance. IWF is defined as the total per cycle water use in gallons (''gal'') divided by the clothes container capacity in ft^3. A lower IWF value indicates more efficient performance.

NEEA recommended that DOE adopt an alternative energy efficiency metric that would replace MEF_{J2} for CCWs. (NEEA, No. 8 at p. 11) NEEA suggested that the alternative energy efficiency metric be based on the weighted-average load size applicable to the machine (measured in pounds of textile), and the weighted-average energy use of the machine (measured in kWh per cycle). *Id.* NEEA also recommended alternatively that DOE develop an energy conservation standard that is a function of capacity. *Id.* NEEA stated that it expects that larger-capacity CCWs would likely need to meet higher MEF_{J2} and lower IWF requirements than smaller-capacity CCWs, given the general trend that larger-capacity appliances are more efficient. *Id.* NEEA commented that standards for CCWs that are a function of capacity would be similar to standards for products such as refrigerators, room air conditioners, and water heaters, where the standards are a function of adjusted volume, cooling capacity, and storage volume, respectively. *Id.*

NEEA further commented that improvement to standby power offers potential energy savings if DOE were to include standby power in the energy efficiency metric for CCWs, similar to the way it does for RCWs with the integrated modified energy factor (''IMEF'') metric. (NEEA, No. 8 at p. 2) NEEA estimated that improvements to standby power in CCWs could save 1.8 percent of total site energy use. *Id.*

NEEA provided results of its testing of 12 RCWs and two CCWs, encompassing both ENERGY STAR and non-ENERGY STAR-qualified models. (NEEA, No. 8 at pp. 8–9) In NEEA's sample, the average standby power of CCWs was 6.4 watts (''W'') (which NEEA characterized as similar to DOE's prior CCW standby measurements that ranged from 0.9 to 11.8 W), compared to 0.5 W for RCWs. *Id.* NEEA also commented that, while CCWs spend more time in the active cycle than RCWs, CCWs spend most of their time in standby and low-power modes. *Id.*

NEEA recommended that if DOE decides to measure CCW standby power, DOE should consider using IEC 62301: Edition 2.0 2011–01 (''Household electrical appliances—Measurement of standby power'') [17] and incorporate low-power modes into the CCW measure of efficiency. (NEEA, No. 8 at p. 9) NEEA also recommended that DOE test the energy use of connected features in CCW energy use metrics as connected functionality becomes more common for CCWs in laundromats and multi-family households. *Id.*

As described, in the September 2021 TP NOPR, DOE proposed to establish a new clothes washer test procedure at appendix J. 86 FR 49140, 49143. As proposed, appendix J would establish

18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

[17] IEC 62301: Edition 2.0 2011–01: Household electrical appliances—Measurement of standby power. Available for purchase online at: *webstore.iec.ch/publication/6789.*

new efficiency metrics that would be based on the weighted-average load size applicable to the machine (rather than on the clothes container capacity, on which the current metrics are based) and the weighted-average energy (or water) use of the machine. 86 FR 49140, 49143–49144. As discussed, the proposed test procedure has not been finalized, and is not used for this evaluation.

With regard to incorporating the energy use in standby mode into the energy efficiency metric for CCWs, DOE concluded in the December 2014 Final Rule that establishing amended standards for CCWs based on IMEF (*i.e.,* establishing a metric that integrates standby mode and off mode energy consumption into the overall efficiency metric) would not be technically feasible. 79 FR 74492, 74501. As discussed in the December 2014 Final Rule, promulgating amended standards based on IMEF could enable backsliding if the new equivalent baseline standard was established at a level that would accommodate all display and payment types.[18] Alternatively, if DOE were to establish the new equivalent baseline standard level at the level corresponding to the lowest standby power observed on non-vended ''push-to-start'' models, manufacturers would be precluded from offering vend price displays, payment systems, or other advanced controls on new baseline CCWs, which would negatively impact consumer and end-user utility, since push-to-start models are not suitable for coin-operated laundries or most multi-family housing applications. *Id.* Finally, because of the wide variations in standby power, CCWs with significantly different active mode (*i.e.,* MEF) ratings could have similar IMEF ratings depending on their control panel functionalities, and vice versa. This would diminish the usefulness of the IMEF metric as a means for differentiating the active mode characteristics of different CCW models. *Id.* For these reasons, DOE determined that establishing amended standards for CCWs based on IMEF would not be technically feasible. *Id.*

As acknowledged by NEEA, the CCW standby power data submitted by NEEA is consistent with the data DOE used to conduct its analysis for the December 2014 Final Rule. DOE is not aware of, and commenters have not submitted, any data or information that would cause DOE to reach a different conclusion than was reached in the December 2014 Final Rule. DOE tentatively reaffirms its prior conclusion that establishing amended standards for CCWs based on IMEF would not be technically feasible.

Regarding NEEA's recommendation to include the energy use associated with ''connected'' features in CCW energy use metrics, DOE described in the May 2020 TP RFI its understanding that connected features for CCWs are available via certain external communication modules, but that DOE is not aware of any CCW models with a ''connected'' function incorporated into the unit as manufactured currently on the market. 85 FR 31065, 31068. DOE's long-standing position is that generally the applicability of the energy conservation standards under EPCA is limited to newly manufactured products (or equipment), the title of which has not passed for the first time to a consumer of the product (or equipment). *See* 72 FR 58189, 58203 (Oct. 12, 2007). (*See also* 42 U.S.C. 6316(a); 42 U.S.C. 6302) As such, the impact of aftermarket connected features would be outside the scope of this analysis.

B. Technology Assessment

DOE develops information in the technology assessment that characterizes the technology options that manufacturers use to attain higher efficiency performance.

In the December 2014 Final Rule, DOE identified a number of technology options that manufacturers could use to reduce energy consumption in CCWs, as measured by the DOE test procedure. 79 FR 74492, 74504–74505. In the July 2020 RFI, DOE requested comment on any changes to these technology options or whether there are any other technology options that DOE should consider in its analysis. 85 FR 44795, 44797. DOE received several comments regarding potential technology options.

NEEA recommended that DOE consider technologies from the December 2014 Final Rule and the RCW energy conservation standards direct final rule (''DFR'') published on May 31, 2012 (77 FR 32308; ''May 2012 RCW DFR'') [19] that can reduce machine energy, hot water energy, and drying energy. (NEEA, No. 8 at pp. 3–4) In particular, NEEA suggested that DOE should focus on technologies that improve CCW water extraction to reduce drying energy consumption, given that drying energy is the largest contributor to the MEF_{J2} efficiency metric. *Id.* NEEA stated that a number of technologies are available that reduce RMC without increasing cycle time, which NEEA stated is important to keep relatively short for CCWs. *Id.* NEEA suggested that DOE evaluate the impact of increasing spin speeds to reduce RMC. *Id.* NEEA presented data from testing it conducted in 2020 showing that CCW spin speeds are lower, and RMCs are higher, than comparable RCWs. *Id.* NEEA also referenced an engineering tear-down it performed in 2019, which compared a top-loading ENERGY STAR-qualified RCW with a similar top-loading non-qualified RCW from the same manufacturer *Id.* at p. 5 NEEA stated that its investigation revealed that changing to a higher power motor (0.4 instead of 0.33 horsepower) and a slightly larger-diameter pulley can increase the spin speed for top-loading clothes washers from 700 to 800 revolutions per minute, resulting in a lower RMC and a 25-percent reduction in calculated drying energy. *Id.* NEEA specifically recommended that DOE evaluate higher power motors and alternate gear ratios to reduce RMC and drying energy for CCWs. *Id.*

NEEA also suggested that DOE include increased basket perforation and a ribbed drum as technology options to reduce RMC. *Id.* NEEA commented that increasing basket perforation could improve RMC, stating that baskets with increased perforation allow more water to move out of the textiles for a given period of time because the length of the pathway for water to travel out of the textiles and the basket during the spin process is shortened if the basket has more exit holes. *Id.* NEEA also commented that a 2005 report found that clothes washers that use a ribbed drum can improve RMC by 20 percent. NEEA stated that is not aware of ribbed drum technology in the market. *Id.*

NEEA also recommended that DOE consider including using warmer rinse water temperatures as a technology option to improve RMC. *Id.* NEEA stated that because viscosity is lower with warmer water temperatures (around 40 percent lower at 100 degrees Fahrenheit (''°F'') versus 60 °F), water can be spun out more easily from textiles that have a warm rinse. *Id.* NEEA added that while more hot water heating energy may be incurred by a CCW with a warm rinse, the improved water extraction may offset the hot water energy use. *Id.*

NEEA further suggested that the range of RMC values present in the current market suggests that the costs to implement technologies that improve water extraction must be relatively low

[18] The December 2014 Final Rule provides discussion of an example illustrating one potential backsliding scenario. 79 FR 74492, 74501.

[19] The RCW energy conservation standards DFR is available online at *www.regulations.gov/docket/EERE-2008-BT-STD-0019.*

and thus are likely to be cost-effective. (NEEA, No. 8 at p. 6)

The Joint Commenters recommended that DOE investigate CCWs with card readers that can allow for a discounted price for a cold cycle as a technology option. (Joint Commenters, No. 4 at p. 3) The Joint Commenters asserted that discounted cold cycle prices may influence consumers to reduce hot water energy use when using coin-operated CCWs. *Id.*

Regarding NEEA's recommendation to consider technologies that improve water extraction to improve RMC, DOE has identified multiple technology options specifically intended to reduce RMC. These include hardware features that enable faster spin speeds (which include more advanced motor technologies) and longer spin duration, as suggested.

Regarding the use of warm rinse to reduce RMC, DOE is not aware of any CCWs that offer a warm rinse. DOE analysis suggests that the additional water-heating energy that would be associated with a heated rinse would offset the reduction in RMC (and associated drying energy) resulting from the higher water temperature. The following illustrative estimate demonstrates this likely offset in a representative top-loading CCW.

First, DOE estimated the reduction in RMC that could be expected from a warm rinse in comparison to a cold rinse. For this estimate, DOE referenced the standard RMC values defined in Table 6.1 of appendix J3 [20] to 10 CFR part 430, subpart B (''appendix J3''), which are used as standardized reference points in generating correction factors for each new manufactured lot of energy test cloth.[21] The standard RMC values defined for the 200 g-force, 4-minute extractor runs—which DOE testing indicates would be most closely associated with the spin portion of a baseline top-loading CCW wash cycle—are 43.1 percent for cloth that has been soaked in cold (60 °F) water, compared to 40.4 percent for cloth soaked in warm (100 °F) water—a difference of 2.7 RMC percentage points. For a typical CCW with capacity of 3.25 ft^3 and the associated load sizes as defined by Table 5.1 of appendix J2, a reduction in RMC of 2.7 percentage points would reduce the drying energy component by around 0.03 kWh/cycle (using the equations specified in sections 3.8 and 4.3 of appendix J2). For a rinse water volume of around 14 gal—which would be typical for a baseline top-loading CCW (see Table IV.6 of this document)—at an assumed warm rinse temperature of 100 °F (consistent with the temperature associated with the assumed RMC values), using a warm rinse would increase water heating energy by around 0.37 kWh/cycle (using the equations specified in sections 4.1.2 and 4.1.3 of appendix J2). In this example, the additional water-heating energy associated with a heated rinse (0.37 kWh/cycle) would far outweigh any efficiency improvement due to the reduced RMC from the heated rinse (0.03 kWh/cycle), on a per-cycle basis. For this reason, DOE has not considered warm rinse as a technology option for improving the efficiency of CCWs as measured by the DOE test procedure.

Regarding the referenced study that showed that a ribbed drum can improve RMC results,[22] DOE reviewed the study and has identified areas of uncertainty that prevent DOE from including this technology at this time; specifically:

- It is unclear from the study whether the ''percent RMC reduction'' data represents reduction of ''RMC percentage points'' or percent reduction of the RMC value, which itself is a percentage; *e.g.,* reducing RMC from a value of 50 percent to 40 percent could be described as either a 10-percent reduction in RMC percentage points, or a 20-percent reduction in the RMC value.
- No information is provided on the additional material or tooling costs that would be associated with manufacturing a ribbed stainless-steel basket. The report notes in section 3.3.8 that the stainless-steel prototype baskets (which used a double-basket design) worked well for testing but could not be used for mass production due to the inefficient use of materials.
- The report states in section 3.4 that the prototype ribbed basket showed increased susceptibility to ''suds lock,'' that none of the prototypes resulted in clear improvements in suds lock, and that most of the suds lock solutions were difficult to envision in a production application.

For these reasons, DOE did not include a ribbed drum design as a technology option in this NOPD.

Regarding the Joint Commenters' recommendation to consider card readers that can allow for a discounted price for a cold cycle as a technology option, DOE considered temperature-differentiated pricing controls as a design option in the analysis accompanying the December 2014 Final Rule. In chapter 5 of the technical support document (''TSD'') accompanying the December 2014 Final Rule, DOE described that its market analysis confirmed the availability of this feature on multiple CCW models from multiple manufacturers.[23] As described in the TSD, DOE's current test procedure at appendix J2 uses a fixed set of Temperature Use Factors (''TUFs''), which represent the percentage of time an end-user would select each wash/rinse temperature selection available on the clothes washer. Because the TUFs in the test procedure are fixed, a CCW with temperature-differentiated pricing controls would be tested the same way as an identical CCW without temperature-differentiated pricing controls. Therefore, the energy savings of this technology cannot be measured according to the conditions and methods specified in the DOE clothes washer test procedure. Accordingly, DOE did not analyze this technology option in its December 2014 Final Rule analysis, and for these same reasons, DOE has not analyzed this as a technology option for the current analysis. The Joint Commenters did not provide, nor is DOE is aware of, any information regarding the extent to which temperature-differentiated pricing controls alter the end-user wash temperature selection frequencies.

In summary, for this analysis, DOE considered the technology options shown in Table IV.

[20] As described in section 1 of appendix J3, the purpose of appendix J3 is to evaluate the moisture absorption and retention characteristics of a new lot of test cloth by measuring the RMC in a standard extractor at a specified set of conditions. The results are used to develop a set of coefficients that correlate the measured RMC values of the new test cloth lot with a set of standard RMC values established as an historical reference point. These correction coefficients are applied to the RMC measurements performed during testing according to appendix J1 or appendix J2, ensuring that the final corrected RMC measurement for a clothes washer remains independent of the test cloth lot used for testing.

[21] The correction factors for each test cloth lot are applied to the RMC measurement for the purpose of ensuring repeatable RMC measurements among different lots of test cloth. As part of the test cloth qualification process, bundles of wet cloth are spun in a specialized extractor at various spin speeds (*i.e.,* gravitational or ''g'' forces), time durations, and water temperatures, with the RMC measured after each extractor run.

[22] Richter, Tim. Energy Efficiency Laundry Process. Prepared for U.S. DOE by GE Global Research. 2005. doi:10.2172/842014. Available at: *www.osti.gov/servlets/purl/842014.*

[23] The TSD for the December 2014 Final Rule is available at docket number EERE–2012–BT–STD–0020. Available online at *www.regulations.gov/docket/EERE-2012-BT-STD-0020.*

TABLE IV.1—COMMERCIAL CLOTHES WASHER TECHNOLOGY OPTIONS

Technology option	Description
Adaptive water fill	Use of advanced control technologies to sense the size of the clothing load and adjust the water level accordingly. This technology option can overcome the tendency of consumers to manually select a water level greater than required for a given load.
Advanced agitation concepts for top-loading machines.	Replaces the standard agitator found in traditional top-loading CCWs. The most common implementation of this technology is a rotating ''impeller'' wash plate at the bottom of the drum.
Capacity increase	Implementing a larger tub capacity can contribute to improved efficiency because a larger amount of clothing can be washed using an incremental increase in the quantity of water that is less than the incremental increase in capacity, therefore reducing the amount of water and energy per pound of clothing.
Higher spin speeds to reduce RMC	Faster spin speeds reduce RMC and thus the drying energy component of MEF_{J2}.
Motor efficiency improvements, including direct-drive motors.	Replaces a single-speed or dual-speed capacitor-start induction motor and mechanical transmission.
Ozonated laundering	Consists of a separate wall-mounted unit that pumps ambient air through an ozone generator, which is then directly injected into the wash water. Once in the water, the ozone reacts with insoluble soils, making them soluble, after which the mechanical action of the washing separates the soils from the fabric.
Polymer bead cleaning	Uses the absorbent properties of nylon polymer beads which are added to the wash drum with a small amount of water and detergent to loosen the dirt or stains on the clothing. The polarity of the nylon polymer attracts stains from the clothing. At the end of the cycle, the polymer beads are separated from the clothing through an inner drum/outer drum rotation process.
Spray rinse or similar water-reducing rinse technology.	Eliminates the need to completely immerse the clothing in water during the wash and rinse phases of the cleaning cycle by spraying rinse water into the drum while the wash basket is rotating.
Thermostatically controlled mixing valves	Inlet valves that have the ability to sense and adjust the hot and cold supply water. This technology option achieves energy savings by more accurately controlling inlet water temperature for hot and warm fills.
Water recirculation loop	Reduces the amount of water used by the CCW by re-using water out of the bottom of the sump during certain parts of the cycle.

C. Screening Analysis

DOE uses the following five screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in working prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production and reliable installation and servicing of a technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on equipment utility or equipment availability.* If it is determined that a technology would have significant adverse impact on the utility of the equipment to significant subgroups of consumers or would result in the unavailability of any covered equipment type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as equipment generally available in the United States at the time, it will not be considered further.

(4) *Adverse impacts on health or safety.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-Pathway Proprietary Technologies.* If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further due to the potential for monopolistic concerns.

10 CFR 431.4; Sections 6(b)(3) and 7(b) of the Process Rule. In summary, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis.

AHAM and CLA commented that increasing cycle time in order to achieve higher levels of efficiency is not a viable option for increasing CCW efficiency. (AHAM and CLA, No. 5 at p. 2)[24] AHAM and CLA stated that end users of CCWs want to wash as much laundry as they can in as little time as possible, and that they also prefer to limit the number of loads or trips per week. *Id.* AHAM and CLA also asserted commercial laundry operators' need to maximize laundry throughput. *Id.*

AHAM and CLA also commented that DOE should consider CCW durability and serviceability in its analysis of whether to propose a determination not to amend energy conservation standards or to engage in a full rulemaking analysis to assess possible amended standards. *Id.* AHAM and CLA stated that CCW components need to be robust and durable enough to withstand the higher number and frequency of cycles anticipated for CCWs compared to domestic applications, and that some of the technology options employed in RCWs (*e.g.,* direct drive motors) may not be suitable for CCWs. *Id.*) AHAM and CLA also stated that owner/operators require low machine down-time for malfunctions and repairs, which requires readily-available parts and easy serviceability. *Id.* AHAM and CLA further stated that for operators who have hundreds or thousands of machines, consistency of design and interchangeability of parts is also an important consideration. *Id.* AHAM and CLA asserted that more stringent energy conservation standards, depending on the level, could threaten the ability of manufacturers to use the same or similar parts, and could potentially increase service complexity and cost. *Id.*

[24] Whirlpool and GEA commented that they support AHAM's comments on the July 2020 RFI and incorporate them into their own comments by reference. Throughout this NOPD, reference to AHAM's written comments (document number 5 in the docket) should be considered reflective of Whirlpool and GEA's positions as well. (Whirlpool, No. 3 at p. 1; GEA, No. 6 at p. 1)

AHAM and CLA recommended that DOE consider how changing water levels in order to increase efficiency could affect end user expectations. (AHAM and CLA, No. 5 at p. 3) According to AHAM and CLA, end users want to see what they believe is a sufficient amount of water to wash their clothes, and that even with current energy conservation standards, manufacturers sometimes hear complaints from consumers about the water levels. *Id.* AHAM and CLA stated that even if smaller load sizes needed to be recommended due to decreased water levels as a result of more stringent standards, users may still wash larger loads, particularly if the users perceive available capacity. *Id.*

AHAM and CLA commented that if it were necessary to further decrease wash temperatures to meet more stringent standards (which AHAM and CLA asserted would make it difficult to clean the clothes with today's detergents), the result would likely be decreased performance for the user and increased complaints to operators. *Id.* AHAM and CLA also stated that a further decrease in water temperatures may also lead to customers re-running their wash cycles, which would prevent the energy and water savings from amended standards from being fully realized. *Id.*

AHAM and CLA commented that while increasing drum volume is one of the key technology options for improving efficiency, the ability to increase capacity for CCWs is extremely limited. (AHAM and CLA, No. 5 at pp. 2–3) AHAM and CLA believe that it may not be possible to further increase the size of the drum to comply with more stringent standards without increasing the cabinet size. *Id.* AHAM and CLA commented that operators need to maximize the return on capital across their base of machines, and they do this by having as many available CCWs as possible in their space. *Id.* AHAM and CLA stated that increasing the cabinet size would result in decreased revenues for commercial operators, since fewer CCWs could fit into the same space. *Id.* AHAM and CLA stated that increasing cabinet size would also result in retooling, which would significantly increase costs. *Id.* AHAM and CLA also commented that increased capacity could also reduce the number of wash loads, thereby resulting in lost revenue to owner/operators. *Id.*

Taking into considerations these comments, as well as previous research and analysis from the December 2014 Final Rule, DOE applied the screening criteria specified above to the technology options listed in Table IV.1 of this NOPD to either retain or eliminate each technology from the screening analysis. The rationale for either screening out or retaining each technology option considered in this analysis is detailed in the following sections.

1. Screened-Out Technologies

Based on DOE's research and consideration of comments received from interested parties, DOE screened out the technology options on the basis of the EPCA criteria shown in Table IV.2.

TABLE IV.2—COMMERCIAL CLOTHES WASHER SCREENING ANALYSIS

Technology option	EPCA criteria (X = basis for screening out)				
	Technological feasibility	Practicability to install, manufacture, and service	Impacts on equipment utility or equipment availability	Adverse impacts on health or safety	Unique-pathway proprietary technologies
Capacity increase		X	X		
Higher spin speeds to reduce RMC			X		
Ozonated laundering		X			
Polymer bead cleaning		X			X

2. Remaining Technologies

After reviewing each technology, DOE did not screen out the following technology options and considers them as design options in the engineering analysis:

(1) Adaptive water fill controls
(2) Advance agitation concepts for top-loading machines
(3) Motor efficiency improvements including direct-drive motors
(4) Spray rinse or similar water-reducing rinse technology
(5) Thermostatically controlled mixing valves
(6) Water recirculation loop

DOE determined that these technology options are technologically feasible because they are being used in commercially available equipment or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, equipment availability, health, or safety).

D. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of CCWs. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of equipment cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency equipment, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each equipment class, DOE estimates the baseline cost, as well as the incremental cost for the equipment at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses. For this NOPD, DOE did not conduct the cost portion of the analysis, as discussed in section V.D of this document, having initially concluded that the maximum technologically feasible energy savings would not result in a significant conservation of energy.

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) Relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing equipment (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option

approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual equipment on the market) may be extended using the design option approach to interpolate to define ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the ''max-tech'' level (particularly in cases where the ''max tech'' level exceeds the maximum efficiency level currently available on the market).

In this proposed determination, DOE is adopting an efficiency-level approach and based its efficiency levels on clusters observed in the market.

1. Baseline Efficiency

For each equipment class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each equipment class represents the characteristics of equipment typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

For this NOPD, DOE used the current energy conservation standards for CCWs, presented in Table IV.3, as the baseline efficiency level for each equipment class.

TABLE IV.3—BASELINE EFFICIENCY LEVELS

Equipment class	Minimum MEF_{J2} (ft^3/kWh/cycle)	Maximum IWF (gal/ft^3/cycle)
Top-Loading	1.35	8.8
Front-Loading	2.00	4.1

2. Higher Efficiency Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given equipment.

The CA IOUs recommended that DOE establish new max-tech standard levels based on up-to-date technical feasibility. (CA IOUs, No. 7 at pp. 3–5) The CA IOUs cited certification data provided in DOE's Compliance Certification Management System (''CCMS'') database [25] (which they accessed on July 23, 2020) indicating that a large percentage of top-loading and front-loading CCWs meet or exceed the max-tech levels defined in the 2014 rulemaking analysis. *Id.*

The Joint Commenters commented that data on available models in DOE's CCMS database indicates a significant potential to improve the efficiency of CCWs. (Joint Commenters, No. 4 at pp. 1–3) The Joint Commenters summarized data from the CCMS database (which they accessed on September 11, 2020) indicating a range of both top-loading and front-loading CCWs that meet or exceed the 2014 DOE max-tech levels. *Id.* The Joint Commenters concluded that these data indicate that there is significant potential to improve the efficiency of CCWs. *Id.*

NEEA commented that, based on its analysis of models in the CCMS database, improving the efficiency of all CCWs to the most efficient technologies available on the market could lead to site energy savings of 19 percent in active mode and an additional 2 percent in standby mode. (NEEA, No. 8 at pp. 2–3) NEEA stated that many technologies are available to cost-effectively reduce standby mode energy use. (NEEA, No. 8 at pp. 5–6) NEEA provided specific technology examples of improved light emitting diode (''LED'') efficacy, improved transformers, resonant switching, synchronous rectification, advanced core materials, and higher internal system voltage for low-voltage communication and control. *Id.*

DOE is aware that the CCMS database previously contained basic models of CCWs that appeared to have efficiency levels higher than the max-tech level described in this document. At the time of publication of the July 2020 RFI, the CCMS database contained equipment ratings for certain CCW basic models that reflected MEF values as measured under appendix J1, in addition to equipment ratings for other CCW basic models that reflected MEF_{J2} values as measured under appendix J2.[26] As shown in the December 2014 Final Rule, for a given appendix J2 MEF_{J2} efficiency level, the equivalent appendix J1 MEF value is a substantively higher number. 79 FR 74492, 74499–74500. For this reason, basic models in CCMS that were rated using MEF appeared to be more efficient than basic models rated using MEF_{J2}, despite being equally or less efficient than the MEF_{J2}-rated basic models when tested equivalently. 79 FR 74492, 74499–74500. Since the July 2020 RFI, the CCMS database has been updated to include only basic models certified with MEF_{J2} values. For this analysis, DOE analyzed only basic models of CCWs rated using appendix J2 (*i.e.,* with MEF_{J2} values). At the time of this analysis, models rated using appendix J2 had MEF_{J2} values ranging from 1.35 to 1.60 for top-loading CCWs and from 2.00 to 2.30 for front-loading CCWs.

As noted, EPCA requires that any new or amended energy conservation standard be designed to achieve the maximum improvement in energy efficiency that is technologically feasible. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A)) For this NOPD, DOE has considered the maximum possible efficiency to correspond to the maximum efficiency level currently available on the market for each equipment class. For CCWs, DOE is unable to conclude that theoretical efficiency levels higher than the maximum currently available on the market would represent commercially viable (*i.e.,* technologically feasible) equipment, because DOE is unable to determine the impact that theoretical

[25] The Department of Energy's Compliance Certification Management System database for CCWs is available online at *www.regulations.doe.gov/certification-data/CCMS-4-Clothes_Washers_-_Commercial.html#q=Product_Group_s%3A%22Clothes%20Washers%20-%20Commercial%22.*

[26] DOE understands that certain basic models rated using appendix J1 MEF values are still in inventory and being sold, but were manufactured prior to January 1, 2018. The current CCW energy conservation standards based on MEF_{J2} apply to all CCWs manufactured in, or imported into, the United States on or after January 1, 2018. 79 FR 74492, 74493.

higher efficiency levels would have on consumer-relevant aspects of equipment performance [27] (such as cleaning performance, cycle time, *etc.*) and equipment reliability.[28]

For this NOPD, DOE considered the efficiency levels listed in Table IV.4.

TABLE IV.4—EFFICIENCY LEVELS CONSIDERED FOR COMMERCIAL CLOTHES WASHERS

Equipment class	Efficiency level	Minimum MEF_{J2} (ft^3/kWh/cycle)	Maximum IWF (gal/cycle/ft^3)
Top-Loading	Baseline	1.35	8.80
	1	1.60	8.50
	2	1.60	7.80
	3 (Max Tech)	1.60	5.50
Front-Loading	Baseline	2.00	4.10
	1	2.20	4.00
	2 (Max Tech)	2.30	3.80

E. Energy and Water Use Analysis

The purpose of the energy and water use analysis is to determine the annual energy and water consumption of CCWs at different efficiencies in representative U.S. multi-family residences and commercial coin-operated laundromats, and to assess the energy and water savings potential of increased CCW efficiency. The energy and water use analysis estimates the range of energy and water use of CCWs in the field (*i.e.,* as they are actually used by consumers). The energy and water use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy and water savings that could result from adoption of amended or new standards.

The energy analysis for this NOPD consists of three related parts—the machine energy use, the drying energy use, and the water-heating energy use. DOE used relevant data from the December 2014 Final Rule TSD and product literature for CCWs currently available on the market to estimate the per-cycle machine and drying energy use that would be associated with each efficiency level as measured by the appendix J2 test procedure.[29] To determine the per-cycle water-heating energy use, DOE first determined the total per-cycle energy use (the clothes container volume divided by the MEF_{J2}) and then subtracted it from the per-cycle drying and machine energy use. DOE determined per-cycle water consumption by multiplying the IWF by the defined capacity.

The per-cycle energy and water use for top-loading and front-loading CCWs associated with each efficiency level are presented in Table IV.5 and Table IV.6, respectively.

TABLE IV.5—PER-CYCLE ENERGY AND WATER USE FOR TOP-LOADING COMMERCIAL CLOTHES WASHERS

Efficiency level	MEF_{J2} (ft^3/kWh/cycle)	IWF (gal/ft^3/cycle)	Capacity (ft^3)	RMC (%)	Energy breakdown (kWh/cycle)			Water consumption (gal/cycle)
					Machine	Hot water	Drying	
Baseline	1.35	8.8	3.25	48	0.21	0.59	1.61	28.6
EL 1	1.60	8.5	3.25	47	0.10	0.36	1.57	27.6
EL 2	1.60	7.8	3.25	47	0.10	0.36	1.57	25.4
EL 3 (Max Tech)	1.60	5.5	3.25	47	0.10	0.36	1.57	17.9

TABLE IV.6—PER-CYCLE ENERGY AND WATER USE FOR FRONT-LOADING COMMERCIAL CLOTHES WASHERS

Efficiency level	MEF_{J2} (ft^3/kWh/cycle)	IWF (gal/ft^3/cycle)	Capacity (ft^3)	RMC (%)	Energy breakdown (kWh/cycle)			Water consumption (gal/cycle)
					Machine	Hot water	Drying	
Baseline	2.00	4.1	3.25	38	0.10	0.28	1.24	13.4
EL 1	2.20	4.0	3.25	36	0.10	0.21	1.17	13.0
EL 2 (Max Tech)	2.30	3.8	3.25	34	0.10	0.21	1.10	12.4

DOE determined the average annual energy and water consumption by multiplying the per-cycle energy and water consumption by the number of cycles per year. For this NOPD, DOE relied on the same research studies as described in chapter 7 of the December 2014 Final Rule TSD to arrive at a range of annual usage cycles. The average values are 1,083 and 1,479 for multi-family and laundromat applications, respectively. The data sources that informed these usage numbers include Multi-Housing Laundry Association (''MLA'') and the CLA, Southern California Edison, and San Diego Gas and Electric, as well as research sponsored by the MLA and the CLA. Chapter 7 of the December 2014 Final Rule TSD describes these sources in detail.[30] DOE is not aware of more recent studies that provide additional data on the average cycles for the considered applications.

Table IV.7 summarizes the average annual energy and water consumption for CCWs.

[27] As an extreme example, DOE could assume that a CCW could reduce its water consumption to near zero, but such equipment would not be viable for washing clothing.

[28] As an example, DOE could assume that a CCW could implement significantly faster spin speeds, but at the risk of more frequent or severe damage to internal bearings, requiring more frequent repairs or replacement.

[29] The TSD for the December 2014 Final Rule is available at docket number EERE-2012-BT-STD-0020. Available online at *www.regulations.gov/docket/EERE-2012-BT-STD-0020.*

[30] The TSD for the December 2014 Final Rule is available at docket number EERE-2012-BT-STD-0020. Available online at *www.regulations.gov/docket/EERE-2012-BT-STD-0020.*

TABLE IV.7—AVERAGE ANNUAL ENERGY AND WATER USE FOR COMMERCIAL CLOTHES WASHERS

Equipment class	Efficiency level	MEF (ft^3/kWh/cycle)	IMF (gal/cycle/ft^3)	Container volume (ft^3)	RMC (%)	Annual energy use		Annual water (1000 gal)
						Electrical (kWh/yr)	Gas (MMBtu/yr)	
Top-Loading	Baseline	1.35	8.80	3.25	48	961	7.05	32.47
	1	1.60	8.50	3.25	47	752	6.04	31.36
	2	1.60	7.80	3.25	47	752	6.04	28.78
	3 (Max Tech)	1.60	5.50	3.25	47	752	6.04	20.29
Front-Loading	Baseline	2.00	4.10	3.25	38	618	4.77	15.24
	1	2.20	4.00	3.25	36	573	4.26	14.76
	2 (Max Tech)	2.30	3.80	3.25	35	546	4.08	14.02

NEEA encouraged DOE to quantify the energy and water use and savings of CCWs installed in on-premise laundries (''OPLs''). (NEEA, No. 8 at p. 8) NEEA stated that some CCWs covered by DOE's current definition are installed as non-vending OPL units in facilities such as spas, hair salons, assisted living centers, and fire stations, and used for laundering various textiles (*e.g.,* towels, sheets, and uniforms). *Id.* NEEA cited the 2014 Final Rule, in which DOE did not evaluate the energy and water use and savings of equipment installed in OPLs due to a lack of data. *Id.* NEEA noted that since 2014, the California Energy Commission (''CEC'') has published data on the installed stock and duty cycle of OPL clothes dryers, which NEEA asserts can be assumed to be similar to clothes washers in the same facility. *Id.* Citing the CEC research, NEEA stated that the number of OPL CCWs installed is smaller than the total number of CCWs in multi-family laundries and laundromats, but that the number of cycles per day in an OPL is much higher than in multi-family laundries or laundromats. *Id.*

DOE reviewed CEC's 2017 study [31] and found the scope of the study is only focused on OPL applications in the state of California. DOE acknowledges the benefit of including the number of cycles per day from OPL application; however, a larger study with greater geographic area would be more applicable, as it would be more representative as to the variability in annual energy and water consumption in different applications.

The CA IOUs recommended that DOE investigate the prevalence of larger-capacity units used in multi-housing laundries and OPL facilities, such as in hotels, health care, universities, and prisons. (CA IOUs, No. 7 at pp. 2–3) The CA IOUs stated that these represent significant segments of the CCW market, and cited a 2009 DOE report on commercial building appliances that estimated 300,000 to 600,000 multi-housing laundries and 60,000 OPL facilities in the United States, compared to 35,000 laundromats. *Id.*

DOE acknowledges the trend and presence of larger-capacity units in multi-housing laundry and OPL facilities in hotels, healthcare establishments and universities. Since larger-capacity units are outside the scope for this NOPD, DOE focused its analysis on CCW units that meet the criteria of horizontal-axis clothes washers not more than 3.5 ft^3 in volume and vertical-axis clothes washers not more than 4.0 ft^3 in volume.

F. Shipments Analysis

DOE uses projections of annual equipment shipments between 2024 and 2053 to calculate the national energy and water savings of potential amended or new energy conservation standards on energy and water use.[32] The shipments model takes an accounting approach in tracking market shares of each equipment class and the vintage of units in the stock. Stock accounting uses equipment shipments as inputs to estimate the age distribution of in-service equipment stocks for all years. The age distribution of in-service equipment stocks is a key input to calculations of both the NES and national water savings (''NWS'').

For this NOPD, DOE used the same shipments model that was performed for the December 2014 Final Rule.[33] DOE used historical shipments data to calibrate its shipments model. The historical shipments data were established using the following sources: (1) ENERGY STAR clothes washer shipments in commercial use applications for the period 2014–2019 [34] and (2) data from the December 2014 Final Rule for the period 1972–2013. DOE projected CCW shipments (for both equipment classes) for the new construction and replacement markets, and also accounted for non-replacement of retired units. For the new construction market, DOE assumed shipments are driven solely by multi-family construction starts, using projections of new housing starts from the DOE Energy Information Administration (''EIA'') *Annual Energy Outlook* (''AEO'') 2021.[35] Implicit in this assumption is the fact that a certain percentage of multi-family residents will need to wash their laundry in either a common-area laundry facility (within the multi-family building) or a laundromat.

For existing buildings replacing broken equipment, the shipments model uses a stock accounting framework. Given the equipment entering the stock in each year and a retirement function, the model predicts how many units reach the end of their lifetime in each year. DOE typically refers to new shipments intended to replace retired units as ''replacement'' shipments. Such shipments are usually the largest part of total shipments.

DOE allocated shipments to each of the two equipment classes based on the current market share of each class. Based on ENERGY STAR 2019 shipments data, DOE estimated that top-loading CCWs comprise 66 percent of the market while front-loading CCWs comprise 34 percent. DOE implemented frozen market share for the projection period (2024–2053) for both the no-new-standards case and potential efficiency standards levels.

To estimate shipments under potential efficiency standards levels, DOE applied a default price elasticity of demand of zero for this equipment

[31] TRC Energy Services, On-Premises Laundromat Dryers Market Survey, Docket Number: 17–AAER–01 (TN#:216326), 03/02/2017. *efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=17–AAER–01.*

[32] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[33] The shipments model performed for the December 2014 Final Rule can be found in the TSD at docket number EERE–2012–BT–STD–0020. Available online at *www.regulations.gov/document/EERE-2012-BT-STD-0020-0017.*

[34] ENERGY STAR: *ENERGY STAR Unit Shipment and Market Penetration Report Calendar Year 2014–2019 Summary. www.energystar.gov/sites/default/files/asset/document/2019%20Unit%20Shipment%20Data%20Summary%20Report.pdf.*

[35] U.S. Department of Energy-Energy Information Administration. Annual Energy Outlook 2021 with Projections to 2050, February 3, 2021. Washington, DC. DOE/EIA–0383(2021). *www.eia.gov/outlooks/aeo/.*

because DOE believes CCWs to be highly price-inelastic, meaning that any cost and price increases resulting from efficiency standards are unlikely to substantially affect the quantity of CCWs purchased.

G. National Energy and Water Savings Analysis

The national energy and water savings (''NEWS'') analysis assesses the NES and the NWS from a national perspective of total consumer savings that would be expected to result from new or amended standards at specific efficiency levels.[36] (''Consumer'' in this context refers to consumers of the equipment being regulated.) DOE calculates the NES and NWS for the potential standards levels considered based on projections of annual equipment shipments, along with the annual energy and water consumption from the energy and water use analysis. For the present analysis, DOE projected the energy and water savings over the lifetime of CCWs sold from 2024 through 2053.

DOE evaluates the effects of new or amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy and water use for each equipment class in the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each equipment class if DOE adopted new or amended standards at specific efficiency levels (*i.e.,* the ELs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of equipment with efficiencies greater than the standard.

Table IV.8 summarizes the inputs and methods DOE used for the NEWS analysis for the NOPD. Discussion of these inputs and methods follows the table.

TABLE IV.8—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL ENERGY AND WATER SAVINGS ANALYSIS

Inputs	Method
Shipments	Annual shipments from shipments model.
Modeled Compliance Date of Standard	2024.
Efficiency Trends	No-new-standards case: Based on current market distribution of efficiencies with a zero growth in efficiency scenario for the analysis period. Standards cases: Based on a ''roll-up'' scenario to roll-up units to meet the standard level.
Annual Energy and water Consumption per Unit	Annual weighted-average values are a function of energy and water use at each EL.
Energy Site-to-Primary and Full Fuel Cycle Conversion	A time-series conversion factor based on AEO 2021.
Discount Rate	3 percent and 7 percent.

1. Equipment Efficiency Trends

A key component of the NEWS analysis is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases.

DOE estimated the current energy and water efficiency distribution for CCWs using model counts from DOE's CCMS database.[37] The estimated market shares for the no-new-standards case for CCWs are shown in Table IV.9.

TABLE IV.9—EFFICIENCY DISTRIBUTIONS: NO-NEW-STANDARDS CASE MARKET SHARES IN 2020

Top-loading				Front-loading			
Efficiency level	MEF_{J2} (ft^3/kWh/cyc)	IWF (gal/cyc/ft^3)	Market share (%)	Efficiency level	MEF_{J2} (ft^3/kWh/cyc)	IWF (gal/cyc/ft^3)	Market share (%)
Baseline	1.35	8.8	40.9	Baseline	2.00	4.1	1.9
1	1.60	8.5	4.5	1	2.20	4.0	89.7
2	1.60	7.8	40.9	2 (Max Tech)	2.30	3.8	8.4
3 (Max Tech)	1.60	5.5	13.6				

To project the future efficiency trend under the no-new-standards case during the analysis period, DOE followed the same methodology developed for the December 2014 Final Rule and assumed that efficiency would remain constant at the 2020 levels.[38]

For the standards cases, DOE used a ''roll-up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2024). In this scenario, the market shares of equipment in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of equipment above the standard would remain unchanged. In the standards cases, the efficiency distribution remains constant at the 2020 levels for the analysis period.

2. National Energy and Water Savings

The NEWS analysis involves a comparison of national energy and water consumption of the considered equipment between each potential standards case (*i.e.,* EL) and the case with no new or amended energy conservation standards. DOE calculated the national energy and water consumption by multiplying the number of units (stock) of each equipment (by vintage or age) by the unit energy and water consumption (also by vintage). DOE calculated annual NES and NWS based on the difference in national energy and water consumption for the no-new-standards case and for each higher efficiency standards case. DOE estimated energy

[36] The NIA accounts for impacts in the 50 states and Washington, DC.

[37] U.S. Department of Energy, Compliance Certification Database, Last accessed July, 2021. *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A*.*

[38] DOE's methodology developed for the December 2014 Final Rule can be found in the TSD available at docket number EERE–2012–BT–STD–0020. Available online at *www.regulations.gov/document/EERE-2012-BT-STD-0020-0017.*

consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO 2021.* Cumulative energy and water savings are the sum of the NES and NWS for each year over the timeframe of the analysis.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the NIA and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [39] that EIA uses to prepare its AEO. The FFC factors incorporate losses in production, and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants.

For this NOPD analysis, DOE reports the FFC energy savings in its NES analysis using inputs from AEO 2021.

H. Further Considerations

In addition to the analysis conducted as required under the 6-year look-back (42 U.S.C. 6316(a); 42 U.S.C. 6395(m)(1)(A)), DOE considered the estimated impacts of amended energy conservation standards on manufacturers of CCWs.

DOE conducted a manufacturer impact analysis for the December 2014 Final Rule. DOE understands that key characterizations and conclusions from that analysis to still be relevant to the CCW industry. Notably, two manufacturers continue to hold over 90 percent of the market share for the covered equipment. The smaller manufacturer, with annual revenues of approximately $570 million, is a low-volume manufacturer (''LVM'') that specializes in CCWs. The larger manufacturer, with annual revenues of $19 billion, is a diversified appliance manufacturer that produces a range of kitchen and laundry appliances.

In the December 2014 Final Rule, DOE raised concerns about disproportionate impacts between the LVM and the larger manufacturer. In particular, the LVM produced clothes washers at volumes that were two orders of magnitude smaller than its major competitor. The opportunity for the LVM to recoup upfront investments in product development was substantially smaller than its competitor. Similarly, depreciated manufacturing capital could only be spread across a disproportionately lower volume of shipments, contributing to higher per-unit production costs. In particular, an increase in amended standards beyond the finalized energy conservation standard levels (*i.e.,* the current standards for CCWs) for top-loading units had the potential for strong disproportionate impacts, with the potential for the LVM to leave the market. 79 FR 74492, 74514, 74516, 74527–74528, 74535.

In reviewing the current industry, DOE finds that the conditions described in the December 2014 Final Rule continue to persist. The smaller manufacturer continues to be a LVM with production volumes of clothes washers that are at least an order of magnitude smaller than for the primary competitor. The LVM continues to sell top-loading CCWs only at the baseline efficiency level, and top-loading CCWs continue to represent the large majority of the market for CCWs. The results of NES and NWS analyses, summarized in Table V.2 in section V.C of this document, indicate that the top-loading CCW equipment class provides significantly greater potential energy and water savings opportunity than the front-loading CCW equipment class. A change in standards for the top-loading equipment class would require product investments and capital expenditures that disproportionately impact the LVM, which operates at lower production volumes, procures components in smaller quantities, and has less access to capital than the large, more diversified competitor.

NEEA commented that updating the CCW standard would likely benefit small business owners and low-income consumers. NEEA commented that households that use a centralized laundry facility are more likely to be low-income than those that maintain an RCW within their dwelling. NEEA also commented that high utility costs impact rates charged to users of laundromats and multi-family laundries, leading to higher per-cycle cost to wash a load. (NEEA, No. 8 at p. 7).

DOE acknowledges that amending the CCW standards could benefit consumers, including small business owners and low-income consumers. DOE has not, however, conducted a consumer impacts analysis for the present rulemaking because it has tentatively determined that significant and disproportionate impacts to the LVM would outweigh the benefits of more stringent standards with respect to national energy and water savings (see section V.F of this document).

V. Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for CCWs. It addresses the efficiency levels examined by DOE and the projected impacts of each of these levels.

A. General Comments From Interested Parties

AHAM and CLA stated that amended energy standards for CCWs are not justified and are skeptical that amended standards for CCWs would meet the threshold for significant energy savings in the Process Rule. (AHAM and CLA, No. 5 at pp. 1–2) AHAM and CLA commented that it is not clear that an amended energy standard would be technologically feasible or economically justified—especially given the design challenges in further improving energy efficiency in clothes washers. (AHAM and CLA, No. 5 at p. 3) AHAM and CLA stated that the priorities identified within the Department's Regulatory Agenda represent a greater opportunity for improvements, better allocation of DOE and stakeholder resources, and are most likely to confer substantial benefits to consumers and the nation. *Id.*

Whirlpool commented that DOE should issue a no-new-standards determination for CCWs. (Whirlpool, No. 3 at p. 1) Whirlpool stated that amended energy conservation standards would not be economically justified due to the challenges of further increasing efficiency (including owner and operator needs, durability requirements, capacity, water levels, and cycle length). *Id.* Whirlpool further commented that it does not believe that amended energy conservation standards would provide an additional 0.3 quads of site energy savings or an additional 10-percent reduction in site energy use over a 30-year period. *Id.* Whirlpool stated that the industry is heavily weighted

[39] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581(2009), October 2009. Available at *www.eia.gov/analysis/pdfpages/0581(2009)index.php.*

towards top-loading CCW shipments, and that achieving an additional 10-percent reduction in site energy use will not be technologically feasible or cost effective. For these reasons, Whirlpool concludes that DOE should propose a no-new-standards determination. *Id.*

GEA suggested that DOE should issue a no-new-standards determination for CCWs because market and technology conditions have not changed since the most recent rulemakings for CCWs, as shown in the early assessment RFI. (GEA, No. 6 at p. 2)

The following sections summarize DOE's preliminary conclusions regarding technological feasibility, energy savings potential, cost-effectiveness, and further considerations regarding potential amended standards for CCWs.

B. Technological Feasibility

EPCA mandates that DOE consider whether amended energy conservation standards for CCWs would be technologically feasible. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(B)) DOE has tentatively determined that there are technology options that would improve the efficiency of CCWs. These technology options are being used in commercially available CCWs and therefore are technologically feasible. (See section IV.C.2 of this document for further information.) Hence, DOE has tentatively determined that amended energy conservation standards for CCWs are technologically feasible.

C. Significant Conservation of Energy

EPCA also mandates that DOE consider whether amended energy conservation standards for CCWs would result in significant conservation of energy. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(A))

To estimate the energy and water savings attributable to potential amended standards for CCWs, DOE compared their energy and water consumption under the no-new-standards case to their anticipated energy consumption under each potential standard level (''PSLs''). The savings are measured over the entire lifetime of equipment purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2024–2053).

DOE analyzed the energy and water savings of three PSLs for CCWs (see Table V.1). The PSLs were derived from the efficiency levels for CCWs that DOE developed in the engineering analysis. For this NOPD, PSL 1 represents the efficiency level above the baseline for both equipment classes. PSL 2 is configured with EL 2 for top-loading CCWs and the max-tech level (EL 2) for front-loading CCWs. PSL 3 represents the max-tech level for both equipment classes.

TABLE V.1—POTENTIAL STANDARD LEVELS FOR CCWS

PSL	Top-loading			Front-loading		
	Efficiency Level	MEF_{J2} (ft^3/kWh/cycle)	IWF (gal/cycle/ft^3)	Efficiency level	MEF_{J2} (ft^3/kWh/cycle)	IWF (gal/cycle/ft^3)
1	1	1.60	8.50	1	2.20	4.00
2	2	1.60	7.80	2 (Max Tech)	2.30	3.80
3	3 (Max Tech)	1.60	5.50	2 (Max Tech)	2.30	3.80

Table V.2 presents DOE's projections of the NES and NWS for each PSL considered for CCWs.

TABLE V.2—CUMULATIVE NATIONAL ENERGY AND WATER SAVINGS FOR COMMERCIAL CLOTHES WASHERS

[2024–2053]

Energy and water savings	Product class	Potential standard level		
		1	2	3
Site energy savings (*quads*)	Front-Loading	0.00	0.01	0.01
	Top-Loading	0.03	0.03	0.03
	Total	0.03	0.04	0.04
Primary energy savings (*quads*)	Front-Loading	0.00	0.01	0.01
	Top-Loading	0.05	0.05	0.05
	Total	0.05	0.06	0.06
FFC energy savings (*quads*)	Front-Loading	0.00	0.01	0.01
	Top-Loading	0.05	0.05	0.05
	Total	0.06	0.06	0.06
Water savings (*trillion gallons*)	Front-Loading	0.00	0.02	0.02
	Top-Loading	0.02	0.07	0.39
	Total	0.02	0.09	0.41

DOE estimates that amended standards for CCWs would result in energy savings of 0.06 quads at PSL 3, the max-tech level.

D. Cost-Effectiveness

DOE analysis tentatively indicates that the market and the manufacturer circumstances are similar to those found when DOE last evaluated amended energy conservation standards for CCWs during the December 2014 Final Rule. In particular, the product offerings and technology options and associated costs have not changed substantively since the previous analysis. As stated and as described further in the following sections, DOE has tentatively determined that amended standards for

CCWs would not be economically justified at levels above the current standard level because the benefits of more stringent standards would not outweigh the burdens.

E. Further Considerations

In the December 2014 Final Rule, DOE rejected higher standards, finding that an increase in standards beyond the adopted level would lead to disproportionate impacts on the LVM. 79 FR 74492, 74535. The LVM primarily sold top-loading CCWs and produced those units only at the baseline efficiency level. The company's production volume of CCWs was significantly lower than its major competitor's production volume. An increase in standards to max-tech would have required significant investment by the LVM, with the potential need for ''greenfield'' factories or a change in business model that relies on sourcing or foreign production. *Id.* at 79 FR 74527. In contrast, the LVM's major competitor was orders of magnitude larger in terms of head count, revenue, and product shipments. The major competitor already produced units at the max-tech level for top-loading units. Thus, for the major competitor, there was no conversion cost burden associated with higher standards.

F. Summary

DOE has tentatively determined that energy conservation standards for CCWs do not need to be amended.

DOE rejected higher TSLs during the previous CCW energy conservation standards rulemaking due to significant and disproportionate impacts to the LVM, which has large market share in the CCW industry. DOE analysis indicates that the market and the manufacturer circumstances are similar to those found when DOE last evaluated amended energy conservation standards for CCWs during the December 2014 Final Rule. In particular, the product offerings and technology options and associated costs have not changed substantively since the previous analysis. As such, DOE believes that amended energy conservation standards for CCWs would not be economically justified at levels above the current standard level because the benefits of more stringent standards would not outweigh the burdens. Therefore, DOE has tentatively determined not to amend the CCW energy conservation standards.

DOE will consider all comments received on this proposed determination in issuing any final determination.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This proposed determination has been determined to be not significant for purposes of Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). As a result, the Office of Management and Budget (''OMB'') did not review this proposed determination.

B. Review Under the Regulatory Flexibility Act

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

DOE reviewed this proposed determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. DOE has tentatively determined that current standards for CCWs do not need to be amended. Because DOE is proposing not to amend standards for CCWs, if adopted, this determination would not amend any energy conservation standards. On the basis of the foregoing, DOE certifies that the proposed determination, if adopted, would have no significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared an IRFA for this proposed determination. DOE will transmit this 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

Manufacturers of CCWs must certify to DOE that their equipment comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their equipment according to the DOE test procedures, 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 CCWs. (*See generally* 10 CFR part 429.) 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.

DOE has tentatively determined that current standards for CCWs do not need to be amended. This proposed determination, if made final, would not impact the reporting burden approved under OMB control number 1910–1400.

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 action in accordance with the National Environmental Policy Act of 1969 (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for actions which are interpretations or rulings with respect to existing regulations. 10 CFR part 1021, subpart D, appendix A4. DOE anticipates that this action qualifies for categorical exclusion A4 because it is an interpretation or ruling in regards to an existing regulation 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 action.

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 determination and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (*See* 42 U.S.C. 6316(a) and (b); 42 U.S.C. 6297) Therefore, no further action is required by E.O. 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 determination 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, sec. 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.*

DOE examined this proposed determination according to UMRA and its statement of policy and determined that the proposed determination does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. As a result, the analytical requirements of UMRA 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 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed determination 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 determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

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

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this NOPD 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 the Office of Information and Regulatory Affairs (''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 E.O. 12866, or any successor Executive 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 determination, which does not propose to amend energy conservation standards for CCWs, is not a significant regulatory action under E.O. 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared Peer Review report pertaining to the energy conservation standards rulemaking analyses.[40] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. DOE has determined that the peer-reviewed analytical process continues to reflect current practice, and the Department followed that process for considering amended energy conservation standards in the case of the present action.

[40] ''Energy Conservation Standards Rulemaking Peer Review Report.'' 2007. Available at *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed September 8, 2021).

VII. Public Participation

A. Participation in the Webinar

The time and date of the webinar 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: *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=3.* 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 NOPD, 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 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 proposed determination 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 proposed determination 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 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. anti-trust 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 proposed determination.

The webinar will be conducted in an informal, conference style. DOE will present a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this proposed determination. 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 proposed determination. The official conducting the webinar 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 NOPD. 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 determination no later than the date provided in the **DATES** section at the beginning of this proposed determination. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will

require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. With this instruction followed, 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 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 to *CommClothesWashers2019STD044@ee.doe.gov* two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

DOE welcomes comments and views on any aspect of this proposal from all interested parties.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of proposed determination and request for comment.

Signing Authority

This document of the Department of Energy was signed on December 14, 2021, by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 15, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–27461 Filed 12–17–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57 and 77

[Docket No. MSHA–2018–0016]

RIN 1219–AB91

Safety Program for Surface Mobile Equipment

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule; reopening of the rulemaking record for public comments; notice of public hearing.

SUMMARY: In response to a public request, the Mine Safety and Health Administration (MSHA) is reopening the rulemaking record for public comments and holding a virtual public hearing on the Agency's proposed rule addressing Safety Program for Surface Mobile Equipment.

DATES:

Hearing date: The virtual public hearing will be held on January 11, 2022.

Additional information on how to participate is listed below under **SUPPLEMENTARY INFORMATION**.

Reopening of the rulemaking record: The 60-day comment period for the proposed rule, published on September 9, 2021 (86 FR 50496), closed on November 8, 2021. In response to a public request, MSHA is now reopening the rulemaking record for additional public comments. All comments must be received or postmarked by 11:59 p.m.

Eastern Standard Time on February 11, 2022.

ADDRESSES: Submit comments and informational materials, identified by RIN 1219–AB91 or Docket No. MSHA–2018–0016 by one of the following methods:

- *Federal E Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E Mail: zzMSHA-comments@dol.gov.*
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Eastern Standard Time Monday through Friday, except federal holidays. Before visiting MSHA in person, call 202–693–9440 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.
- *Fax:* 202–693–9441.

Instructions: All submissions must include RIN 1219–AB91 or Docket No. MSHA 2018–0016. Do not include personal or proprietary information that you do not wish to disclose publicly. If a commenter marks parts of a comment as ''business confidential'' information, MSHA will not post those parts of the comment. Otherwise, MSHA will post all comments without change, including personal information.

Docket: For access to the docket to read comments and background documents, go to *http://www.regulations.gov.* The docket can also be reviewed in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. (Eastern Standard Time) Monday through Friday, except federal holidays. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

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

SUPPLEMENTARY INFORMATION:

I. Background

On September 9, 2021, MSHA published a proposed rule (86 FR 50496) that would require that mine operators employing six or more miners develop and implement a written safety program for mobile and powered haulage equipment (excluding belt conveyors) at surface mines and surface areas of underground mines. The written safety program would include actions mine operators would take to identify hazards and risks to reduce accidents, injuries, and fatalities related to surface mobile equipment. The proposal would offer mine operators flexibility to devise a safety program that is appropriate for their specific mining conditions and operations. The 60-day comment period closed on November 8, 2021. However, in response to a public request, the MSHA will hold a virtual public hearing to receive additional comments and data from stakeholders on the proposed rule. The comment period is reopened until February 11, 2022. Comments received since November 8, 2021 will also be made a part of the rulemaking record.

II. Virtual Public Hearing

MSHA will hold a virtual public hearing on the proposed rule to provide the public with an opportunity to present oral statements and other information on this rulemaking.

The virtual public hearing will be held on January 11, 2022, and will begin at 10 a.m. Eastern Standard Time, and will end after the last presenter speaks.

The virtual public hearing will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations (*see Public Participation information below*). Speakers and other attendees may present information to MSHA for inclusion in the rulemaking record.

The virtual public hearing will be conducted in an informal manner. Formal rules of evidence or cross examination will not apply. A verbatim transcript of the proceeding will be prepared and made a part of the rulemaking record. Copies of the transcript will be available to the public. The transcript may also be viewed on MSHA's website at *https://arlweb.msha.gov/currentcomments.asp.*

Public Participation

A. *To speak in the hearing:*

- Those who wish to speak during the virtual public hearing are asked to register here (*https://www.msha.gov/form/safety-program-surface-mobile-equipment-proposed-rule-virtual-public-hearing*) by 5 p.m. Eastern Standard Time on Monday, January 10, 2022.
- Speakers will be called in the order in which they signed up. If you do not register in advance and you wish to speak, you will be called after all those who registered have spoken.

B. *To participate by Phone or WebEx:*

- Pre-registration is not required to attend the hearing.
- *To attend by Phone:*
- Dial the toll-free conference number: 877–465–7975.
- Attendee access code: 2760 635 2000.
- *To attend by WebEx:*
- To log into the virtual public hearing, go to: *https://usdol.webex.com.*
- Enter Meeting number: 2760 635 2000.
- Enter Meeting password: Welcome!24.

III. Request for Comments

MSHA is interested in any information and data associated with safety programs for surface mobile equipment. The Agency is particularly interested in any aspect of the safety programs that work best and are most effective. The Agency also is interested in comments on MSHA's proposal to require a written safety program for mine operators employing six or more miners. Please be very specific and include supporting rationale.

The Agency is interested in receiving comments from all members of the mining community and all interested stakeholders. MSHA will accept comments from any interested party, including those not presenting oral statements during the virtual public hearing. Where possible, specific examples to support the rationale are strongly encouraged. If a commenter marks parts of a comment as ''business confidential'' information, MSHA will not post those parts of the comment.

The comment period is reopened until February 11, 2022. All comments must be received or postmarked by 11:59 p.m. Eastern Standard Time on February 11, 2022.

Patricia W. Silvey,

Deputy Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2021–27478 Filed 12–17–21; 8:45 am]

BILLING CODE 4520–43–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[EPA–HQ–OLEM–2021–0556; FRL–7122–04–OLEM]

Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is extending the comment period for the proposed rule entitled ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations.'' EPA published the proposed rule in the **Federal Register** on October 22, 2021, and the public comment period was scheduled to end on December 21, 2021. However, EPA has received at least one request for additional time to develop and submit comments on the proposal. In response to the request for additional time, EPA is extending the comment period for an additional 30 days, through January 20, 2022.

DATES: Comments must be received on or before January 20, 2022.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OLEM–2021–0556, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information or other information whose disclosure is restricted by statute.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OLEM Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID–19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For further information on this document, contact Jennifer McLeod, Program Implementation and Information Division, Office of Resource Conservation and Recovery, (202) 566–0384; email address: *mcleod.jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary

On October 22, 2021 (86 FR 58730), EPA published in the **Federal Register** a proposal to expand the available options for extraction and determinative methods used to characterize and verify the cleanup of polychlorinated biphenyl (PCB) waste under the federal Toxic Substances Control Act (TSCA) regulations (also referred to as the PCB regulations). These proposed changes are expected to greatly reduce the amount of solvent used in PCB extraction processes, thereby conserving resources and reducing waste. In addition, the proposed changes are expected to result in quicker, more efficient, and less costly cleanups, due to greater flexibility in the cleanup and disposal of PCB waste, while still being equally protective of human health and the environment. The proposal also included several other amendments to the PCB regulations, such as: The amendment of performance-based disposal option for PCB remediation waste; the removal of the provision allowing PCB bulk product waste to be disposed as roadbed material; the addition of more flexible provisions for cleanup and disposal of waste generated by spills that occur during emergency situations (*e.g.,* hurricanes or floods); the harmonization of the general disposal requirements for PCB remediation waste; and other amendments to improve the implementation of the regulations, clarify ambiguity and correct technical errors.

The comment period for the proposed rule was scheduled to end on December 21, 2021. Since publication, EPA has received at least one request to extend that comment period to allow for additional time to develop comments on the proposed rule. After considering this request for additional time, EPA has decided to extend the comment period for an additional 30 days, through January 20, 2022.

II. Public Participation

Submit your comments, identified by Docket ID No. EPA–HQ–OLEM–2021–0556, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* 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.*

Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous substances, Incorporation by reference, Labeling, Polychlorinated biphenyls (PCBs), Reporting and recordkeeping requirements.

Dated: December 14, 2021.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2021–27407 Filed 12–17–21; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1173

RIN 3136–AA45

Indemnification of Employees

AGENCY: National Endowment for the Humanities, National Foundation on the Arts and the Humanities.

ACTION: Proposed rule with request for comments.

SUMMARY: The National Endowment for the Humanities (NEH) is proposing to publish a policy that permits indemnification of NEH employees in appropriate circumstances, as determined by the Chairperson of NEH or the Chairperson's designee, for claims made against NEH employees as a result of actions taken by them in the scope of their employment.

DATES: Send comments on or before January 19, 2022.

ADDRESSES: You may send comments by email to *gencounsel@neh.gov.*

Instructions: Include ''3136–AA44'' in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *gencounsel@neh.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Federal courts have upheld the authority of a Federal agency to establish procedures governing the production of records and testimony by personnel in legal proceedings in which the agency is not a party. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). This proposed rule would establish policies and procedures that the agency will follow when, in a legal proceeding, a current or former NEH employee receives a demand or request to testify as to facts or events that relate to his or her official duties or the functions of NEH or to produce official records and information.

This proposed rule relates to testimony and the production of records only in connection with legal proceedings to which the United States is not a party. It would not apply to requests under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a; Congressional demands or requests for testimony or records; or legal proceedings to which the United States is a party.

Request for Comments

NEH requests comments, which NEH must receive at the above address, by the above date.

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

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

Executive Order 13132, Federalism

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

Executive Order 12988, Civil Justice Reform

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this rulemaking is written in clear language designed to help reduce litigation.

Executive Order 13175, Indian Tribal Governments

Under the criteria in Executive Order 13175, NEH evaluated this rulemaking and determined that it will not have any potential effects on Federally recognized Indian Tribes.

Executive Order 12630, Takings

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year.

National Environmental Policy Act of 1969

This rulemaking will not have a significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E-Government Act of 2002

All information about NEH required to be published in the **Federal Register** may be accessed at *www.neh.gov.* The website *www.regulations.gov* contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010

To ensure this proposed rule speaks in plain and clear language so that the public can use and understand it, NEH modeled the language of the proposed rule on the Federal Plain Language Guidelines.

List of Subjects in 45 CFR Part 1173

Administrative practice and procedure.

For the reasons set forth in the preamble, the National Endowment for the Humanities proposes to amend 45 CFR chapter XI by adding part 1173,

consisting of §§ 1173.1 and 1173.2, to read as follows:

PART 1173—INDEMNIFICATION OF EMPLOYEES

Authority: 5 U.S.C. 301.

§ 1173.1 Policy on employee indemnification.

(a) This part explains when the National Endowment for the Humanities (NEH) will indemnify you, an employee or a former employee of NEH, against a verdict, judgment, or other monetary award that a court or other competent authority renders against you. When NEH indemnifies you against a verdict, judgment, or other monetary award, it means that NEH will pay the amounts that the court orders you to pay.

(b) This part also explains when NEH will settle a claim (also referred to as compromising a claim) that someone brings or threatens to bring against you in court or before another competent authority. It is only in exceptional circumstances that NEH will agree to settle a claim before a court or other competent authority has entered a verdict, judgment, or monetary award against you.

(c) In order for NEH to indemnify you or settle a claim:

(1) The verdict, judgment, or monetary award to be paid or the claim to be settled must relate to something that you did (or failed to do) within the scope of your employment with NEH; and

(2) The Chairperson of NEH or someone the Chairperson designates (the Agency Official) must determine, as a matter of discretion, that indemnifying you or settling the claim would be in the interest of NEH.

(d) If you become aware that someone has made or may make a claim against you personally as a result of something that you did (or failed to do) within the scope of your employment, you must immediately notify the Office of the General Counsel.

(e) To request that NEH indemnify you or settle a claim against you, you must submit a written request to the Office of the General Counsel. You must include a copy of the verdict, judgment, monetary award, or settlement proposal, as appropriate. The Office of the General Counsel may consult about the matter with your supervisor, other agency employees, and the Department of Justice.

(f) The Agency Official may waive the requirements of paragraphs (d) and (e) of this section if it would be in the interest of NEH to do so.

(g) If the Agency Official determines that NEH will indemnify you or settle a claim on your behalf, NEH's commitment will be subject to the availability of appropriated funds. The Agency Official may impose other conditions or limitations on the determination at his or her discretion.

(h) If the Chairperson requests indemnification or settlement of a claim, the General Counsel will perform the functions assigned to the Chairperson under this section with respect to that request.

§ 1173.2 [Reserved]

Dated: December 15, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2021–27479 Filed 12–17–21; 8:45 am]

BILLING CODE 7536–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 50, 52, 53, 54, 56, 57, 58, 59, 61, 62, 63, and 64

[Docket No. USCG–2020–0634]

RIN 1625–AC72

Updates to Marine Engineering Standards

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Coast Guard is extending the comment period by 45 days for the notice of proposed rulemaking, ''Updates to Marine Engineering Standards,'' published on October 19, 2021, which proposes to incorporate by reference updated marine engineering standards and eliminate outdated or unnecessarily prescriptive regulations. We are extending the comment period to allow the public more time to comment on the proposed rulemaking. The comment period is now open through February 3, 2022.

DATES: The deadline for the comment period for the proposed rule published October 19, 2021 (86 FR 57896) is extended. Comments and related material must be received by the Coast Guard on or before February 3, 2022.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0634 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For further information about this document call or email Thane Gilman, Systems Engineering Division (CG–ENG–3), 2703 Martin Luther King Jr. Ave. SE, Washington, DC 20593. Phone (202) 372–1383, Email: *thane.gilman@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

We encourage you to submit comments through the Federal eRulemaking Portal at *www.regulations.gov.* If you cannot submit your material by using *www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

Background and Discussion

We issued a notice of proposed rulemaking, ''Updates to Marine Engineering Standards,'' on October 19, 2021 (86 FR 57896). In it we proposed to incorporate by reference updated marine engineering standards and eliminate outdated or unnecessarily prescriptive regulations in title 46 of the Code of Federal Regulations (CFR) subchapter F. This proposed rule is part of a continuing effort for regulatory reform that increases compliance options for the regulated public while providing a cost savings to the regulated public and the U.S. government.

We set a 60-day comment period for the proposed rule and received a request to extend the comment period by an additional 90 days. The requester cited the scope of the changes in the proposed rule requiring analysis, the overlap with the upcoming holiday season, and the reduction in workforce availability due to the COVID–19 pandemic as reasons for the requested extension.

Since the proposed rule is primarily updating standards incorporated by reference in the CFR to current editions already used by industry, we do not believe public comment will require substantial technical or economic analysis. However, inconsideration of the commenter's other concerns, we have decided to extend the public comment period by 45 days. The comment period is now open through February 3, 2022.

This document is issued under the authority of 5 U.S.C. 552(a).

Dated: December 15, 2021.

J.W. Mauger,

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

[FR Doc. 2021–27567 Filed 12–17–21; 8:45 am]

BILLING CODE 9110–04–P

Notices

Federal Register
Vol. 86, No. 241
Monday, December 20, 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

Submission for OMB Review; Comment Request

December 15, 2021.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are required regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 19, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Request for Geospatial Products and Services.

OMB Control Number: 0560–0176.

Summary of Collection: The information collection is needed to enable the Department of Agriculture to effectively administrate the Geospatial and Aerial Photography Programs. The Geospatial Enterprise Operation under the Farm Production and Conservation–Business Center (FPAC–BC) (formerly Farm Service Agency (FSA)) has the responsibility for conducting and coordinating the aerial imagery, remote sensing programs, and the aerial imagery flying contract programs. The digital and film imagery secured by FPAC–BC is public domain and reproductions are available at cost to any customer with a need. All receipts from the sale of aerial photography products and services are retained by the operation. The FPAC–ISD–441—Request for Geospatial Products and Services is the form supplies to the customers for placing an order for the geospatial and aerial imagery products and services. The operation also collects information using the three FPAC–ISD–441B, Customer Digital Print Form, and FPAC–ISD–441C Service Quality Survey and FPAC–ISD–441D, One-time Credit Card Payment Authorization (new).

Need and Use of the Information: FPAC–BC will collect the name, address, contact name, telephone, fax, email, customer code, agency code, purchase order number, credit card number/exp. date and amount remitted/purchase order amount. Customers have the option of placing orders by mail, fax, telephone, and walk-in. Furnishing this information requires the customer to research and prepare their request before submitting it to the operation. Information collected is used to process fiscal obligations, communicate with the customer, process the request, and email or ship the requested products.

Description of Respondents: Farms; Individuals or household; Business or other for-profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 2.477.

Frequency of Responses: Recordkeeping; Reporting; Annually; Other (when ordering).

Total Burden Hours: 542.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–27458 Filed 12–17–21; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 15, 2021.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 19, 2022 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Supplemental Nutrition Assistance Program Emergency Allotments (COVID–19).

OMB Control Number: 0584–0652.

Summary of Collection: The Families First Coronavirus Response Act of 2020 (Pub. L. 116–127), enacted March 18, 2020, includes a general provision that allows the Department of Agriculture to issue emergency allotments (EA) based on a public health emergency declaration by the Secretary of Health and Human Services under Section 319 of the Public Health Service Act related to an outbreak of COVID–19 when a State has also issued an emergency or disaster declaration.

Need and Use of the Information: The purpose for this collection is for FNS to implement administrative actions in response to the current economic crisis resulting from the pandemic. FNS distributed updated State guidance on April 1, 2021, outlining a new approach for States to calculate EA, which provides greater equity for households most in need. In addition to outlining a new EA minimum benefit policy, the updated guidance describes an EA phase-out process States may request and use when their State-level emergency declaration expiration date is coming up. The State agency process for requesting EA, as outlined in the April 2021 guidance, remains generally unchanged, though the State must now confirm that the State's emergency or disaster declaration remains active when requesting EA.

FNS reviews request for approval to provide EA to households to bring all households up to the maximum benefit allowable due to pandemic related economic conditions. Because the EA waiver increases the monthly benefit of participants above the amount originally anticipated for this fiscal year, the amount of benefits issued and redeemed are carefully tracked to ensure FNS does not exceed its appropriation. As such, it is necessary for FNS to collect information from State agencies operating EA on a more frequent basis than would be reported normally.

Description of Respondents: (53) State, Local or Tribal Government.

Number of Respondents: 53.

Frequency of Responses: Reporting: Recordkeeping Once, On occasion.

Total Burden Hours: 763.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–27450 Filed 12–17–21; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2021–0021]

National Advisory Committee on Meat and Poultry Inspection; Nominations for Membership

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice to solicit nominations for membership.

SUMMARY: The U.S. Department of Agriculture (USDA) is soliciting nominations for membership for the National Advisory Committee on Meat and Poultry Inspection (NACMPI). The full Committee consists of 20 members, and each person selected is expected to serve a 2-year term. The USDA is announcing Committee vacancies to minority businesses and organizations, consumer groups, businesses, media, local and state governments, and academia to attract and appoint diverse candidates. The USDA expects to appoint new Committee members for the entire committee in 2022.

DATES: Nominations, including a cover letter to the Secretary, the nominee's typed resume or curriculum vitae, and a completed USDA Advisory Committee Membership Background Information form AD–755, must be received by February 18, 2022. Self-nominations are welcome.

ADDRESSES: The USDA Advisory Committee Membership Background Information form AD–755 is available online at: *https://www.fsis.usda.gov/sites/default/files/2020-08/AD-755_0512.doc.*

FOR FURTHER INFORMATION CONTACT: Valeria Green, Designated Federal Official, National Advisory Committee on Meat and Poultry Inspection, U.S. Department of Agriculture, by telephone at (301) 504–0846, Email: *valeria.green@usda.gov,* regarding specific questions about the Committee or this solicitation. General information about the Committee can also be found at: *https://www.fsis.usda.gov/nacmpi.*

SUPPLEMENTARY INFORMATION:

Background

In accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2), USDA is seeking nominees for membership on the National Advisory Committee on Meat and Poultry Inspection (NACMPI). The Committee provides advice and recommendations to the Secretary of Agriculture on meat and poultry inspection programs (see 21 U.S.C. 607(c), 624, 645, 661(a)(3), and 661(c) and 21 U.S.C. 454(a)(3), 454(c), 457(b), and 460(e)). Nominations for membership are being sought from persons representing industry; academia; State and local government officials; public health organizations; and consumers and consumer organizations. NACMPI is seeking members with knowledge and interest in meat and poultry food safety and other FSIS policies. Appointments to the Committee will be made by the Secretary of Agriculture. To ensure that recommendations of the Committee consider the needs of the diverse groups served by the Department, membership will include, to the extent practicable, individuals with demonstrated ability to serve on behalf of underrepresented minorities, women, and persons with disabilities. It is anticipated that the Committee will meet at least once annually. Please note that federally registered lobbyists cannot be considered for USDA advisory committee membership. Members can only serve on one USDA advisory committee at a time. All nominees will undergo a USDA background check.

How To Apply

To receive consideration for service on the NACMPI, a nominee must submit their resume and the USDA Advisory Committee Membership Background Information form AD–755. The resume or curriculum vitae must be limited to five one-sided pages and should include the nominee's educational background and expertise. For submissions received that are more than five one-sided pages in length, only the first five pages will be reviewed. The USDA Advisory Committee Membership Background Information form AD–755 is available online at: *https://www.ocio.usda.gov/sites/default/files/docs/2012/AD-755-Approved_Master-exp-3.31.22_508.pdf.* The AD–755 will only be considered if it is complete.

Nomination packages should be accompanied by a resume or curriculum vitae and AD–755 form and can be sent via email to Valeria Green, Director, Resource and Administrative Staff, Office of Policy and Program Development, Food Safety and Inspection Service at *NACMPI@usda.gov.*

Regarding Nominees Who Are Selected

The USDA Office of Ethics determines who will be designated as Special Government Employees (SGE) and must complete the U.S. Office of Government Ethics (OGE) 450 Confidential Financial Disclosure Report electronically through the USDA online system before rendering any advice or before their first

meeting. SGEs are required to update financial forms yearly. An invitation to fill out the OGE 450 form will be sent via email before the NACMPI meeting. All members will be reviewed for conflict of interest pursuant to 18 U.S.C. 208 in relation to specific NACMPI work charges. Advisory Committee members serve a two-year term, renewable for two consecutive terms.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication online through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS also will announce and provide a link to it through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *https://www.fsis.usda.gov/subscribe.*

Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

Dated: December 14, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–27434 Filed 12–17–21; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #: RBS–21–BUSINESS–0039]

Notice of Solicitation of Applications for the Rural Innovation Stronger Economy (RISE) Grant Program for Fiscal Year 2022

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of solicitation of applications.

SUMMARY: The Rural Business-Cooperative Service (Agency), an agency of the United States Department of Agriculture (USDA), invites applications under the Rural Innovation Stronger Economy (RISE) program for fiscal year (FY) 2022, subject to the availability of funding. This notice is being issued in order to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2022. Selected applicants will use Agency grant funds to provide financial assistance in support of innovation centers and job accelerator programs that improve the ability of distressed rural communities to create high wage jobs, accelerate the formation of new businesses, and help rural communities identify and maximize local assets. An announcement will be made on the Agency website: *https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas* regarding any amount received in the FY 22 appropriations.

DATES: Completed applications must be submitted electronically by no later than 11:59 p.m. Eastern Standard Time, April 19, 2022, through *Grants.gov*, to be eligible for grant funding. Please review the *Grants.gov* website at *https://grants.gov/applicants/organization_registration.jsp* for instructions on the process of registering your organization as soon as possible to ensure that you are able to meet the electronic application deadline. The Agency will not consider any application(s) received after the deadline and that are not submitted through *Grants.gov*. Potential applicants may submit a concept proposal for review by the Agency to *SM.USDA-RD.RISE@usda.gov* no later than February 18, 2022 in compliance with 7 CFR 4284.1115(a). The application and Concept Proposal deadline dates and time are firm.

ADDRESSES: Entities wishing to apply for a RISE grant, or to submit a Concept Proposal for their project, may download the application documents and requirements delineated in this notice from *https://www.rd.usda.gov/programs-services/business-programs/rural-innovation-stronger-economy-rise-grants.* Information for the submission of an electronic application may be found at: *https://www.Grants.gov.* Concept Proposals containing elements outlined in Section D.2.(b) of this Notice must be submitted to *SM.RISE-RD.RISE@usda.gov.*

FOR FURTHER INFORMATION CONTACT: Will Dodson, Program Management Division, Rural Business-Cooperative Service, United States Department of Agriculture, 1400 Independence Avenue SW, Mail Stop-3226, Room 5160-South, Washington, DC 20250–3226, (202) 720–1400 or email: *SM.USDA-RD.RISE@usda.gov.*

SUPPLEMENTARY INFORMATION: The Agency encourages applicants to consider projects that will advance the following key priorities (more details available at *https://www.rd.usda.gov/priority-points*):

—Assisting rural communities to recover economically from the impacts of the COVID–19 pandemic, particularly disadvantaged communities;

—Ensuring that all rural residents have equitable access to Rural Development (RD) programs and benefits from RD funded projects; and
—Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities.

Priority will also be given to projects that will leverage next generation gigabit broadband service to promote entrepreneurship and entities based in geographical areas with established agriculture and technology sectors which are focused on the development of precision and autonomous agriculture technologies as a way to strengthen rural economies and create jobs.

Overview

Federal Agency: Rural Business-Cooperative Service.

Funding Opportunity Title: Rural Innovation Stronger Economy Grant Program.

Announcement Type: Initial Notice.

Assistance Listing: 10.755.

Funding Opportunity Number (grants.gov): RD–RBS–22–01–RISE.

Dates: Electronic applications must be received and accepted by *http://www.grants.gov* no later than 11:59 Eastern Standard Time, April 19, 2022, or they will not be considered for funding.

Potential applicants may submit a concept proposal for review by the Agency to *SM.USDA-RD.RISE@usda.gov* no later than February 18, 2022 in compliance with 7 CFR 4294.1115(a). Submission of a concept proposal is not an application for program funds.

Administrative: To focus investments in areas resulting in the greatest opportunity for growth in prosperity, the Agency encourages applications that serve the smallest communities with the lowest incomes, with an emphasis on areas where at least 20 percent of the population is living in poverty, according to the American Community Survey data by census tracts.

The Agency encourages energy communities to utilize the RISE program to support workforce development; identify and maximize local assets; spur job creation; and connect to regional opportunities, networks, and industry clusters.

Hemp related projects: Please note that no assistance or funding from this grant can be provided to a hemp producer unless they have a valid license issued from an approved State, Tribal or Federal plan as defined by the Agriculture Improvement Act of 2018, Public Law 115–334. Verification of valid hemp licenses will occur at the time of award.

The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. The Agency reserves the right to contact applicants to seek clarification on materials contained in the submitted application. See the Application Template for a full discussion of each item. For requirements of completed grant applications, refer to Section D of this document.

A. Program Description

1. Purpose of the Program

The RISE program is a grant program to help struggling communities by funding job accelerators in low-income rural communities. The primary objective of the RISE program is to support jobs accelerator partnerships to improve the ability of distressed rural communities to create high wage jobs, accelerate the formation of new businesses through innovation centers, and help rural communities identify and maximize local assets.

2. Statutory Authority

The RISE program is a grant program authorized under section 379I of the Consolidated Farm and Rural Development Act (7 U.S.C. 2008w). The regulations governing this program are published at 7 CFR part 4284, subpart L.

3. Definitions

The terms you need to understand are defined and published at 7 CFR 4284.1103. In addition, the terms ''rural'' and ''rural area,'' are defined at section 379I of the Consolidated Farm and Rural Development Act (7 U.S.C. 1991(a)(13)) and will be used for this program. The term ''you'' referenced throughout this notice should be understood to mean ''you'' the applicant.

4. Application of Awards

Grants are awarded on a competitive basis. The Agency will review, evaluate, and score applications received in response to this notice based on the provisions found in 7 CFR part 4284, subpart L, and as indicated in this notice. The minimum award amount per grant is $500,000 and the maximum award amount per grant is $2,000,000, as authorized by Section 379I of the Consolidated Farm and Rural Development Act (7 U.S.C. 2008w). Grant funds may be used to pay for up to 80 percent of eligible project activity costs. Grant funds may be used to pay for costs directly related to the purchase or construction of an innovation center located in a low-income rural area; costs directly related to operations of an innovation center including purchase of equipment, office supplies, and administrative costs including salaries directly related to the project; costs directly associated with support programs to be carried out at or in direct partnership with job accelerators; reasonable and customary travel expenses directly related to job accelerators and at rates in compliance with 2 CFR 200.474; utilities, operating expenses of the innovation center and job accelerator programs and associated programs; and administrative costs of the grantee not exceeding 10% of the grant amount for the duration of the project.

B. Federal Award Information

Type of Award: Competitive Grant.

Fiscal Year Funds: FY 2022.

Available Funds: Anyone interested in submitting an application for funding under this Program is encouraged to consult the Rural Development Notices of Solicitation of Applications website at *https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas* for the amount of available funds appropriated in FY 2022.

Minimum Award: $500,000.

Maximum Award: $2,000,000.

Due Date for Applications: April 19, 2022.

Due Date for Concept Proposals: February 18, 2022.

Anticipated Award Date: September 15, 2022.

Performance Period: September 15, 2022, through December 31, 2026.

Type of Assistance Instrument: Initial Solicitation Announcement.

C. Eligibility Information

1. Eligible Applicants

Applicants must meet all the following eligibility requirements. Applications that fail to meet any of these requirements by the application deadline will be deemed ineligible and will not be evaluated further. To be considered an eligible applicant, you must be a rural jobs accelerator partnership formed after December 20, 2018, and meet the eligibility criteria found in 7 CFR 4282.1112 to apply for this program. Individuals and individual entities are not an eligible applicant for the RISE program.

(i) The rural jobs accelerator partnership must have a lead applicant who is responsible for the administration of the grant proceeds and activities. A lead applicant will be the named applicant on Agency documents and must be one of the following entities:

(a) A district organization;

(b) An Indian Tribe, or a consortium of Indian Tribes;

(c) A state or a political subdivision of a state, including a special purpose unit of a State or local government engaged in economic development activities, or a consortium of political subdivisions;

(d) An institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) or a consortium of institutions of higher education; or

(e) A public or private nonprofit organization.

(ii) Additional eligibility requirements you must meet are as follows:

(a) An applicant is not eligible if they have been debarred or suspended or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.'' The Agency will check the System for Award Management (SAM) at the time of application and prior to funding any grant award to determine if the applicant has been debarred or suspended. In addition, an applicant will be considered ineligible for a grant due to an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court), is delinquent on the payment of Federal income taxes, or is delinquent on Federal debt. See 7 CFR 4284.6. The applicant must certify as part of the application that they do not have an outstanding judgment against them. The Agency will check the Do Not Pay System at the time of application and also prior to funding any grant award to verify this information.

(b) Any corporation that has been convicted of a felony criminal violation under any Federal law within the past 24 months or that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, is not eligible for financial assistance provided with funds appropriated by an Appropriations Act for FY 2022, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

(c) Applications will be deemed ineligible if the application includes any funding restrictions identified under Section D.6(a) and (b) of this notice. Inclusion of funding restrictions outlined in Section D.6(a) and (b) of this notice precludes the Agency from making a federal award.

(d) Applications will be deemed ineligible if the application is not complete in accordance with the requirements stated in Section C.3.

(e) The Lead Applicant must be registered in the System for Award Management (SAM) prior to submitting an application. The Lead Applicant must also maintain an active SAM registration with current information at all times during which it has an active Federal award or an application under consideration by the Agency. All other restrictions in this notice will apply.

2. Cost Sharing or Matching

Your matching funds requirement is 20 percent of the eligible project costs of any activity carried out using RISE grant funds. Matching funds must be available throughout the grant term and applied individually to each RISE activity. Grant funds may only be used for up to 80 percent of an eligible RISE activity. Additional information on matching funds is found at 7 CFR 4284.1114. When you calculate your matching funds requirement, please round up or down to whole dollars as appropriate. To calculate your matching funds requirement, multiply your total eligible project costs of each eligible RISE activity by 0.20. The amount of matching funds required for your RISE activities is then added together to attain the total amount of non-Federal matching funds required for your project. Applications that only provide matching funds equal to 20 percent of the grant amount will be deemed ineligible due to an insufficient matching funds amount.

You must provide a written commitment of match funds to verify that all matching funds are available during the grant period and provide this documentation with your application in accordance with requirements identified in Section D.2 of this notice. If you are awarded a grant, additional verification documentation may be required to confirm the availability of matching funds for the duration of the grant term.

Matching funds must meet all of the following:

(a) They must be spent on eligible expenses during the grant period.

(b) They must be from eligible sources.

(c) They must be spent in advance or as a pro-rata portion of grant funds being spent.

(d) They must be provided by either the applicant or a third party in the form of cash or an in-kind contribution.

(e) They cannot include other Federal grants unless provided by authorizing legislation.

(f) They cannot include cash or in-kind contributions donated outside of the grant period.

(g) They cannot include over-valued, in-kind contributions.

(h) They cannot include any project costs that are ineligible under the RISE program.

(i) They cannot include any project costs that are restricted or unallowable under 2 CFR part 200, subpart E, and the Federal Acquisition Regulation (for-profits) or successor regulation.

(j) They can include reasonable and customary travel expenses for staff delivering the RISE program if you have established written policies explaining how these costs are normally reimbursed, including rates. You must include an explanation of this policy in your application or the contributions will not be considered as eligible matching funds.

(k) You must be able to document and verify the number of hours worked and the value associated with any in-kind contribution being used to meet a matching funds requirement.

(l) In-kind contributions provided by individuals, businesses, or cooperatives which are being assisted by you cannot be provided for the direct benefit of their own projects as the Agency considers this to be a conflict of interest or the appearance of a conflict of interest.

3. Other Eligibility Requirements

(a) Completeness

Your application will not be considered for funding if it fails to meet an eligibility criterion by the time of application deadline or does not provide sufficient information to determine eligibility and scoring. You must include all the forms and proposal elements as discussed in the regulation and as clarified further in this notice in one package. Incomplete applications will not be reviewed by the Agency. For more information on what is required for a complete application, see 7 CFR 4284.1115.

(b) Purpose Eligibility

Your application must propose the establishment of an innovation center and/or costs directly related to operations of an innovation center and/or costs directly associated with support of programs to be carried out at or in direct partnership with job accelerators as outlined in 7 CFR 4284.1113. The Applicant project outcome must accelerate the formation of new

businesses with high-growth potential, improve the ability of rural businesses and distressed rural communities to create high-wage jobs, and strengthen rural regional economies. You must use project funds, including grant and matching funds, for eligible purposes only as outlined in 7 CFR 4284.1114.

(c) Project Eligibility

All project activities must be for the benefit of communities, industries and residents located in a rural area, as defined. The Applicant is cautioned against taking any actions or incurring any obligations prior to the Agency completing the environmental review that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction. If the Applicant takes any such actions or incurs any such obligations, it could result in project ineligibility. Projects involving the construction of an innovation center as an eligible purpose are subject to the environmental requirements of 7 CFR part 1970, as well as the applicable design and construction requirements of Rural Development and the adopted codes of the jurisdiction.

(d) Multiple Application Eligibility

Only one application can be submitted per applicant, who is defined as a lead applicant as found in 7 CFR 4282.1112(b). If two applications are submitted by the same lead applicant, both applications will be deemed ineligible for funding.

(e) Grant Period

Your application must include a cost and performance plan for no more than a four-year grant period, or it will not be considered for funding. The grant period should begin no earlier than September 15, 2022, and no later than January 1, 2023. Applications that request funds for a project with a performance period ending after December 31, 2026, will not be considered for funding. Projects must be completed within a four-year timeframe. Prior approval is needed from the Agency if you are awarded a grant and desire the grant period to begin earlier or later than previously discussed or approved.

The Agency may approve requests to extend the grant period for up to an additional two-year period at its discretion. Further guidance on grant period extensions will be provided in the award document.

D. Application and Submission Information

1. Application Information

For further information and program materials, including an Application Template, you should contact the Rural Development National Office and/or review the program website at *https://www.rd.usda.gov/programs-services/business-programs/rural-innovation-stronger-economy-rise-grants.*

2. Content and Form of Application Submission

Applicants may only submit one RISE grant application each Federal Fiscal Year. You must submit your application electronically through *Grants.gov.* Applications submitted to the Agency in any format outside of *Grants.gov* will not be considered for funding. You are encouraged, but not required to utilize an optional-use application template found at *https://www.rd.usda.gov/programs-services/business-programs/rural-innovation-stronger-economy-rise-grants.* The Application Template provides specific, detailed instructions for each item of a complete application. The Agency emphasizes the importance of including every item and strongly encourages applicants to follow the instructions carefully, using the examples and illustrations in the Application Template.

(a) Electronic Submission

You can locate the *Grants.gov* downloadable application package for this program by using a keyword, the program name, or the Catalog of Federal Domestic Assistance Number 10.755 for this program.

When you enter the *Grants.gov* website, you will find information about applying electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through *Grants.gov.* Applicants are also encouraged to review all application requirements of 7 CFR 4284.1115 prior to preparing or submitting their application.

There are no specific limitations on the number of pages or other formatting requirements of an application, but a complete application should be in a narrative form using a minimum of 11-point font and will at a minimum include all information required in a concept proposal as stated in 7 CFR 4284.1115(a). The narrative must clearly describe the jobs accelerator partnership, characteristics of the targeted region and targeted industry cluster(s), and how the project meets the RISE program initiatives.

(b) Concept Proposal

A potential applicant for RISE is strongly encouraged to submit a concept proposal for review by the Agency not less than 60 days in advance of the application submittal deadline. The concept proposal should be in a narrative format up to 10 pages in length using a minimum of 11-point font and submitted electronically by email to: *SM.RISE-RD.RISE@usda.gov.* The concept proposal must include all items stated in 7 CFR 4284.1115(a). The concept proposal will be evaluated by the Agency and an encouragement or discouragement letter will be issued to the potential applicant. If a discouragement letter is issued, it will detail any weaknesses evaluated in the Agency's review, though a complete application may still be submitted prior to the application deadline. Applicants who submit a concept proposal to the Agency will not need to resubmit the same information with their application. However, submission of a concept proposal is not an application for program funds.

3. Dun and Bradstreet Data Universal Numbering System (or Unique Entity Identifier) and System for Award Management

All applicants must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number which can be obtained at no cost via a toll-free request line at (866) 705–5711 or at *https://fedgov.dnb.com/webform.*

(i) Each applicant applying for loan or grant funds must (A) be registered in the System for Award Management (SAM) before submitting its application and (B) provide a valid unique entity identifier in its application, unless determined exempt under 2 CFR 25.110.

(ii) Applicant must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an application under consideration by a Federal awarding agency.

(iii) Applicant must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

(iv) The Agency will not make an award until the applicant has complied with all applicable DUNS (unique entity identifier) and SAM requirements. If an applicant has not fully complied with the requirements by the time the Agency is ready to make an award, the Agency may determine that the applicant is not qualified to receive a Federal award and

use that determination as a basis for making a Federal award to another applicant.

4. Submission Date and Time

Explanation of Deadline: Completed applications must be submitted electronically through *Grants.gov* by no later than 11:59 p.m. Eastern Time, April 19, 2022, to be eligible for grant funding. Please review the *Grants.gov* website for instructions on the process of registering your organization as soon as possible to ensure that you can meet the electronic application deadline. *Grants.gov* will not accept applications submitted after the deadline. Please see *https://grants.gov/applicants/organization_registration.jsp* for instructions on the process of registering your organization as soon as possible to ensure that you can meet the electronic application deadline. *Grants.gov* will not accept applications submitted after the deadline.

Potential applicants may electronically submit a concept proposal for review by the Agency to: *SM.RISE-RD.RISE@usda.gov* no later than February 18, 2022 in compliance with 7 CFR 4294.1115(a) and as stated in Section D, 2(b) of this Notice. Submission of a concept proposal is not an application for program funds.

5. Intergovernmental Review of Applications

Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' does not apply to this program.

6. Funding Restrictions

(a) Project funds, including grant and matching funds, cannot be used for ineligible grant purposes as stated in 7 CFR 4284.1114, 2 CFR part 200, subpart E, ''Cost Principles,'' and the most current Federal Acquisition Regulation (for-profits) or successor regulations.

(b) In addition, your application will not be considered for funding if it does any of the following:

(i) Focuses assistance on only one business;

(ii) Requests less than the minimum grant amount or more than the maximum grant amount;

(iii) The project budget includes administrative costs in excess of 10 percent of the grant amount; or

(iv) Grant funds will be passed through to a member of the partnership in the form of lease payments or other activities with a conflict of interest or appearance thereof.

7. Other Submission Requirements

(a) You should not submit your application in more than one format or in more than one submission. You must submit your application electronically. Note that we cannot accept applications through mail or courier delivery, in-person delivery, email, or fax. To submit an application electronically, you must follow the instruction for this funding announcement at *http://www.grants.gov.* A password is not required to access the website.

(b) National Environmental Policy Act

All recipients under this notice are subject to the requirements of 7 CFR part 1970. However, technical assistance awards under this notice are classified as a Categorical Exclusion according to 7 CFR 1970.53(b), and usually do not require any additional documentation.

The Agency will review each grant application to determine its compliance with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist the Agency with this determination.

(c) Civil Rights Compliance Requirements

All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A), and Section 504 of the Rehabilitation Act of 1973.

E. Application Review Information

1. Criteria

Eligible applicant partnerships formed after December 20, 2018, will use Agency grant funds to provide financial assistance in support of innovation centers and job accelerator programs that improve the ability of distressed rural communities to create high-wage jobs, accelerate the formation of new businesses, and help rural communities identify and maximize local assets.

2. Review and Selection Process

The National Office will review applications to determine if they are eligible for assistance based on requirements in 7 CFR part 4284, subpart L, this notice, and other applicable Federal regulations. If determined eligible, your application will be scored by a panel of USDA employees in accordance with the point allocation and scoring criteria published at 7 CFR 4284.1117. Applications will be funded in rank order from highest to lowest score until the available funding has been exhausted. Applications that cannot be fully funded may be offered partial funding at the Agency's discretion.

If your application is evaluated as an eligible project, but not funded, it will not be carried forward into the next competition.

F. Federal Award Administration Information

1. Federal Award Notices

If you are selected for funding, you will receive a signed notice of Federal award by postal or electronic mail from the USDA Rural Development State Office where your application was submitted, containing instructions and requirements necessary to proceed with execution and performance of the award. You must comply with all applicable statutes, regulations, and notice requirements before the grant award will be funded.

If you are not selected for funding, you will be notified in writing via postal or electronic mail and informed of any review and appeal rights. See 7 CFR part 11 for USDA National Appeals Division procedures. We anticipate that there will be no available funds for successful appellants once all FY 2022 funds, if available, are awarded and obligated.

2. Administrative and National Policy Requirements

Additional requirements that apply to grantees selected for this program can be found in 7 CFR part 4284, subpart L; the Grants and Agreements regulations of the Department of Agriculture codified in 2 CFR parts 180, 400, 415, 417, 418, 421; 2 CFR parts 25 and 170; and 48 CFR 31.2, and successor regulations to these parts.

In addition, all recipients of Federal financial assistance are required to report information about first-tier subawards and executive compensation (see 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282) reporting requirements (see 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

The following additional requirements apply to grantees selected for awards within this program:

(a) Execution of an Agency-approved financial assistance agreement;

(b) Acceptance of a written letter of conditions; and submission of the following Agency forms:

(1) Form RD 1940–1, ''Request for Obligation of Funds.''

(2) Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

(3) Form RD 400–1 for construction projects.

3. Reporting

After grant approval and through grant completion, you will be required to provide an SF–425, ''Federal Financial Report,'' and a performance report on a semiannual basis (due 30 working days after end of the semiannual period) for the first two years, and then annually thereafter, with the first report submitted no later than six months after receiving a grant under this section. The project performance reports shall include all items listed in paragraph (h)(2) under 7 CFR 4284.1120.

G. Agency Contacts

If you have questions about this notice, please contact the Rural Development National Office by email at: *SM.USDA-RD.RISE@usda.gov*. Program guidance as well as application and matching funds templates may be obtained at: *https://www.rd.usda.gov/programs-services/business-programs/rural-innovation-stronger-economy-rise-grants.* If you want to submit an electronic application, follow the instructions for the RISE funding announcement located at *http://www.grants.gov.* You may also contact the National Office Program Management Division at *USDA-RD.RISE@usda.gov.*

H. Other Information

1. Paperwork Reduction Act. In accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with the programs, as covered in this notice, have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0075.

2. National Environmental Policy Act. All recipients under this Notice are subject to the requirements of 7 CFR part 1970.

3. Nondiscrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Mission Area, agency or staff office, the USDA TARGET Center, at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at: *https://www.ocio.usda.gov/document/ad-3027,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* United States Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Karama Neal,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2021–27447 Filed 12–17–21; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Comprehensive Economic Development Strategies

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on October 13, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Economic Development Administration (EDA), Commerce.

Title: Comprehensive Economic Development Strategies.

OMB Control Number: 0610–0093.

Form Number(s): None.

Type of Request: Regular submission; Extension without change of a currently approved information collection.

Number of Respondents: 527.

Average Hours per Response: 480 hours for the initial CEDS for a District Organization or other planning organization funded by EDA; 160 hours for the CEDS revision required at least every 5 years from an EDA-funded District or other planning organization; 40 hours per CEDS update and performance report; and 40 hours per applicant for EDA Public Works or Economic Adjustment Assistance with a project deemed by EDA to merit further consideration that is not located in an EDA-funded District.

Burden Hours: 31,640 hours.

Type of response	Number of respondents	Average hours per response	Estimated burden hours
Initial CEDS	3	480	1,440
Revised CEDS	77	160	12,320
CEDS Updates/Performance Reports	385	40	15,400
CEDS by applicants not in EDA-funded District	62	40	2,480
Total	527	.....	31,640

Needs and Uses: To effectively administer and monitor its economic development assistance programs, EDA collects certain information from applications for, and recipients of, EDA investment assistance. A Comprehensive Economic Development Strategy (CEDS) emerges from a continuing planning process developed and driven by a public sector planning organization by engaging a broad-based and diverse set of stakeholders to address the economic problems and potential of a region. The CEDS should include information about how and to what extent stakeholder input and support was solicited. Information on how the planning organization collaborated with its diverse set of stakeholders (including the public sector, private interests, non-profits, educational institutions, and community organizations) in the development of the CEDS should be included. In accordance with 13 CFR 303.7(b), a CEDS must contain a summary background, a SWOT (Strengths, Weaknesses, Opportunities, and Threats) Analysis, Strategic Direction/Action Plan, and an Evaluation Framework. In addition, the CEDS must incorporate the concept of economic resilience (*i.e.,* the ability to avoid, withstand, and recover from economic shifts, natural disasters, etc.). A CEDS is required for an eligible applicant to qualify for an EDA investment assistance under EDA's Public Works program, Economic Adjustment Assistance program, and certain planning programs, and is a prerequisite for a region's designation by EDA as an Economic Development District (see 13 CFR part 303, 13 CFR 305.2, and 13 CFR 307.2). EDA collects information under this information collection to ensure compliance with EDA's CEDS requirements.

Affected Public: (1) Cities or other political subdivisions of a State, including a special purpose unit of state or local government engaged in economic or infrastructure development activities; (2) States; (3) institutions of higher education; (4) public or private non-profit organizations or associations; (5) District Organizations; and (6) Indian Tribes.

Frequency: Planning Organizations must submit a new or revised CEDS to EDA at least every five years, unless EDA or the Planning Organization determines that a new or revised CEDS is required earlier due to changed circumstances.

Respondent's Obligation: Mandatory.

Legal Authority: The Public Works and Economic Development Act of 1965 (42 U.S.C. 3121 et seq).

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0610–0093.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–27446 Filed 12–17–21; 8:45 am]

BILLING CODE 3510–34–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–59–2021]

Foreign-Trade Zone (FTZ) 104—Savannah, Georgia; Authorization of Production Activity; Savannah Yacht Center Inc. (Repair of Yachts, Sailboats, and Boat Tenders); Savannah, Georgia

On August 17, 2021, Savannah Yacht Center Inc. (SYC) submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 104J, in Savannah, Georgia.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (86 FR 47294, August 24, 2021). On December 15, 2021, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: December 15, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–27442 Filed 12–17–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB633]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a one-and-a-half-day hybrid (in-person/virtual) meeting of its Reef Fish Advisory Panel (AP).

DATES: The meeting will take place Wednesday, January 5, 2022, from 9 a.m. to 5:30 p.m. and Thursday, January 6, 2022, from 9 a.m. to 12 p.m., EST.

ADDRESSES: The in-person meeting will take place at the Gulf Council office. If you do not wish to travel, you may attend via webinar. Registration information will be available on the Council's website by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

Council address: Gulf of Mexico Fishery Management Council, 4107 W. Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Rindone, Lead Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Wednesday, January 5, 2022; 9 a.m.–5:30 p.m., EST

The meeting will begin with Introductions of Members and Adoption of Agenda, Election of New Chair and Vice Chair, Approval of Minutes and Meeting Summary from the February 24, 2021 webinar meeting, review of Scope of Work and Reef Fish and IFQ Program Landings.

The AP will review and discuss SEDAR 72: Gulf of Mexico Gag Grouper Stock Assessment, SEDAR 68: Gulf of Mexico Scamp Stock Assessment, and SEDAR 70: Gulf of Mexico Greater Amberjack Projections; including presentations, projections and SSC Recommendations for Overfishing Limits (OFL) and Acceptable Biological Catch (ABC), Something's Fishy, AP Recommendations, Stock Assessment Reports, Stock Assessment Executive Summaries, and SSC Meeting Summaries.

The AP will review Draft Snapper Grouper Amendment 44/Reef Fish

Amendment 55: Modifications to the Southeastern U.S. Yellowtail Snapper Catch Limits, Jurisdictional Allocation, South Atlantic Sector Allocation, and South Atlantic Commercial Management Measures, including a presentation, document and AP Recommendations.

The AP will hold a discussion on Southeast For-Hire Integrated Electronic Reporting Program Proposed Rule Changes; including discussion of COLREGS, autofill reporting, the Data Collection AP Summary Report for September 2021, October 2021 Council Data Collection Committee Report and AP Recommendations. Next the AP will discuss the Framework Action: Modification to Location Reporting Requirements for For-Hire Vessels; including Data Collection AP Summary Report for September 2021, October 2021 Council Data Collection Committee Report and AP Recommendations.

Thursday, January 6, 2022; 9 a.m.–12 p.m., EST

The AP will review the Draft Framework Action: Modifications to Vermilion Snapper Overfishing Limit, Acceptable Biological Catch and Annual Catch Limits. The AP will then review Updates to the Commercial Electronic Logbook Program.

Lastly, the AP will receive Public Comment and discuss any Other Business items, including the retention of reef fish by captain and crew.

—Meeting Adjourns

The meeting will be also be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the Advisory Panel meeting on the calendar. The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Advisory Panel will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take-action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Pereira, (813) 348–1630, at least 5 days prior to the meeting date.

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

Dated: December 8, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–27463 Filed 12–17–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2021–0051]

USPTO To Begin Issuing Electronic Trademark Registration Certificates

Correction

In Notice document 2021–27116, appearing on pages 71249 through 71250, in the issue of Wednesday, December 15, 2021, make the following correction:

On page 71249, in the third column, in the standard heading titled ''**DATES:**'', the date reading ''December 15, 2021'' should read ''January 14, 2022''.

[FR Doc. C1–2021–27116 Filed 12–17–21; 8:45 am]

BILLING CODE 0099–10–D

The Committee for Purchase From People Who Are Blind or Severely Disabled

Quarterly Public Meeting

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice of public meeting.

SUMMARY: The Committee is announcing a virtual public meeting to be held February 10, 2022.

DATES: *Registration is due no later than:* February 8, 2022.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Angela Phifer, Telephone: (703) 798–5873 or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to register to attend a public meeting.

Summary: This notice provides information to access and participate in the February 10, 2022 regular quarterly public meeting of the Committee for Purchase From People Who Are Blind or Severely Disabled, operating as the U.S. AbilityOne Commission (Commission), via webinar. The Commission oversees the AbilityOne Program, which provides employment opportunities through federal contracts for people who are blind or have significant disabilities in the manufacture and delivery of products and services to the Federal Government. The Javits-Wagner-O'Day Act (41 U.S.C. Chapter 85) authorizes the contracts and established 15 Presidential appointees, including private citizens conversant with the employment interests and concerns of people who are blind or significantly disabled. Presidential appointees also include representatives of federal agencies. The public meetings include updates from the Commission and staff.

Date and Time: February 10, 2022, from 1:00 p.m. to 4:00 p.m., ET.

Place: This meeting will occur via Zoom webinar.

Commission Statement: As the Commission implements new strategies and priorities, we are committed to public meetings that provide substantive information. These meetings also provide an opportunity for input from the disability community and other stakeholders. For the meeting on February 10, 2022, the Commission invites comments or suggestions regarding:

1. The Individual Eligibility Evaluation (IEE) forms used by the Commission as documentation of significant disability.

2. Third party certification or verification of significant disability.

Registration: Attendees must register not later than 11:59 p.m. EDT on Tuesday, February 8, 2022. The registration link will be accessible on the Commission's home page, *www.abilityone.gov,* not later than Monday, January 10, 2022. During registration, you may choose to submit comments, or you may request speaking time at the meeting. Comments submitted via the registration link will be reviewed with the Commission members prior to the meeting. The Commission may invite some attendees who submit advance comments to speak to their comments during the meeting. Comments posted in the chat box during the meeting will be shared with the Commission members after the meeting.

Personal Information: Do not include any information that you do not want publicly disclosed.

For Further Information, Contact: Angela Phifer, (703) 798–5873.

The Commission is not subject to the requirements of 5 U.S.C. 552(b); however, the Commission published this notice to encourage the broadest possible participation in its February 10, 2022 public meeting.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2021–27391 Filed 12–17–21; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket Number CPSC–2021–0036]

Privacy Act of 1974; System of Records

AGENCY: Consumer Product Safety Commission (US CPSC).

ACTION: Notice of a new system of records.

SUMMARY: A system for the US CPSC's Consumer Ombudsman to track public inquiries.

DATES: Comments must be received no later than January 19, 2022. The new system of records will be effective on January 20, 2022, unless CPSC receives comments that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2021–0036, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *http://www.regulations.gov.* Follow the instructions for submitting comments. The Commission does not accept comments submitted by electronic mail (email), except through *www.regulations.gov.* The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions in the following way: Mail/hand delivery/courier to: Office of the General Counsel Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7264.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to: *http://www.regulations.gov,* and insert the docket number, CPSC–2021–, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Nina DiPadova, General Attorney, U.S. Consumer Product Safety Commission, Office of the General Counsel, Division of the Secretariat, phone: 301–504–7264, 4330 East West Highway, Bethesda MD 20814.

SUPPLEMENTARY INFORMATION:

SYSTEM NAME AND NUMBER:

Consumer Ombudsman Inquiry Database, CPSC–2021–.

SECURITY CLASSIFICATION:

Not Classified.

SYSTEM LOCATION:

U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814.

SYSTEM MANAGER(S):

Consumer Ombudsman, 4330 East West Highway, Bethesda, MD, 20814, 301–504–8120, *consumerombudsman@cpsc.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S. Code § 301

PURPOSE(S) OF THE SYSTEM:

The CPSC uses this system to store, track, and manage inquiries received by the Consumer Ombudsman from members of the public at large. These inquiries may include PII from individuals who contacted the Commission concerning product safety issues affecting them, *e.g.,* telephone number and address.[1]

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Members of the public-at-large, who have contacted the Commission with a product safety concern or question.

CATEGORIES OF RECORDS IN THE SYSTEM:

Members of the public-at-large: Individual's name, home address, home telephone number(s), personal cell phone number(s), electronic email address, and other miscellaneous information that an individual may include in a comment or questions to the CPSC.

[1] The Commission voted unanimously (4–0) to publish this notice.

RECORD SOURCE CATEGORIES:

Records can be submitted by direct phone call, electronic mail, Information Center referral, staff referral, or website input.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Staff uses the information in the system to reply to consumer inquiries through electronic mail, telephone, or postal mail.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The information in this system includes paper documents, records, and files that are stored in cabinets, and electronic records, files, and data that are stored in the Commission's computer network databases.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Paper records can be filed and retrieved by the name of the inquirer or by other indicia. Computer records are indexed by, and retrievable by, date of submission, names, and other indicia.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The agency's Office of the General Counsel, Division of the Secretariat and the National Archives and Records Administration will determine a records schedule for this system, which will be an agency-specific records schedule with retention periods determined with a set period, along with an option to retain for longer periods, if necessary, for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The CPSC computer network databases are protected by security protocols, which include controlled access, passwords, and other security features. Paper documents will be secured in a locked office. The agency IT staff limits access to the system by putting users into predefined user roles with specific permissions for each role that dictates what abilities each user has on the system. Once a user is logged into the system, the software records when each visit occurred and logs every page and action performed on each site with the user's corresponding IP address. Only staff having an IT duty will be given permission in their user roles to access the system. IT staff have documented controls governing access to the system, which require manager approval. However, each accessing event does not require manager approval. Once a user has been assigned a role that allows access, then the

individual can access the system, as needed.

RECORD ACCESS PROCEDURES:

Consumer Ombudsman, 4330 East West Highway, Bethesda, MD, 20814, 301–504–8120, *consumerombudsman@cpsc.gov.*

CONTESTING RECORD PROCEDURES:

Consumer Ombudsman, 4330 East West Highway, Bethesda, MD, 20814, 301–504–8120, *consumerombudsman@cpsc.gov.*

NOTIFICATION PROCEDURES:

Consumer Ombudsman, 4330 East West Highway, Bethesda, MD, 20814, 301–504–8120, *consumerombudsman@cpsc.gov.*

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

N/A—This is a new SORN for a new system.

Dated: December 14, 2021.

Alberta Mills,

Secretary.

[FR Doc. 2021–27440 Filed 12–17–21; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket Number CPSC–2021–0035]

Privacy Act of 1974; System of Records

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of modified system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, the Consumer Product Safety Commission (CPSC) is proposing changes to one system of records notice (SORN). CPSC is proposing to amend CPSC 23—Equal Employment Opportunity (EEO) Disability/Accommodation Files. The amendment will expand the authorities for maintenance of the system, the purposes of the system, the categories of individuals covered by the system, the record source categories, and the records contained in the system, to include records of requests for accommodation based on sincerely held religious beliefs, practices, or observances.

DATES: Comments must be received no later than January 19, 2022. The modified system of records described here will become effective January 19, 2022.

ADDRESSES: Comments, identified by Docket No. CPSC–2021–0035, can be submitted electronically or in writing:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *http://www.regulations.gov.* Follow the instructions for submitting comments. CPSC does not accept comments submitted by electronic mail (email), except through *www.regulations.gov.* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, described above.

Written Submissions: Submit written submissions by Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions) to the Office of the General Counsel, Division of the Secretariat, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (800) 638–2772.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to: *http://www.regulations.gov,* including any personal information provided. Do not submit electronically any confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to provide such information, please submit it in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, CPSC–2021–0034, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Abioye Mosheim, Assistant General Counsel, Consumer Product Safety Commission, Office of the General Counsel, Division of the Secretariat, telephone 301–504–7454, 4330 East West Highway, Bethesda MD 20814.

SUPPLEMENTARY INFORMATION: CPSC is proposing to amend the authorities for maintenance of the system, purposes of the system, the categories of records contained in the system, the categories of individuals covered by the system, the record source categories, a citation in the Routine Uses section, a citation in the Record Access Procedures section, and a citation in the Contesting Records Procedures section of CPSC 23—Equal Employment Opportunity (EE) Disability/Accommodation Files.[1]

CPSC is updating the System Location by adding, ''U.S.'' to agency's title.

[1] The Commission voted unanimously (4–0) to publish this notice.

CPSC expanded the Categories of Individuals Covered by the System beyond the Rehabilitation Act and the Americans with Disabilities Act to include ''race, color, religion, sex (including gender identity and pregnancy), national origin, disability, age, genetic information, sexual orientation, parental status, and/or any basis covered by Executive Order 11478.'' Categories of Records in the System now includes supporting documentation, in addition to correspondence. The Authority Section was expanded beyond the Rehabilitation Act and the Americans with Disabilities Act to include Title VII of the Civil Rights Act, relevant Executive Orders, and CPSC's EEO Directive. The Purposes were expanded to cover religious beliefs, in addition to disabilities, as well as prospective, current, and former employees; and to provide more detail. The Routine Uses now refer to the 12 exceptions found in the Privacy Act, as well as additional circumstances that require sharing information with external entities, including medical personnel, other federal agencies not already referenced in the Privacy Act exceptions, and contractors. The Retention section was changed to refer generally to the National Archives and Record Administration applicable records-retention requirements if the timeframe changes later. Other minor changes were made, including formatting and title corrections.

CPSC sent a report to Congress and the Office of Management and Budget for their evaluation.

For the public's convenience, CPSC's amended system of records is published in full below, with changes italicized.

SYSTEM NAME AND NUMBER:

CPSC–23, Equal Employment Opportunity (EEO) Disability/Accommodation Files.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Office of Equal Employment Opportunity and Minority Enterprise, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814.

SYSTEM MANAGER(S):

Director, Office of Equal Employment Opportunity and Minority Enterprise, *U.S.* Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), Executive Order 13991, Protecting the Federal Workforce and Requiring Mask-Wearing (Jan. 20, 2021), Executive Order 12196, Occupational Safety and Health Program for Federal Employees (Feb. 26, 1980), Executive Order 11478 (Aug. 8, 1969), 5 U.S.C. chapters 11 and 79, the Rehabilitation Act, 29 U.S.C. 794, the Americans with Disabilities Act, 42 U.S.C. 12101, *Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and CPSC's Directive on Equal Employment Opportunity and Procedures for Filing Complaints of Discrimination.*

PURPOSES OF THE SYSTEM:

The purposes of this system are: (1) To allow CPSC to collect and maintain records on prospective, current, and former employees with disabilities or sincerely held religious beliefs, practices, or observances who requested or received reasonable accommodation by CPSC; (2) to track and report the processing of requests for reasonable accommodation at CPSC to comply with applicable law and regulations; and (3) to maintain the confidentiality of medical or religious information submitted by or on behalf of applicants or employees requesting reasonable accommodation.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals, classes of individuals, or representatives designated to act on behalf of CPSC employees, former employees, or applicants for employment who have (1) consulted with an Equal Employment Opportunity (EEO) counselor and/or (2) who have filed a formal complaint alleging discrimination on the basis of race, color, religion, sex (including gender identity and pregnancy), national origin, disability, age, genetic information, sexual orientation, parental status and/or any basis covered by Executive Order 11478, because of a determination, decision, action, or non-action administered against them by a departmental official, as well as individuals alleging reprisal for having previously participated in EEO activity and/or (3) who have filed a request for a medical or religious reasonable accommodation.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence and *supporting documentation* submitted to the Commission to request reasonable accommodations. *Records contain information such as* name, address, city, state, telephone number and other pertinent information related to *the individual's request for reasonable accommodation.*

RECORD SOURCE CATEGORIES:

Information in these records is furnished by: (1) Individual to whom the record pertains; (2) *CPSC* officials; (3) affidavits or statements from employee; (4) testimonies of witnesses; (5) official documents relating to appeals, grievances, or complaints; (6) correspondence from specific organizations or persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information about covered individuals may be disclosed without consent as permitted by the *Privacy Act of 1974, 5 U.S.C. 552a(b), and:*

1. To physicians or other medical professionals to provide them with or obtain from them the necessary medical documentation and/or certification for reasonable accommodation.

2. *To another federal agency or commission with responsibility for labor or employment relations or other issues, including equal employment opportunity and reasonable accommodation issues, when that agency or commission has jurisdiction over reasonable accommodation issues.*

3. *To the Office of Management and Budget (OMB), Department of Labor (DOL), Office of Personnel Management (OPM), Equal Employment Opportunity Commission (EEOC), or Office of Special Counsel (OSC) to obtain advice regarding statutory, regulatory, policy, and other requirements related to reasonable accommodations.*

4. *To appropriate third-parties contracted by the Agency to facilitate mediation or other dispute resolution procedures or programs.*

5. *To the Department of Defense (DOD) for purposes of procuring assistive technologies and services through the Computer/Electronic Accommodation Program in response to a request for reasonable accommodation.*

6. *To appropriate agencies, entities, and persons when (1) CPSC suspects or has confirmed that there has been a breach of the system of records, (2) CPSC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, CPSC (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with CPSC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.*

7. *To another Federal agency or Federal entity, when CPSC determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.*

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records will be maintained in hard copy in file folders or on computer disk/drive.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records will be indexed and retrieved by name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained and destroyed in accordance with the National Archives and Record Administration's (NARA) Basic Laws and Authorities (44 U.S.C. 3301, *et seq.*) or a CPSC records disposition schedule approved by NARA. Records existing on paper are destroyed beyond recognition.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are maintained in locked/*password protected* files in a secured *environment;* access is limited to those persons whose official duties require such access.

RECORD ACCESS PROCEDURES:

CPSC's access and amendment regulations are found at 16 CFR part 1014. Inquiries should be sent to CPSC's Chief FOIA Officer, Office of the *General Counsel, Division of the* Secretariat, *U.S.* Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814.

CONTESTING RECORD PROCEDURES:

Same as notification.

NOTIFICATION PROCEDURES:

Same as notification.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

CPSC–23, Equal Employment Opportunity (EEO) Disability/

Accommodation files (last published at 77 FR 29596 (May 18, 2012)).

Dated: December 14, 2021.

Alberta Mills,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2021–27438 Filed 12–17–21; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0169]

Agency Information Collection Activities; Comment Request; School Pulse Panel Data Collection Winter Collections Revision

AGENCY: Institute of Educational Science (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: Approval by the OMB has been requested by or before [December 17, 2021]. Interested persons are invited to submit comments on or January 19, 2022.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0169. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel Data Collection Activities.

OMB Control Number: 1850–0963.

Type of Review: A revision of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 17,280.

Total Estimated Number of Annual Burden Hours: 4,752.

Abstract: The School Pulse Panel is a new study conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education, to collect extensive data on issues concerning the impact of the COVID–19 pandemic on students and staff in U.S. public primary, middle, high, and combined-grade schools. The survey will ask school district staff and sampled school principals about topics such as instructional mode offered; enrollment counts of subgroups of students using various instructional modes; learning loss mitigation strategies; safe and healthy school mitigation strategies; special education services; use of technology; use of federal relief funds; and information on staffing. Because this data collection is extremely high priority and time sensitive, it will undergo Emergency Clearance. Because this data collection is extremely high priority and time sensitive, it will undergo Emergency Clearance. It will not go through a 60-day public comment period and will only undergo a 30-day public comment period after clearance has been granted. NCES has also submitted a parallel ICR package to undergo the usual 60-day and 30-day clearance processes so that data collection can continue beyond the expiration of the emergency clearance.

The administration of the School Pulse Panel study is in direct response to President Biden's Executive Order 14000: Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers. It will be one of the nation's few sources of reliable data on a wealth of information focused on school reopening efforts, virus spread mitigation strategies, services offered for students and staff, and technology use, as reported by school district staff and principals in U.S. public schools. About 1,200 public elementary, middle, high, and combined-grade schools will be selected to participate in a panel where school and district staff will be asked to provide requested data monthly during the 2021–22 school years. This approach provides the ability to collect detailed information on various topics while also assessing changes in reopening efforts over time. Given the high demand for data collection during this time, the content of the survey may change on a quarterly basis.

Emergency Justification: In October 2021, the SPP was suspended for the months of October, November, and December due to low response rates for the first month of the collection (OMB 1850–0963 v6). During that pause, the Institute of Education Sciences used that time to redesign the study to improve response rates. A primary strategy for that was to reduce burden in each month's collection and to rotate content to address data needs of the agencies across months. Additionally, we are actively recruiting schools in a more comprehensive manner in order to start the January collection with a more robust, committed panel of schools. This submission includes planned communication materials and items to be collected in January, February, and March. The SPP study itself is extremely important particularly now that COVID–19 has not waned, and the pulse model is one that the agency will need after the pandemic subsides for other quick-turnaround data needs.

Dated: December 15, 2021.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division Office of Chief Data Officer Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–27476 Filed 12–17–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Statewide Family Engagement Centers

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2022 for the Statewide Family Engagement Centers (SFEC) program, Assistance Listing Number (ALN) 84.310A. This notice relates to the approved information collection under the Office of Management and Budget (OMB) control number 1894–0006.

DATES:

Applications Available: December 20, 2021.

Deadline for Transmittal of Applications: February 18, 2022.

Deadline for Intergovernmental Review: April 19, 2022.

Pre-Application Webinar Information: For information about the pre-application webinar, visit the SFEC website at: *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/school-choice-improvement-programs/statewide-family-engagement-centers-program/.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Beth Yeh, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E335, Washington, DC 20202–5970. Telephone: (202) 205–5798. Email: *beth.yeh@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:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The SFEC program is authorized under title IV, part E of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The purpose of the SFEC program is to provide financial support to organizations that provide technical assistance and training to State educational agencies (SEAs) (as defined in the notice) and local educational agencies (LEAs) (as defined in the notice) in the implementation and enhancement of systemic and effective family engagement policies, programs, and activities that lead to improvements in student development and academic achievement. The Secretary is authorized to award grants to statewide organizations (or consortia of such organizations) to establish SFECs that (1) carry out parent education and family engagement in education programs, and (2) provide comprehensive training and technical assistance to SEAs, LEAs, schools identified by SEAs and LEAs, organizations that support family-school partnerships, and other such programs.

Background: Deep and meaningful family engagement is critical to the success of all schools and all students. The SFEC program seeks to promote high-impact cradle-to-career family, school, and community engagement by funding centers that build the capacity of all stakeholders—including families, SEAs, LEAs, school-level staff and personnel, and community-based organizations—to engage in effective partnerships that support equity, student opportunities and achievement, and students' and families' social and emotional needs.

Family, school, and community engagement must be viewed as a shared responsibility among all parties, in order to be effective. The engagement should be continuous from birth to young adulthood and should take place wherever children learn—at home, in school, and in their community.

The Department's Dual Capacity-Building Framework for Family-School Partnerships [1] identifies several key conditions essential to the design of high-quality activities and initiatives for building the capacity of families, SEAs, LEAs, and school staff to partner in ways that support school improvement and student opportunities and achievement. These conditions highlight the fact that high-quality activities are purposefully designed and linked to school and LEA achievement goals (*e.g.,* school readiness, student achievement, and school improvement).

The Dual Capacity-Building Framework promotes the integration of initiatives into the support structures and processes at the SEA and LEA levels, including training, professional development, teaching and learning, resource development and community collaboration. The framework also recommends that these initiatives operate with adequate resources, including public-private partnerships, to ensure meaningful and effective strategies that have the power to impact student learning and achievement.

Building on years of research and lessons learned from programs such as the Parent Training and Information Centers,[2] the high-impact family engagement envisioned in SFEC requires a focus on State and local policy, as well as initiatives designed to promote parental involvement (as defined in this notice) and other direct support for parents, families, and the organizations that serve them.

In this year's SFEC competition, the Department also seeks to continue to build an evidence base for the program by providing incentives to applicants that propose: (1) Projects (as defined in the notice) that are supported by evidence (Competitive Preference Priority 1); and (2) robust evaluations. Such projects would, if well implemented, yield promising evidence (as defined in this notice). To this end, we include a competitive preference priority encouraging projects that are based on evidence and a selection criterion factor that encourages applicants to further explain the conceptual framework, which can be outlined in a logic model.

In addition, through Competitive Preference Priorities 2–4, we seek applications that propose to address the impacts from the COVID–19 pandemic (Competitive Preference Priority 2), promote equity (Competitive Preference Priority 3), and support coordination (Competitive Preference Priority 4). These priorities are important for this SFEC program competition for a variety of reasons. The COVID–19 pandemic has required LEAs and schools to work closely with families as schools moved in and out of remote learning, implemented return to school plans, and have supported students' social, emotional, mental health, and academic needs after significant disruption and

[1] See: *www2.ed.gov/documents/family-community/frameworks-resources.pdf.*

[2] The Parent Training and Information Centers program is one of the primary vehicles under the Individuals with Disabilities Education Act (IDEA) for providing information and training to parents of children with disabilities.

lost instructional time. Our hope is that this family school coordination can continue to be improved as schools focus on recovery efforts and meeting the needs of students and families.

Equity has always been at the heart of the SFEC program. The statute requires that 65 percent of funds serve LEAs, schools, and community-based organizations that serve high concentrations of disadvantaged students. Therefore, we include a Competitive Preference Priority 3 focused on equity. The competitive preference priority also dovetails with the goals of the SFEC program to coordinate family engagement within states through SEAs, LEAs, schools, and community organizations.

Although Competitive Preference Priorities 2–4 are focused on the LEA and school levels, SFECs can play a vital role in promoting these priorities in a variety of ways. SFECs can partner with organizations that emphasize these priorities in their staff and vision. SFECs can also highlight resources addressing these priorities on their websites, provide specific technical assistance around these priories through trainings or webinars, or address this work at Advisory committee meetings either through subcommittees or adding attendees to the committees such as additional community groups. These priorities could also be addressed through the evidence-based interventions in LEAs conducted by the SFEC.

Applicants may address the equity priority through strategies to increase racial and socioeconomic diversity through robust family and community involvement that includes increasing the racial and socioeconomic diversity of families recruited for interventions, trainings, webinars, and advisory committee attendance with these specific priorities in mind. Attendance in statewide and LEA-wide committees that include other LEAs, regional groups, housing, and transportation groups could also address this priority. Additionally, working with any existing diversity plans at in LEA intervention sites would be a way to address this priority.

Priorities: This notice contains four competitive preference priorities. Competitive Preference Priority 1 is from section 4503(c) of the ESEA. Competitive Preference Priorities 2, 3, and 4 are from the Secretary's Final Supplemental Priorities and Definitions for Discretionary Grant Programs (Supplemental Priorities), published in the **Federal Register** on December 10, 2021 (86 FR 70612).

Competitive Preference Priorities: For FY 2022 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional three points each to an application depending on how well the application meets Competitive Preference Priority 1, Competitive Preference Priority 2, Competitive Preference Priority 3, and/or Competitive Preference Priority 4 for a maximum of twelve additional points under these priorities. The total possible points for each competitive preference priority are noted in parentheses.

These priorities are:

Competitive Preference Priority 1—Evidence-Based Activities (up to 3 Points)

The Secretary gives priority to statewide family engagement centers that will use grant funds for evidence-based activities (as defined in this notice).

Competitive Preference Priority 2—Addressing the Impact of COVID–19 on Students, Educators, and Faculty (up to 3 Points)

Projects that are designed to address the impacts of the COVID–19 pandemic, including impacts that extend beyond the duration of the pandemic itself, on the students most impacted by the pandemic, with a focus on underserved students (as defined in this notice) and the educators who serve them, through one or more of the following priority areas:

(a) Conducting community asset-mapping and needs assessments that may include an assessment of the extent to which students, including subgroups of students, have become disengaged from learning, including students not participating in in-person or remote instruction, and specific strategies for reengaging and supporting students and their families.

(b) Providing resources and supports to meet the basic, fundamental, health and safety needs of students and educators.

(c) Addressing students' social, emotional, mental health, and academic needs through approaches that are inclusive with regard to race, ethnicity, culture, language, and disability status.

Competitive Preference Priority 3—Promoting Equity in Student Access to Educational Resources, and Opportunities (up to 3 Points)

Under this priority, an applicant must demonstrate that it proposes a project designed to promote educational equity and adequacy in resources and opportunity for underserved students—

(a) In one or more of the following educational settings:

(1) Early learning (as defined in the notice) programs.

(2) Elementary school.

(3) Middle school.

(4) High school.

(5) Career and technical education programs.

(6) Out-of-school-time settings.

(7) Alternative schools and programs.

(8) Juvenile justice system or correctional facilities.

(9) Adult learning.

(b) That examines the sources of inequity and inadequacy and implement responses, that may include one or more of the following:

(1) Establishing, expanding, or improving the engagement of underserved community members (including underserved students and families) in informing and making decisions that influence policy and practice at the school, district, or State level by elevating their voices, through their participation and their perspectives and providing them with access to opportunities for leadership (*e.g.,* establishing student government programs and parent and caregiver leadership initiatives)).

(2) Increasing student racial or socioeconomic diversity, through one or more of the following:

(i) Ongoing, robust family and community involvement.

(ii) Intra- or inter-district or regional coordination.

(iii) Cross-agency collaboration, such as with housing or transportation authorities.

(iv) Alignment with an existing public diversity plan that is evidence-based and designed to effectively promote diversity.

Competitive Preference Priority 4—Strengthening Cross-Agency Coordination and Community Engagement To Advance Systemic Change (up to 3 Points)

Projects that are designed to take a systemic evidence-based approach to improving outcomes for underserved students in the following priority area:

(a) Establishing cross-agency partnerships, or community-based partnerships with local nonprofit organizations, businesses, philanthropic organizations, or others, to meet family well-being needs.

Application Requirements: The following requirements are from section 4503 of the ESEA. For FY 2022 and any subsequent year in which we make

awards from the list of unfunded applications from this competition, the following application requirements apply. In order to receive funding, an applicant must include the following in its application:

(a) A description of the applicant's approach to family engagement in education.

(b) A description of how the SEA and any partner organization will support the SFEC that will be operated by the applicant including a description of the SEA and any partner organization's commitment of such support.

(c) A description of the applicant's plan for building a statewide infrastructure for family engagement in education, that includes—

(1) management and governance;

(2) statewide leadership; or

(3) systemic services for family engagement in education.

(d) A description of the applicant's demonstrated experience in providing training, information, and support, to SEAs, LEAs, schools, educators, parents, and organizations on family engagement in education policies and practices that are effective for parents (including low-income parents) and families, parents of English learners (as defined in this notice), minorities, students with disabilities, homeless children and youth, children and youth in foster care, and migrant students, including evaluation results, reporting, or other data exhibiting such demonstrated experience.

(e) A description of the steps the applicant will take to target services to low-income students and parents.

(f) An assurance that the applicant will—

(1) Establish a special advisory committee, the membership of which includes—

(i) Parents, who shall constitute a majority of the members of the special advisory committee;

(ii) Representatives of education professionals with expertise in improving services for disadvantaged children;

(iii) Representatives of local elementary schools and secondary schools, including students;

(iv) Representatives of the business community; and

(v) Representatives of SEAs and LEAs;

(2) Use not less than 65 percent of the funds received under Part E of the ESEA, Family Engagement in Education Programs in each fiscal year to serve LEAs, schools, and community-based organizations that serve high concentrations of disadvantaged students, including students who are English learners, minorities, students with disabilities, homeless children and youth, children and youth in foster care, and migrant students;

(3) Operate a SFEC of sufficient size, scope, and quality to ensure that the center is adequate to serve the SEA, LEAs, and community-based organizations;

(4) Ensure that the SFEC will retain staff with the requisite training and experience to serve parents in the State;

(5) Serve urban, suburban, and rural LEAs and schools;

(6) Work with—

(i) Other SFECs assisted under Part E of the ESEA, Family Engagement in Education Programs; and

(ii) Parent training and information centers and community parent resource centers assisted under sections 671 and 672 of the Individuals with Disabilities Education Act (20 U.S.C. 1471; 1472); and

(7) Use not less than 30 percent of the funds received under this competition for each fiscal year to establish or expand technical assistance for evidence-based parent education programs;

(8) Provide assistance to SEAs, LEAs, and community-based organizations that support family members in supporting student achievement;

(9) Work with SEAs, LEAs, schools, educators, and parents to determine parental needs and the best means for delivery of services to address such needs;

(10) Conduct sufficient outreach to assist parents, including parents who the applicant may have a difficult time engaging with a school or LEA; and

(11) Conduct outreach to low-income students and parents, including low-income students and parents who are not proficient in English.

(g) An assurance that the applicant will conduct training programs in the community to improve adult literacy, including financial literacy.

Program Requirements: Program requirement (a) is from section 4504 of the ESEA.

(a) Uses of funds.

Each grantee shall use the grant funds, based on the needs determined under Application Requirement (e)(9), to provide training and technical assistance to SEAs, LEAs, and organizations that support family-school partnerships; and activities, services, and training for LEAs, school leaders, educators, and parents—

(1) To assist parents in participating effectively in their children's education and to help their children meet challenging State academic standards, such as by assisting parents—

(i) To engage in activities that will improve student academic achievement, including understanding how parents can support learning in the classroom with activities at home and in afterschool and extracurricular programs;

(ii) To communicate effectively with their children, teachers, school leaders, counselors, administrators, and other school personnel;

(iii) To become active participants in the development, implementation, and review of school-parent compacts, family engagement in education policies, and school planning and improvement;

(iv) To participate in the design and provision of assistance to students who are not making academic progress;

(v) To participate in State and local decision making;

(vi) To train other parents; and

(vii) In learning and using technology applied in their children's education;

(2) To develop and implement, in partnership with the SEA, statewide family engagement in education policy and systemic initiatives that will provide for a continuum of services to remove barriers for family engagement in education and support school reform efforts; and

(3) To develop and implement parental involvement policies under the ESEA.

Definitions: For FY 2022 and any subsequent year in which we make awards from the list of unfunded applications from this competition, the following definitions apply. The definitions of ''Local educational agency,'' ''Parental involvement,'' ''State educational agency'' and ''Evidence-based'' are from section 8101of the ESEA. The definitions of ''Experimental study,'' ''Performance measure,'' ''Performance target,'' ''Project,'' ''Project component,'' ''Promising evidence,'' ''Quasi-experimental design study,'' ''Relevant outcome,'' and ''What Works Clearinghouse Handbook'' are from 34 CFR 77.1. The definitions of ''Children or students with disabilities,'' Disconnected youth,'' ''Early learning,'' ''English learner,'' ''Military- or veteran-connected students'' and ''Underserved students'' are from the Supplemental Priorities.

Children or students with disabilities means children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1401(3)) and 34 CFR 300.8, or students with disabilities, as defined in the Rehabilitation Act of 1973 (29 U.S.C. 705(37), 705(202) (B)).

Early learning means any (a) State-licensed or State-regulated program or provider, regardless of setting or funding source, that provides early care

and education for children from birth to kindergarten entry, including, but not limited to, any program operated by a child care center or in a family child care home; (b) program funded by the Federal Government or State or local educational agencies (including any IDEA-funded program); (c) Early Head Start and Head Start program; (d) non-relative child care provider who is not otherwise regulated by the State and who regularly cares for two or more unrelated children for a fee in a provider setting; and (e) other program that may deliver early learning and development services in a child's home, such as the Maternal, Infant, and Early Childhood Home Visiting Program; Early Head Start; and Part C of IDEA.

English learner means an individual who is an English learner as defined in section 8101(20) of the Elementary and Secondary Education Act of 1965, as amended, or an individual who is an English language learner as defined in section 203(7) of the Workforce Innovation and Opportunity Act.

Evidence-based, for purposes of this notice, means an activity, strategy, or intervention that demonstrates a statistically significant effect on improving student outcomes or other relevant outcomes (as defined by the notice) based on promising evidence.

Experimental study means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component (as defined in the notice) or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.,* sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) (as defined in the notice) standards without reservations as described in the WWC Handbooks:

(i) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(ii) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(iii) A single-case design study uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

Local educational agency (LEA) means: (a) In General. A public board of education or the public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) Administrative Control and Direction. The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(c) Bureau of Indian Education Schools. The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the ESEA with the smallest student population, except that the school shall not be subject to the jurisdiction of any SEA other than the Bureau of Indian Education.

(d) Educational Service Agencies. The term includes educational service agencies and consortia of those agencies.

(e) State educational agency. The term includes the SEA in a State in which the SEA is the sole educational agency for all public schools.

Military- or veteran-connected student means one or more of the following: (a) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a member of the uniformed services (as defined by 37 U.S.C. 101), in the Army, Navy, Air Force, Marine Corps, Coast Guard, Space Force, National Guard, Reserves, National Oceanic and Atmospheric Administration, or Public Health Service or is a veteran of the uniformed services with an honorable discharge (as defined by 38 U.S.C. 3311).

(b) A student who is a member of the uniformed services, a veteran of the uniformed services, or the spouse of a service member or veteran.

(c) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a veteran of the uniformed services (as defined by 37 U.S.C. 101).

Parental involvement means the participation of parents in regular, two-way, and meaningful communication involving student academic learning and other school activities, including ensuring—

(A) That parents play an integral role in assisting their child's learning;

(B) That parents are encouraged to be actively involved in their child's education at school;

(C) That parents are full partners in their child's education and are included, as appropriate, in decision making and on advisory committees to assist in the education of their child; and

(D) The carrying out of other activities, such as those described in section 1116 of the ESEA.

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance.

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project.

Project means the activity described in the application.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Promising evidence means that there is evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(a) A practice guide prepared by WWC reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(b) An intervention report prepared by the WWC reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome with no reporting of a ''negative effect'' or ''potentially

negative effect'' on a relevant outcome; or

(c) A single study assessed by the Department, as appropriate, that—

(i) Is an experimental study (as defined in the notice), a quasi-experimental design study (as defined in the notice), or a well-designed and well-implemented correlational study with statistical controls for selection bias (*e.g.,* a study using regression methods to account for differences between a treatment group and a comparison group); and

(ii) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.,* establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

Relevant outcome means the student outcome(s) or other outcomes(s) the key project component is designed to improve, consistent with the specific goals of the program.

State educational agency (SEA) means the agency primarily responsible for the State supervision of public elementary schools and secondary schools.

Underserved student means a student (which may include children in early learning environments, students in K–12 programs, students in postsecondary education or career and technical education, and adult learners, as appropriate) in one or more of the following subgroups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) A student who is a member of a federally recognized Indian Tribe.

(d) An English learner.

(e) A child or student with a disability (as defined in the notice).

(f) A disconnected youth (as defined in the notice).

(g) A technologically unconnected youth.

(h) A migrant student.

(i) A student experiencing homelessness or housing insecurity.

(j) A lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student.

(k) A student who is in foster care.

(l) A student without documentation of immigration status.

(m) A pregnant, parenting, or caregiving student.

(n) A student impacted by the justice system, including a formerly incarcerated student.

(o) A student who is the first in their family to attend postsecondary education.

(p) A student enrolling in or seeking to enroll in postsecondary education for the first time at the age of 20 or older.

(q) A student who is working full-time while enrolled in postsecondary education.

(r) A student who is enrolled in or is seeking to enroll in postsecondary education who is eligible for a Pell Grant.

(s) An adult student in need of improving their basic skills or an adult student with limited English proficiency.

(t) A student performing significantly below grade level.

(u) A military- or veteran- connected student (as defined in the notice).

What Works Clearinghouse Handbooks (WWC Handbooks) means the standards and procedures set forth in the WWC Standards Handbook, Versions 4.0 or 4.1, and WWC Procedures Handbook, Versions 4.0 or 4.1, or in the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference, see § 77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

Program Authority: Sections 4501–4506 of the ESEA (20 U.S.C. 7241–46).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The Supplemental Priorities.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds:

The Administration has requested $12,500,000 for the Statewide Family Engagement Centers program for FY 2022, of which we intend to use an estimated $5,000,000 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2023 from the list of unfunded applications from this competition.

Estimated Range of Awards: $500,000–$1,000,000 per project year.

Estimated Average Size of Awards: $750,000 per project year.

Maximum Award: We will not make an award exceeding $1,000,000 for a single budget period of 12 months.

Estimated Number of Awards: 5–7.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months. Continued funding of a grant under this competition will be contingent on the grantee's progress toward meeting the performance measures (as defined in the notice) and targets identified in the application.

III. Eligibility Information

1. *Eligible Applicants:* Statewide organizations (or consortia of such organizations).

2. a. *Cost Sharing or Matching:* ESEA section 4502(c) requires that each grantee contribute non-Federal resources, which may be in cash or in-kind, towards its project for each fiscal year after the first fiscal year in which the project is funded by the Department.

b. Administrative Cost Limitation: This program does not include any program specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to

follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the SFEC program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make all successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 40 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the preliminary memorandum of understanding, a logic model, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is included in parentheses following the title of the specific selection criterion. Each criterion also includes the factors that reviewers will consider in determining the extent to which an applicant meets the criterion. Points awarded under these selection criteria are in addition to any points an applicant earns under the competitive preference priorities in this notice.

A. Quality of the Project Design (up to 25 Points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors—

(1) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(2) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(3) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

B. Quality of the Management Plan (up to 20 Points)

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(4) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(5) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

C. Project Personnel (up to 15 Points)

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, in determining the quality of the management plan and project personnel, the Secretary considers the following factors—

(1) The qualifications, including relevant training and experience, of the project director or principal investigator.

(2) The qualifications, including relevant training and experience, of key project personnel.

(3) The qualifications, including relevant training and experience, of project consultants or subcontractors.

D. Adequacy of Resources (up to 20 Points)

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors—

(1) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(2) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(3) The extent to which the costs are reasonable in relation to the number of persons to be served and the anticipated results and benefits.

E. Quality of the Project Evaluation (up to 20 Points)

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers—

(1) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(2) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(3) The extent to which methods of evaluation will, if well-implemented, produce promising evidence (as defined in 34 CFR 77.1(c)) about the project's effectiveness.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* As outlined in title IV, part E, section 4501 of the ESEA, SFEC is focused on using family engagement to improve student development and academic achievement. The program recognizes that in order to effectively and sustainably engage parents and families, grantees must use training and technical assistance to build capacity at the State and district levels to develop and implement policies, programs, and activities that are inclusive of families and lead to improvements in student development and academic achievement. SFECs must also provide direct support to parents, teachers, and others that strengthen the relationship between parents and their children's school, foster greater engagement, and assist them in meeting the educational needs of children. SFEC will coordinate its activities with activities conducted under section 1116 and other parts of the ESEA, as well as other Federal, State, and local services and programs.

Annual performance measures: (1) The number of parents who are participating in SFEC activities designed to provide them with the information necessary to understand their annual school report cards and other opportunities for engagement under section 1116 and other related ESEA provisions; (2) the number of high-impact activities or services provided to build a statewide infrastructure for systemic family engagement that includes support for SEA- and LEA-level leadership and capacity-building; (3) the number of high-impact activities or services implemented to ensure that parents are trained and can effectively engage in activities that will improve student academic achievement, to include an understanding of how they can support learning in the classroom with activities at home or outside the school generally, as well as how they can participate in State and local decision-making processes; (4) the percentage of parents and families receiving SFEC services who report having enhanced capacity to work with schools and service providers effectively in meeting the academic and developmental needs of their children; (5) The number of high-impact activities or services implemented to ensure that LEA, school, and community-based organization staff are trained and can effectively engage in activities with families that will improve student academic achievement, to include an understanding of how they can support families with activities at home or outside the school generally, as well as how they can help families participate in state and local decision-making processes; and (6) The percentage of LEA and school staff receiving SFEC services who report having enhanced capacity to work with families effectively in meeting the academic and developmental needs of their children.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets (as defined in the notice) in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package 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 discor 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.

Ian Rosenblum,

Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Elementary and Secondary Education.

[FR Doc. 2021–27489 Filed 12–17–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. 18–70–LNG]

Change in Control; Mexico Pacific Limited LLC

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of change in control.

SUMMARY: The Office of Fossil Energy and Carbon Management (FECM) of the Department of Energy (DOE) gives notice of receipt of a Notification Regarding Change in Control (Notification) filed by Mexico Pacific Limited LLC (MPL) on October 27, 2021, and a Supplement to Notification Regarding Change in Control (Supplement) filed on November 23, 2021, in the docket. The Notification and Supplement describe a change in MPL's ownership and were filed under the Natural Gas Act (NGA).

DATES: Protests, motions to intervene, or notices of intervention, as applicable, and written comments are to be filed electronically as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, January 4, 2022.

ADDRESSES: *Electronic Filing by email: fergas@hq.doe.gov.*

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, DOE 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 Office of Resource Sustainability staff at (202) 586–2627 or (202) 586–4749 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.

FOR FURTHER INFORMATION CONTACT:

Amy Sweeney or Jennifer Wade, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability, Office of Fossil Energy and Carbon Management,[1] Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2627 or (202) 586–4749, *amy.sweeney@hq.doe.gov* or *jennifer.wade@hq.doe.gov*

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793, *cassandra.bernstein@hq.doe.gov*

SUPPLEMENTARY INFORMATION:

Summary of Change in Control

MPL states that, by means of a transaction (Transaction) that closed effective as of September 30, 2021, its ownership has changed. In the Supplement, MPL states that Q–LNG Holdings, LLC, a Delaware limited liability company, has become the holder of more than 10% of the membership interest in MPL, through its acquisition of 100% of the newly-created Series C ownership units. The three largest equity owners of MPL in terms of total ownership are now Q–LNG Holdings, LLC (38.2%), AVAIO MPL Special, LP (24.3%), and DKRW Energy Partners, LLC (8.0%), as discussed in the Supplement and shown in the accompanying Exhibit A (revised 10/01/2021). In the Notification, MPL states that, effective as of September 30, 2021, members of MPL have entered into an amended and restated limited liability agreement reflecting the new MPL ownership structure.

Additional details can be found in MPL's filings posted on the DOE website at: *https://www.energy.gov/sites/default/files/2021-11/Mexico%20Pacific%20Limited%20LLC-%20CIC.pdf* (Notification) and *https://www.energy.gov/sites/default/files/2021-11/MPL%20CIC%2011_23_21.pdf* (Supplement).

DOE Evaluation

DOE will review the Notification and Supplement in accordance with its Procedures for Changes in Control Affecting Applications and Authorizations to Import or Export Natural Gas (CIC Procedures).[2] Consistent with the CIC Procedures, this notice addresses MPL's authorization to export liquefied natural gas (LNG) to non-free trade agreement (non-FTA) countries, granted in DOE/FE Order No. 4312.[3] If no interested person protests the change in control and DOE takes no action on its own motion, the change in control will be deemed granted 30 days after publication in the **Federal Register**. If one or more protests are submitted, DOE will review any motions to intervene, protests, and answers, and will issue a determination as to whether the change in control has been demonstrated to render the underlying authorizations inconsistent with the public interest.

Public Comment Procedures

Interested persons will be provided 15 days from the date of publication of this notice in the **Federal Register** to move to intervene, protest, and answer MPL's Notification and Supplement.[4] Protests, motions to intervene, notices of intervention, and written comments are invited in response to this notice only as to the change in control described in the Notification and Supplement. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by DOE's regulations in 10 CFR part 590.

As noted, DOE is only accepting electronic submissions at this time. Please email the filing to *fergas@hq.doe.gov.* All filings must include a reference to ''Docket No. 18–70–LNG'' or ''Mexico Pacific Limited LLC Change in Control'' in the title line.

Please Note: Please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

The Notification, Supplement, and any filed protests, motions to intervene, notices of intervention, and comments will be available electronically by going to the following DOE Web address: *https://www.energy.gov/fecm/division-natural-gas-regulation.*

Signed in Washington, DC, on December 14, 2021.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.

[FR Doc. 2021–27412 Filed 12–17–21; 8:45 am]

BILLING CODE 6450–01–P

[1] The Office of Fossil Energy changed its name to the Office of Fossil Energy and Carbon Management on July 4, 2021.

[2] 79 FR 65541 (Nov. 5, 2014).

[3] MPL's Notification and Supplement also apply to its existing authorization to export LNG to FTA countries, but DOE will respond to that portion of the filings separately pursuant to the CIC Procedures, 79 FR 65542.

[4] Intervention, if granted, would constitute intervention only in the change in control portion of these proceedings, as described herein.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–409–000.

Applicants: Houston Pipe Line Company LP, Enable Oklahoma Intrastate Transmission, LLC, Southwest Gas Storage Company.

Description: Compliance filing: Houston Pipe Line Company LP submits tariff filing per 154.203: Notice of Change in Circumstance to be effective N/A.

Filed Date: 12/13/21.

Accession Number: 20211213–5096.

Comment Date: 5 p.m. ET 12/27/21.

Docket Numbers: RP22–410–000.

Applicants: Alliance Pipeline L.P.

Description: § 4(d) Rate Filing: Action Alert and OFO Provisions Filing to be effective 1/13/2022.

Filed Date: 12/13/21.

Accession Number: 20211213–5165.

Comment Date: 5 p.m. ET 12/27/21.

Docket Numbers: RP22–411–000.

Applicants: Enable Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Filing to Remove Tariff Language Related to Bistineau Storage Field to be effective 1/17/2022.

Filed Date: 12/13/21.

Accession Number: 20211213–5168.

Comment Date: 5 p.m. ET 12/27/21.

Docket Numbers: RP22–412–000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: Compliance filing: Abandon Multiple X-Rate Schedules Compliance Filing to be effective 2/1/2022.

Filed Date: 12/14/21.

Accession Number: 20211214–5038.

Comment Date: 5 p.m. ET 12/27/21.

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.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–27453 Filed 12–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

	Docket No.
Azure Sky Wind Project, LLC	EG21–237–000
Alta Farms Wind Project II, LLC	EG21–238–000
Azure Sky Wind Storage, LLC	EG21–239–000
Ranchland Wind Project II, LLC	EG21–240–000
Ranchland Wind Storage, LLC	EG21–241–000
Blue Jay Solar I, LLC	EG21–242–000
Skipjack Solar Center, LLC	EG21–243–000
AR Searcy Project Company, LLC	EG21–244–000
El Algodon Alto Wind Farm, LLC	EG21–245–000
Blackjack Creek Wind Farm, LLC	EG21–246–000
Big Star Solar, LLC	EG21–247–000
IP Radian, LLC	EG21–248–000
Bellflower Solar 1, LLC	EG21–249–000
Black Bear Alabama Solar 1, LLC	EG21–250–000
Happy Solar 1, LLC	EG21–251–000
Sun Mountain Solar 1, LLC	EG21–252–000
Bay Tree Solar, LLC	EG21–253–000
Bay Tree Lessee, LLC	EG21–254–000
EnerSmart El Cajon BESS LLC	EG21–255–000
AP Solar 2, LLC	EG21–256–000
Drew Solar, LLC	EG21–257–000
Dunns Bridge Solar LLC	EG21–258–000
Mililani I Solar, LLC	EG21–259–000
Lanikuhana Solar, LLC	EG21–260–000
Ventress Solar Farm 1, LLC	EG21–261–000
Nexus Line, LLC	EG21–262–000
Stanly Solar, LLC	EG21–263–000
PGR 2021 Lessee 1, LLC	EG21–264–000
NET Power, LLC	EG21–265–000

Take notice that during the month of November 2021, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2021).

Dated: December 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–27451 Filed 12–17–21; 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: ER20–442–001.

Applicants: Wildcat I Energy Storage, LLC.

Description: Notice of Non-Material Change in Status of Wildcat I Energy Storage, LLC.

Filed Date: 12/10/21.

Accession Number: 20211210–5238.

Comment Date: 5 p.m. ET 1/3/22.

Docket Numbers: ER21–1325–001.

Applicants: ISO New England Inc., New Hampshire Transmission, LLC.

Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: New Hampshire Transmission; ER21–1325—Supplemental Order 864 Compliance Filing to be effective 1/1/2020.

Filed Date: 12/14/21.

Accession Number: 20211214–5184.

Comment Date: 5 p.m. ET 12/27/21.

Docket Numbers: ER21–2924–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Deficiency Response—Compensation for Rescheduled Maintenance Costs to be effective 11/22/2021.

Filed Date: 12/14/21.
Accession Number: 20211214–5073.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–628–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6245; Queue No. AE2–221 to be effective 11/15/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5026.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–629–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA, SA No. 6253; Queue No. AG2–050 to be effective 11/23/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5054.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–630–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Revisions to Attachment AE to Clarify the Electric Storage Resource Loss Factor to be effective 2/14/2022.
Filed Date: 12/14/21.
Accession Number: 20211214–5086.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–631–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6232; Queue No. AE1–071 to be effective 11/15/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5114.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–632–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: BPA Amend Restated Midpoint-Meridian Agmt RS 369 Rev 1 to be effective 2/12/2022.
Filed Date: 12/14/21.
Accession Number: 20211214–5158.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–633–000.
Applicants: AEP Energy Partners, Inc.
Description: Request for Limited Waiver of AEP Energy Partners, Inc.
Filed Date: 12/13/21.
Accession Number: 20211213–5256.
Comment Date: 5 p.m. ET 1/3/22.
Docket Numbers: ER22–634–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of ISA, SA No. 5493; Queue No. AC1–107 re: breach to be effective 12/14/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5174.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: R22–635–000.
Applicants: Liberty Utilities (Granite State Electric) Corp.
Description: § 205(d) Rate Filing: Borderline Sales Rate Sheet Update December 2021 to be effective 11/1/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5187.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–636–000.
Applicants: ITC Midwest LLC.
Description: § 205(d) Rate Filing: Filing of a Fiber Agreement to be effective 2/14/2022.
Filed Date: 12/14/21.
Accession Number: 20211214–5192.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–637–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6247; Queue No. AE2–218 to be effective 11/15/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5194.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–638–000.
Applicants: American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: American Electric Power Service Corporation submits tariff filing per 35.13(a)(2)(iii: AEP submits one Facilities Agreement re: ILDSA, SA No. 1336 to be effective 2/13/2022.
Filed Date: 12/14/21.
Accession Number: 20211214–5197.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–639–000.
Applicants: PacifiCorp.
Description: Notice of Cancellation of Rate Schedule No. 384 with Bonneville Power Administration of PacifiCorp.
Filed Date: 12/10/21.
Accession Number: 20211210–5239.
Comment Date: 5 p.m. ET 1/3/22.
Docket Numbers: ER22–640–000.
Applicants: PacifiCorp.
Description: Notice of Cancellation of Rate Schedule No. 371 with Bonneville Power Administration of PacifiCorp.
Filed Date: 12/10/21.
Accession Number: 20211210–5240.
Comment Date: 5 p.m. ET 1/3/22.
Docket Numbers: ER22–641–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Interim ISA, SA No. 6234; Queue No. AF1–164 to be effective 11/15/2021.
Filed Date: 12/14/21
Accession Number: 20211214–5208.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–642–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6250; Queue No. AE2–278 to be effective 11/15/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5210.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–643–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3881 Southwestern Power Admin & AEP OK Trans Co Inter Agr to be effective 12/1/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5217.
Comment Date: 5 p.m. ET 1/4/22.
Docket Numbers: ER22–644–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3882 Southwestern Power Admin & Public Service Co OK Inter Agr to be effective 12/1/2021.
Filed Date: 12/14/21.
Accession Number: 20211214–5222.
Comment Date: 5 p.m. ET 1/4/22.

The filings are accessible in the Commission's eLibrary system by clicking on the links or 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:

https://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: December 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–27454 Filed 12–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD21–15–000]

Joint Federal-State Task Force on Electric Transmission; Notice Announcing Meeting and Inviting Agenda Topics

On June 17, 2021, the Commission established a Joint Federal-State Task Force on Electric Transmission (Task Force) to formally explore transmission-related topics outlined in the Commission's order.[1] The Commission stated that the Task Force will convene for multiple formal meetings annually, which will be open to the public for listening and observing and on the record.[2] The first public meeting of the Task Force was held on November 10, 2021, in Louisville, Kentucky.[3] The second public meeting of the Task Force will be held on Wednesday, February 16, 2022, from approximately 10:00 a.m. to 2:00 p.m. Eastern time. The meeting will be held at the Renaissance Downtown Hotel in Washington, DC. Commissioners may attend and participate in this meeting.

The meeting will be open to the public for listening and observing and on the record. There is no fee for attendance and registration is not required. The public may attend in person or via Webcast.[4] This conference will be transcribed. Transcripts will be available for a fee from Ace Reporting, 202–347–3700.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

As explained in the Establishing Order, the Commission will issue agendas for each meeting of the Task Force, after consulting with all Task Force members and considering suggestions from state commissions.[5] The Establishing Order set forth a broad array of transmission-related topics that the Task Force has the authority to examine and will focus on topics related to planning and paying for transmission, including transmission to facilitate generator interconnection, that provides benefits from a federal and state perspective.[6] The first public meeting focused on incorporating state perspectives into regional transmission planning. In anticipation of the second public meeting, all interested persons, including all state commissions, are hereby invited to file comments in this docket on agenda topics for the second public meeting of the Task Force, due January 4, 2022. The Task Force members will consider the suggested agenda topics in developing the agenda for the second public meeting. The Commission will issue the agenda no later than February 2, 2022, for the second public meeting to be held on February 16, 2022.

Comments may be filed electronically via the internet.[7] Instructions are available on the Commission's website, *https://www.ferc.gov/ferc-online/overview.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, submissions sent via the U.S. Postal Service must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

More information about the Task Force, including frequently asked questions, is available here: *https://www.ferc.gov/TFSOET.* For more information about this meeting, please contact: Gretchen Kershaw, 202–502–8213, *gretchen.kershaw@ferc.gov*; or Jennifer Murphy, 202–898–1350, *jmurphy@naruc.org.* For information related to logistics, please contact Benjamin Williams, 202–502–8506, *benjamin.williams@ferc.gov;* or Rob Thormeyer, 202–502–8694, *robert.thormeyer@ferc.gov.*

Dated: December 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–27455 Filed 12–17–21; 8:45 am]

BILLING CODE 6717–01–P

[1] *Joint Fed.-State Task Force on Elec. Transmission,* 175 FERC ¶ 61,224 (2021) (Establishing Order).

[2] *Id.* P 4.

[3] *See Joint Fed.-State Task Force on Elec. Transmission,* 176 FERC ¶ 61,131, at P 6 (2021); *Joint Fed.-State Task Force on Elec. Transmission,* Notice, Docket No. AD21–15–000 (issued Oct. 27, 2021).

[4] A link to the Webcast will be available here on the day of the event: *https://www.ferc.gov/TFSOET.*

[5] Establishing Order, 175 FERC ¶ 61,224 at PP 4, 7.

[6] *Id.* P 6.

[7] *See* 18 CFR 385.2001(a)(1)(iii) (2021).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2021–0414; FRL–9345–01–OCSPP]

Science Advisory Committee on Chemicals (SACC); Notice of Public Meeting and Request for Comments on Draft Toxic Substances Control Act (TSCA) Systematic Review Protocol

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 3-day peer review virtual public meeting of the Science Advisory Committee on Chemicals (SACC) to consider and review the draft TSCA Systematic Review Protocol. In addition, EPA is announcing the availability of and soliciting public comments on the draft protocol. The draft protocol is based on a revised, generic approach to systematic review accounting for comments from prior SACC reviews of chemical risk evaluations and more recent recommendations from the National Academies of Sciences, Engineering, and Medicine (NASEM).

DATES:

Peer Review Virtual Public Meeting: Will be held on April 19–21, 2022, from 10:00 a.m. to approximately 5:00 p.m. (EDT). See the additional details and instructions for registration that appear in Unit III.

Written Comments: Submit your written comments on or before February 18, 2022. As described in Unit III., you may also register to make oral comments during the virtual public meeting.

Special accommodations: Requests for special accommodations should be submitted on or before April 4, 2022, to allow EPA time to process these requests.

ADDRESSES:

Peer Review Virtual Meeting: You must register online to receive the webcast meeting link and audio teleconference information. Please follow the registration instructions that will be announced on the SACC website at *https://www.epa.gov/tsca-peer-review* by early March 2022. For additional instructions related to this meeting, see Unit III.

Written Comments: Submit written comments, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0414, through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not electronically submit any information you consider to be

Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Copyrighted material will not be posted without explicit permission of the copyright holder. Members of the public should also be aware that their personal contact information, if included in any written comments, may be posted on the internet at *https://www.regulations.gov.* Additional information on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room are open to the public by appointment only. For further information on the EPA Docket Center (EPA/DC) services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.* For questions about this docket, you may also contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**.

Special accommodations: For information on access or services for individuals with disabilities, and to request accommodation for a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Dr. Todd Peterson, DFO, Office of Chemical Safety and Pollution Prevention (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8450; email address: *peterson.todd@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action is directed to the public in general. This action may be of interest to persons who are or may be required to conduct testing and those interested in risk evaluations of chemical substances under TSCA. Since other entities may also be interested in this action, the EPA has not attempted to describe all the specific entities that may be affected by this action.

B. Where can I access information about the SACC and this meeting?

Information about the SACC and this meeting is available on the SACC website at *https://www.epa.gov/tsca-peer-review* and in the docket for this meeting, identified by docket ID number EPA–HQ–OPPT–2021–0414, at *https://www.regulations.gov.* You may also subscribe to the following listserv for alerts when notices regarding this and other SACC related activities are published: *https://public.govdelivery.com/accounts/USAEPAOPPT/subscriber/new?topic_id=USAEPAOPPT.*

C. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI information to EPA through *regulations.gov* or email. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see Tips for Effective Comments at *https://www.epa.gov/dockets.*

II. Background

A. What is the purpose of the SACC?

The SACC was established by EPA in 2016 and operates in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2 *et seq.* The SACC provides expert independent scientific advice and consultation to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated under TSCA.

The SACC is comprised of experts in: Toxicology; Human health and environmental risk assessment; Exposure assessment; and Related sciences (*e.g.,* synthetic biology, pharmacology, biotechnology, nanotechnology, biochemistry, biostatistics, physiologically based pharmacokinetic [PBPK] modeling, computational toxicology, epidemiology, environmental fate, and environmental engineering and sustainability). When needed, the committee members will be assisted in their reviews by consultants with specific expertise in the topics under consideration.

B. What is the purpose of peer review of the draft TSCA systematic review protocol?

The draft TSCA Systematic Review Protocol includes a revised generic approach for TSCA-related approaches accounting for previous peer review comments from SACC reviews of risk evaluations on the first 10 chemical assessments and more recent recommendations from the NASEM review of the Application of Systematic Review in TSCA Risk Evaluations. In addition to the revised, generic approach, this peer review package will include appendices containing chemical specific information that is relevant for search strings and screening statements and data evaluation criteria for the next chemical risk evaluations being conducted by the Office of Pollution Prevention and Toxics (OPPT).

C. How can I access the SACC documents?

EPA's background documents, related supporting materials, and draft charge questions to the SACC are available on the SACC website and in the docket established for this meeting are available at *https://www.regulations.gov;* docket ID number EPA–HQ–OPPT–2021–0414. In addition, EPA will provide additional background documents (*e.g.,* SACC members and consultants participating in this meeting and the meeting agenda) as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available, in the docket at *https://www.regulations.gov* and the SACC website at *https://www.epa.gov/tsca-peer-review.*

After the public meeting, the SACC will prepare meeting minutes summarizing its recommendations to the EPA. The meeting minutes will be posted on the SACC website and in the relevant docket.

III. Public Participation Instructions

To participate in the peer review virtual public meeting, please follow the instructions in this unit.

A. How can I provide comments?

To ensure proper receipt of comments it is imperative that you identify docket ID number EPA–HQ–OPPT–2021–0414 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages written comments for the peer review public meeting be submitted using the instructions in **ADDRESSES** and Unit I.B. and C, on or before the date set in the **DATES** section. Anyone submitting written comments after this date should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**. If you submit comments after the date set in the **DATES** section, those comments will be provided to the SACC members.

2. *Oral comments.* The Agency encourages each individual or group wishing to make brief oral comments to the SACC during the peer review virtual public meeting to please follow the registration instructions that will be announced on the SACC website by

early March 2022 (*https://www.epa.gov/tsca-peer-review*).

Oral comments before the SACC during the peer review virtual public meeting are limited to 5 minutes unless arrangements have been made prior to the date set in the **DATES** section. In addition, each speaker should email a copy of his/her comments to the DFO prior to the meeting for distribution to the SACC by the DFO.

B. How can I participate in the virtual public meeting?

This meeting will be virtual and viewed via webcast. For information on how to first register and then view the webcast, please refer to the SACC website at *https://www.epa.gov/tsca-peer-review.* EPA intends to announce registration instructions on the SACC website by early March 2022.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 14, 2021.

Michal Freedhoff,

Assistant Administrator, Office of Chemicals Safety and Pollution Prevention.

[FR Doc. 2021–27437 Filed 12–17–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9284–01–OMS]

Senior Executive Service Performance Review Board; Membership

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Notice is hereby given of the membership of the U.S. Environmental Protection Agency (EPA) Performance Review Board for 2021.

FOR FURTHER INFORMATION CONTACT: Lizabeth Engebretson, Deputy Director, Policy, Planning & Training Division, 3601M, Office of Human Resources, Office of Mission Support, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 564–0804.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. This board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointment authority relative to the performance of the senior executive. Members of the 2021 EPA Performance Review Board are:

Barry Breen, Principal Deputy Assistant Administrator, Office of Land and Emergency Management
Tom Brennan, Director, Science Advisory Board, Office of the Administrator
Katrina Cherry, Director, Office of Management and International Services, Office of International and Tribal Affairs
Kerry Drake, Mission Support Division Director, Region 9
Lizabeth Engebretson, (Ex-Officio) Deputy Director, Policy, Planning and Training Division, Office of Human Resources, Office of Mission Support
Diana Esher, Deputy Regional Administrator, Region 3
Arron Helm, Director, Office of Administration and Resources Management—Research Triangle Park, Office of Mission Support
Vanessa ''Kay'' Holt, Deputy Director for Management, Center for Public Health & Environmental Assessment, Office of Research and Development
Juan Carlos Hunt, Director, Office of Civil Rights, Office of the Administrator
Samantha Jones, Associate Director for Risk Assessment, Center for Public Health and Environmental Assessment, Office of Research and Development
Mara J. Kamen, (Ex-Officio) Director, Office of Human Resources, Office of Mission Support
James McDonald, Mission Support Division Director, Region 6
Karen McGuire, Director, Enforcement & Compliance Assurance Division, Region1
Jennifer McLain, Director, Office of Ground Water and Drinking Water, Office of Water
Tanya Mottley, Director, National Program Chemicals Division, Office of Chemical Safety and Pollution Prevention
Mary Ross, Director, Office of Science Advisor, Policy & Engagement, Office of Research and Development
Kenneth Schefski, Regional Counsel—Region 8, Office of Enforcement and Compliance Assurance
Gautam Srinivasan, Associate General Counsel, Air and Radiation Law Office, Office of General Counsel
Carol Terris, Associate Chief Financial Officer, Office of the Chief Financial Officer
Richard ''Chet'' Wayland, Director of the Air Quality Assessment Division, Office of Air Quality Planning and Standards, Office of Air and Radiation

Mara J. Kamen,

EPA Deputy Chief Human Capital Officer, and Director, Office of Human Resources, Office of Mission Support.

[FR Doc. 2021–27449 Filed 12–17–21; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2021–3049]

Agency Information Collection Activities: Final Collection; 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. This form is to be completed by EXIM borrowers as required under EXIM Credit Guarantee Facility (CGF) transactions in conjunction with a borrower's request for disbursement for local cost goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM lenders to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements.

DATES: Comments should be received on or before January 19, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 18–02) or by email to <*donna.schneider@exim.gov*>, or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-03_itemized_statement_of_payments-local_costs_for_exim_cgf_-_Oct%202021.xlsx.*

FOR FURTHER INFORMATION CONTACT: To request additional information, please Donna Schneider. 202–565–3612.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–03 Itemized Statement of Payments—Local Costs for EXIM Credit Guarantee Facility.

OMB Number: 3048–0055.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for local cost goods and services submitted to EXIM lenders under CGF transactions.

Affected Public: This form affects EXIM borrowers involved in financing local cost goods and services under CGF transactions.

Annual Number of Respondents: 6.

Estimated Time per Respondent: 75 minutes.

Annual Burden Hours: 7.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses: None.

This form is submitted by the borrower to the CGF lender for review. The lender reports information regarding the disbursement electronically to EXIM using OMB Number 3048–0046 CGF (EIB 12–02) Disbursement Approval Request Report.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–27466 Filed 12–17–21; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2021–6047]

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. EXIM's financial institution policy holders provide this form to U.S. exporters, who certify to the eligibility of their exports for EXIM support. The completed forms are held by the financial institution policy holders, only to be submitted to EXIM in the event of a claim filing. A requirement of EXIM's policies is that the insured financial institution policy holder obtains a completed Exporter's Certificate at the time it provides financing for an export. This form will enable EXIM to identify the specific details of the export transaction. These details are necessary for determining the eligibility of claims for approval. EXIM staff and contractors review this information to assist in determining that an export transaction, on which a claim for non-payment has been submitted, meets all of the terms and conditions of the insurance coverage.

DATES: Comments must be received on or before February 18, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Jean Fitzgibbon, *jean.fitzgibbon@exim.gov,* Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Jean Fitzgibbon. 202–565–3620.

The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib-94-07.pdf.*

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 94–07 Exporters Certificate for Use with a Short Term Export Credit Insurance Policy.

OMB Number: 3048–0041.

Type of Review: Regular.

Need and Use: EXIM uses the referenced form to obtain exporter certification regarding the export transaction, U.S. content, non-military use, non-nuclear use, compliance with EXIM's country cover policy, and their eligibility to participate in USG programs. These details are necessary to determine the legitimacy of claims submitted. It also provides the financial institution policy holder a check on the export transaction's eligibility, at the time it is fulfilling a financing request.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 240.

Estimated Time per Respondent: 15 minutes.

Annual Burden Hours: 60 hours.

Frequency of Reporting of Use: As required.

Government Expenses:

Reviewing time per year: 12 hours.
Average Wages per Hour: $42.50.
Average Cost per Year: $510 (time * wages).
Benefits and Overhead: 20%.
Total Government Cost: $612.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–27464 Filed 12–17–21; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice: 2021–3048]

Agency Information Collection Activities: Final Collection; 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. This form is to be completed by EXIM borrowers as required under EXIM Credit Guarantee Facility (CGF) transactions in conjunction with a borrower's request for disbursement for U.S. goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM lenders to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements.

DATES: Comments should be received on or before January 19, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 18–02) or by email to <*donna.schneider@exim.gov*>, or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-02_itemized_statement_of_payments-us_costs_for_exim_cgf_-_Oct%202021.xlsx.*

FOR FURTHER INFORMATION CONTACT: To request additional information, please Donna Schneider, 202–565–3612.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–02 Itemized Statement of Payments—US Costs for EXIM Credit Guarantee Facility.

OMB Number: 3048–0054.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for U.S. goods and services submitted to EXIM lenders under CGF transactions.

Affected Public: This form affects EXIM borrowers involved in financing U.S. goods and services under CGF transactions.

Annual Number of Respondents: 12.

Estimated Time per Respondent: 150 minutes.

Annual Burden Hours: 30 hours.

Frequency of Reporting or Use: As needed.

Government Expenses: None.

This form is submitted by the borrower to the CGF lender for review. The lender reports information regarding the disbursement electronically to EXIM using OMB Number 3048–0046 CGF (EIB 12–02) Disbursement Approval Request Report.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–27469 Filed 12–17–21; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2021–3050]

Agency Information Collection Activities: Final Collection; 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. This form is to be completed by EXIM borrowers as required under certain EXIM long-term guarantee and direct loan transactions in conjunction with a borrower's request for disbursement for U.S. goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements. This form will be uploaded into an electronic disbursement portal.

DATES: Comments should be received on or before January 19, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 18–02) or by email to <*donna.schneider@exim.gov*>, or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-04_itemized_statement_of_payments-us_costs_form%20Oct%202021.xlsx.*

FOR FURTHER INFORMATION CONTACT: To request additional information, please Donna Schneider. 202–565–3612.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–04 Itemized Statement of Payments—Long-term Guarantees and Direct Loans— US Costs.

OMB Number: 3048–0056.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for U.S. goods and services submitted to EXIM through an electronic disbursement portal under certain long-term guarantee and direct loan transactions.

Affected Public: This form affects EXIM borrowers involved in financing U.S. goods and services under certain long-term guarantee and direct loan transactions.

Annual Number of Respondents: 75.

Estimated Time per Respondent: 150 minutes.

Annual Burden Hours: 187.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses:

Reviewing Time per Year: 187.5 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $7,968.75 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $9,562.50.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–27472 Filed 12–17–21; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice: 2021–3051]

Agency Information Collection Activities: Final Collection; 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. This form is to be completed by EXIM borrowers as required under certain EXIM long-term guarantee and direct loan transactions in conjunction with a borrower's request for disbursement for local cost goods and services. It is used to summarize disbursement documents submitted with a borrower's request and to calculate the requested financing amount. It will enable EXIM to identify the specific details of the amount of disbursement requested for approval to ensure that the financing request is complete and in compliance with EXIM's disbursement requirements. This form will be uploaded into an electronic disbursement portal.

DATES: Comments should be received on or before January 19, 2022 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 18–02) or by email to <*donna.schneider@exim.gov*>, or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571. The form can be viewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib18-05_itemized_statement_of_payments-local_cost_form_-_Oct%202021.xlsx.*

FOR FURTHER INFORMATION CONTACT: To request additional information, please Donna Schneider. 202–565–3612.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 18–05 Itemized Statement of Payments Long-term Guarantee and Direct Loan—Local Costs.

OMB Number: 3048–0057.

Type of Review: NEW.

Need and Use: The information collected will assist in determining compliance of disbursement requests for local cost goods and services submitted to EXIM through an electronic disbursement portal under certain long-term guarantee and direct loan transactions.

Affected Public: This form affects EXIM borrowers involved in financing local cost goods and services under certain long-term guarantee and direct loan transactions.

Annual Number of Respondents: 25.

Estimated Time per Respondent: 30 minutes.

Annual Burden Hours: 12.5 hours.

Frequency of Reporting or Use: As needed.

Government Expenses:

Reviewing Time per Year: 12.5 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $531.25 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: $637.50.

Bassam Doughman,

IT Specialist.

[FR Doc. 2021–27473 Filed 12–17–21; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0951; FR ID 62741]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 18, 2022. 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: 3060–0951.

Title: Sections 1.204(b) Note and 1.1206(a) Note 1, Service of Petitions for Preemption.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, Individuals or households; Not-for-profit institutions; and State, Local or Tribal Government.

Number of Respondents and Responses: 125 respondents; 125 responses.

Estimated Time per Response: 0.28 hours (17 minutes).

Frequency of Response: On occasion reporting requirements and third party disclosure 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, and 303.

Total Annual Burden: 35 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: Yes.

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the Commission requests respondents to submit information which respondents believe is confidential, respondents may request confidential treatment of such information pursuant to section 0.459 of the Commission's rules, 47 CFR 0.459.

The FCC has a system of records, FCC/OGC–5, ''Pending Civil Cases,'' to cover the collection, purpose(s), storage, safeguards, and disposal of the personally identifiable information (PII) that individuals may submit with their petitions for preemption that they file with the Commission.

Needs and Uses: These provisions supplement the procedures for filing petitions seeking Commission preemption of state and local government regulation of telecommunications services. They require that such petitions, whether in the form of a petition for rulemaking or a petition for declaratory ruling, be served on all state and local governments. The actions for which are cited as a basis for requesting preemption. Thus, in accordance with these provisions, persons seeking preemption must serve their petitions not only on the state or local governments whose authority would be preempted, but also on other state or local governments whose actions are cited in the petition.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–27475 Filed 12–17–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 19, 2022.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *QCR Holdings, Inc., Moline, Illinois;* to merge with Guaranty Federal Bancshares, Inc., Springfield, Missouri.

Board of Governors of the Federal Reserve System, December 15, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–27487 Filed 12–17–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–1212]

Wound Healing Scientific Workshop; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the following public workshop entitled ''Wound Healing Scientific Workshop.'' The purpose of the workshop is to discuss nonhealing chronic wounds.

DATES: The public workshop will be held on April 28, 2022 (Day 1), 9 a.m. to 4 p.m. Eastern Time and April 29, 2022 (Day 2), 9 a.m. to 4 p.m. Eastern Time. Submit either electronic or written comments on this public workshop by June 28, 2022. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held in a virtual format.

You may submit comments as follows. See section III below for guidance on structuring comments. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before June 28, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 28, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–N–1212 for ''Wound Healing Scientific Workshop.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: K. Dev Verma, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5327, Silver Spring, MD 20993, 240–402–0282, *Kapil.Verma@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 2020, through a Science Strategies program launched by the Office of New Drugs (OND) in the Center for Drug Evaluation and Research, the Division of Dermatology and Dentistry collaborated with experts from the Center for Biologics Evaluation and Research, Center for Devices and Radiological Health, and OND's Division of Clinical Outcome Assessments to assess areas of unmet medical need and activity in the product development pipeline for wound healing. Because of high unmet medical need with relatively limited research and funding, FDA identified nonhealing chronic wounds as an area warranting prioritization. Root cause analyses indicated that barriers to product development for nonhealing chronic wounds involve, but are not limited to, deficient biological understanding, challenges in drug delivery, challenges in clinical trial execution, and limited commercial viability. Specific issues include the lack of current optimal preclinical animal models that are capable of properly recapitulating human wounds, heterogeneous natural history of different wounds, lack of alternative endpoints to complete wound closure, limited standardization between clinical trials, high rate of clinical trial failures, difficulties with participant enrollment in clinical trials, and a complex reimbursement environment.

FDA recognized the need for a multistakeholder Wound Healing Scientific Workshop to enhance

awareness of these unmet medical needs and barriers, to seek external input, to support data sharing, and to communicate current regulatory thinking.

II. Topics for Discussion at the Public Workshop

During the 2-day workshop, FDA and wound-healing experts aim to outline the landscape of and review current standards for product development in the field of nonhealing chronic wounds, as well as identify challenges of implementing and conducting clinical trials, discuss potential solutions to overcome these challenges, and explore how current research in wound healing can be applied to promote innovative product development.

By building on the science of known physiological processes and principles of normal wound healing and recognizing factors that disrupt these mechanisms, the workshop anticipates that a better understanding of the complexity of chronic wounds will help illustrate the gaps in current treatment options.

Furthermore, hearing from patients and patient representatives regarding their understanding of the etiology and pathology of their nonhealing chronic wounds, as well as learning what is clinically meaningful to them and what their experiences have been with clinical trials, will further inform how wound healing measures might be improved upon to execute successful clinical trials and drive innovation.

III. Request for Specific Public Comments

FDA is also soliciting public comment on experiences with nonhealing chronic wounds. When submitting a comment, FDA requests that commenters identify whether they are a patient, caregiver, medical provider, product developer, or other stakeholder. FDA also requests that commenters answer the following questions based on their identifications:

1. If you are a patient or a caregiver of an individual who has experience living with a nonhealing chronic wound:

a. Meaningful outcomes: What results of treatment would you consider meaningful to you (*e.g.,* complete healing of the wound, partial healing of the wound, decreased pain, easier wound care/dressing changes)?

b. Clinical trial experience: If you have been involved in a clinical trial to treat a nonhealing chronic wound, please describe your experience. If you have not been able to participate (*e.g.,* not eligible), or if you have chosen not to participate in a clinical trial, please tell us why.

c. Impact on quality of life: What aspects of the nonhealing wound(s) have the most significant impact on your quality of life (*e.g.,* odor, pain, discharge, decreased mobility, burdensome wound care, etc.)? Please provide a specific example, if possible.

2. If you are a caregiver or loved one, in addition to the above questions:

a. Challenges: Which aspect(s) of providing care have been the most challenging (*e.g.,* logistics of coordinating appointments, burdensome wound care, affordability of products/supplies, access to treatment, emotional stress)?

b. Education/Training: Were you trained on how to care for your loved one and the individual's nonhealing chronic wound? If so, did the training and education that you were provided allow you to feel confident in your ability to perform dressing changes and other necessary care? Please explain.

3. If you are a healthcare provider:

a. Wound types: What subtypes of nonhealing chronic wounds do you treat in your practice (*e.g.,* diabetic foot ulcers, pressure wounds, arterial wounds, venous wounds)?

b. Challenges: What have been your challenges to providing care to patients with nonhealing chronic wounds?

c. Standard of Care: Do you utilize a standard of care protocol for your nonhealing chronic wound patients? If so, describe what standard of care protocol you utilize (specified by wound etiology).

d. Products: What new products (*e.g.,* drugs, devices, biologics, combination products) would you find helpful in treating nonhealing chronic wounds?

e. Reimbursement: How does reimbursement affect your ability to provide care?

4. If you are a product developer/researcher:

a. Challenges: What are strategic, operational, and tactical challenges (and possible solutions) to implementation of successful clinical trials for chronic, nonhealing wounds?

b. Innovation: What are barriers (and possible solutions) to wound care research in the development of innovative wound care products?

5. If you are involved in the reimbursement landscape (*e.g.,* Centers for Medicare and Medicaid Services, insurance payors, billers):

a. Acceptable evidence: What is the current acceptable evidence for coverage decisions related to wound care products (devices, drugs, biologics, combination products)?

b. Challenges: What are challenges (and possible solutions) encountered in reimbursement-related decisions for wound care treatment?

III. Participating in the Public Workshop

Registration: To register for the public workshop, please visit the following website: *https://woundhealingfda2022.eventbrite.com/.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free and based on space availability, with priority given to early registrants. Persons interested in attending this public workshop must register by April 3, 2022, by 11:59 p.m. Eastern Time. Registrants will receive confirmation when they have been accepted. Early registration is recommended because space is limited; therefore, FDA may limit the number of participants from each organization.

Streaming Webcast of the public workshop: This public workshop will be webcast at *https://fda.zoomgov.com/j/1610233374?pwd=VTU5VDZid3FnaWJKMndOWXRMbmFSUT09.* The link above should allow you to enter the webinar directly. If Zoom asks for a passcode, please use the case-sensitive passcode below.

Case-Sensitive Passcode for Zoom Webinar: eEG.p5

FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/office-immunology-and-inflammation-division-dermatology-and-dentistry-ddd.*

Dated: December 15, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–27459 Filed 12–17–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS–0990–0430, 0431, 0432, 0433, 0434]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 19, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When submitting comments or requesting information, please include the document identifier 0990–0430, 0431, 0432, 0433, 0434–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Crime Control Act—Requirement for Background Checks.

Type of Collection: Extension.

OMB No. 0990–0430—Office of the Assistant Secretary for Financial Resources, Office of Acquisitions.

Abstract: Crime Control Act—Requirement for Background Checks: Performance of HHS mission requires the support of contractors. In some circumstances, depending on the requirements of the specific contract, the contractor is tasked to provide personnel who will be dealing with children under the age of 18. After contract award contractor personnel must undergo a background check as required by HHS Acquisition Regulation (HHSAR) 337.103(d)(3) and the clause at HHSAR 352.237–72 (Crime Control Act—Requirement for Background Checks) before working on the contract as required by federal law (Crime Control Act of 1990). The contractor is therefore required to provide information on the individual so that a proper background check can be performed.

The Agency is requesting a 3-year extension to collect this information from public or private businesses.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Business (contractor)	160	1	1	160
Total	160	1	1	160

Title of the Collection: Acquisitions Involving Human Subjects.

Type of Collection: Extension.

OMB No. 0990–0431—Office of the Assistant Secretary for Financial Resources, Office of Acquisitions.

Abstract: Acquisitions Involving Human Subjects: Performance of HHS mission requires the support of contractors involving human subjects. Before awarding a contract to any contractor that will need to use human subjects, the Contracting Officer is required to verify that, the contractor holds a valid Federal Wide Assurance (FWA) approved by the Office for Human Research Protections (OHRP). The provisions are implemented via contract clauses found at HHSAR 352.270–4a (Notice to Offerors, Protection of Human Subjects), the clause at HHSAR 352.270–4b (Protection of Human Subjects), the provision at HHSAR 352.270–10 (Notice to Offerors—Protection of Human Subjects, Research Involving Human Subjects Committee (RIHSC) Approval of Research Protocols Required), and the clause at HHSAR 352.270–11 (Protection of Human Subjects—Research Involving Human Subjects Committee (RIHSC) Approval of Research Protocols Required).

The Agency is requesting a 3-year extension to collect this information from public or private businesses.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Business (contractor)	90	4	5	1,800
Total	90	4	5	1,800

Title of the Collection: Acquisitions Involving the Use of Laboratory Animals.

Type of Collection: Extension.

OMB No. 0990–0432—Office of the Assistant Secretary for Financial Resources, Office of Acquisitions.

Abstract: Acquisitions Involving the Use of Laboratory Animals: Performance of HHS mission requires the use of live vertebrate animals. Before awarding a contract to any contractor, which will need to use live vertebrate animals, the Contracting Officer is required to verify that the contractor holds a valid Animal Welfare Assurance from the Office of Laboratory Animal Welfare (OLAW) within NIH. Contractors are required to file the appropriate forms to obtain this approval. The applicable clauses are found at HHSAR 352.270–5a (Notice to Offerors of Requirement for Compliance with the Public Health Service Policy on Humane Care and Use of Laboratory Animals), and the clause at HHSAR 352.270–5b (Care of Live Vertebrate Animals). The Agency is requesting a 3-year extension to collect this information from public or private businesses.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Business (contractor)	36	1	3	108
Total	36	1	3	108

Title of the Collection: Indian Child Protection and Family Violence Act.

Type of Collection: Extension.

OMB No. 0990–0433—Office of the Assistant Secretary for Financial Resources, Office of Acquisitions.

Abstract: Indian Child Protection and Family Violence Act: Performance of IHS mission requires the support of contractors. In some circumstances, depending on the requirements of the specific contract, the contractor is tasked to provide personnel who will be dealing with Indian children under the age of 18. After contract award contractor personnel must undergo a background check as required by HHSAR 337.103(d)(4) and the clause at HHSAR 352.237–73 (Indian Child Protection and Family Violence Act) before working on the contract as required by federal law (Indian Child Protection and Family Violence Act (ICPFVA)). The contractor is therefore required to provide information on the individual so that a proper background check can be performed, as stated in the HHS Acquisition Regulation.

The Agency is requesting a 3-year extension to collect this information from public or private businesses.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Business (contractor)	2,000	1	0.033	67
Total	2,000	1	0.033	67

Title of the Collection: Meetings, Conferences, and Seminars—Public Accommodations and Commercial Facilities—Funding and Sponsorship.

Type of Collection: Extension.

OMB No. 0990–0434—Office of the Assistant Secretary for Financial Resources, Office of Acquisitions.

Abstract: Meetings, Conferences, and Seminars—Public Accommodations and Commercial Facilities—Funding and Sponsorship: Performance of HHS mission requires the support of contractors. In some circumstances, depending on the requirements of the specific contract, the contractor is tasked to conduct meetings, conferences, and seminars. HHSAR 311.7102 and the clause at HHSAR 352.211–1 (Public Accommodations and Commercial Facilities) require contractors to provide a plan describing the contractor's ability to meet the accessibility standards in 28 CFR part 36. HHSAR 311.7202(b) and the clause at HHSAR 352.211–2 (Conference Sponsorship Request and Conference Materials Disclaimer) require contractors to provide funding disclosure and a content disclaimer statement on conference materials. As a result of these clauses, HHS contractors providing conference, meeting, or seminars services are required to provide specific information to HHS as stated in the HHS Acquisition Regulation.

The Agency is requesting a 3-year extension to collect this information from public or private businesses.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Business (contractor)	1,067	1	1	1,067
Total	1,067	1	1	1,067

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2021–27432 Filed 12–17–21; 8:45 am]

BILLING CODE 4151–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Generic Clearance for National Cancer Institute (NCI) NCI Resources, Software and Data Sharing Forms (National Cancer Institute)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Diane Kreinbrink, Office of Management Policy and Compliance, National Cancer Institute, 9609 Medical Center Drive, Rockville, Maryland 208 or call non-toll-free number (240) 276–7283 or Email your request, including your address to: *diane.kreinbrink@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Generic Clearance for National Cancer Institute (NCI) NCI Resources, Software and Data Sharing Forms, 0925—EXISTING COLLECTION IN USE WITHOUT AN OMB NUMBER, Expiration Date xx/xx/xxxx, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: In preparation for dissemination and sharing of data sets, forms requesting or applying for access, upload, share, and store data will be needed. The purpose of data sharing allows data generated from one research study to be used to answer questions beyond the original study. It reinforces open scientific inquiry, encourages diversity of analysis, supports studies on data collection methods and measurement, facilitates the education of new researchers, and enables the exploration of topics not envisioned by the initial investigators. Biomedical researchers and data scientists can use the NCI cloud resources, web interface, and computational workspaces to query, submit data, analyze, and visualize data. The forms would be used to register a scientist's research data, apply for data storage, and submit a request to access and use the data. In addition to these forms, forms related to metadata information (*i.e.,* related to the collection of the research data; how the data was collected) would be collected for some research OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden are 5,775 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Request Data Access/Use					
Data Access Request-Submitter	Individuals	1,500	1	45/60	1,125
Institutional Certification	Individuals	1,500	1	30/60	750
Data Submission/Storage					
Data Submission/Storage Request	Individuals	1,500	1	30/60	750
Institutional Certification	Individuals	1,500	1	30/60	750
Request Access to/Use NCI Resources/Software					
Data Resources	Individuals	1,500	1	30/60	750
Project Renewal or Project Close-out					
Project Renewal or Project Close-out form	Individuals	1,500	2	15/60	750
Institutional Certification	Individuals	1,500	2	18/60	900
Totals		10,500	13,500		5,775

Dated: December 14, 2021.

Diane Kreinbrink,

Project Clearance Liaison, National Cancer Institute, National Institutes of Health.

[FR Doc. 2021–27411 Filed 12–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Review of Radiation Oncology-Biology Integration Network (ROBIN) Centers.

Date: February 3–4, 2022.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Drug Development Support TEP.

Date: February 4, 2022.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–5: NCI Clinical and Translational Cancer Research.

Date: February 8–9, 2022.

Time: 9:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–672–6175, *singhshr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Metabolic Dysregulation and Cancer Risk.

Date: February 8, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–10: NCI Clinical and Translational Cancer Research.

Date: February 22, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W552, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Biman Chandra Paria, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W552, Rockville, Maryland 20850, 202–731–8506, *pariab@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–7: NCI Clinical and Translational Cancer Research.

Date: February 23–24, 2022.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Robert F. Gahl, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W104, Rockville, Maryland 20850, 240–276–7869, *robert.gahl@nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group; Institutional Training and Education Study Section (F).

Date: February 23–24, 2022.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850, 240–276–6368, *Stoicaa2@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award (R50).

Date: February 24–25, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Translational and Basic Research Early Lesions (U54 and U24).

Date: March 2–3, 2022.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group; Career Development Study Section (J).

Date: March 3–4, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850, 240–276–6132, *tushar.deb@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–4: NCI Clinical and Translational Cancer Research.

Date: March 17, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Informatics Technologies for Cancer Research.

Date: March 30–31, 2022.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W114, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W114, Rockville, Maryland 20850, 240–276–6371, *decluej@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 15, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–27482 Filed 12–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 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 on Alcohol Abuse and Alcoholism Special Emphasis Panel; National Consortium on Alcohol and Neurodevelopment in Adolescence (NCANDA) (RFA AA 21–007, 008, 009).

Date: February 9, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Beata Buzas, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2116, MSC 6902, Bethesda, MD 20817, (301) 443–0800, *bbuzas@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: December 15, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–27481 Filed 12–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; BRAIN Initiative: Research Opportunities in the Human Brain (ROH) U01.

Date: January 28, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Tatiana Pasternak, Ph.D., Scientific Review Officer, Scientific Review Branch, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Rockville, MD 20852, (301) 496–9223, *tatiana.pasternak@nih.gov*.

Name of Committee: Neurological Sciences Training Initial Review Group; NST–2 Study Section Post-Doc Career Development Fellowships (F32s, K01s, and K99s).

Date: February 7–9, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: DeAnna Lynn Adkins, Ph.D., Scientific Review Officer, Scientific Review Branch, NSC Building, 6001 Executive Boulevard, Bethesda, MD 20892, (301) 496–9223, *deanna.adkins@nih.gov*.

(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: December 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–27484 Filed 12–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meetings will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, including consideration of

personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Date: January 23–25, 2022.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: Porter Neuroscience Research Center, Building 35A, 35 Convent Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nina F. Schor, MD, Ph.D., Deputy Director, National Institute of Neurological Disorders and Stroke, NIH Building 31, Room 8A52, Bethesda, MD 20892, 301–496–9746 *nina.schor@nih.gov*.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Date: March 20–22, 2022.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: Porter Neuroscience Research Center, Building 35A, 35 Convent Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nina F. Schor, MD, Ph.D., Deputy Director, National Institute of Neurological Disorders and Stroke, NIH Building 31, Room 8A52, Bethesda, MD 20892, 301–496–9746 *nina.schor@nih.gov*.

(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: December 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–27483 Filed 12–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0164]

National Boating Safety Advisory Committee; January 2022 Teleconference

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee teleconference meeting.

SUMMARY: The National Boating Safety Advisory Committee (Committee) will meet via teleconference to discuss matters relating to recreational boating safety. This meeting will be open to the public.

DATES: *Meeting:* The Committee will meet by teleconference on Thursday, January 20, 2022, from 12:00 p.m. until 4:00 p.m., (Eastern Standard Time). The teleconference may adjourn early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the teleconference, submit your written comments no later than January 17, 2022.

ADDRESSES: To join the teleconference or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on January 17, 2022, to obtain the needed information. The number of teleconferences lines is limited and will be available on a first-come, first-served basis.

Instructions: You are free to submit comments at any time, including orally at the teleconference as time permits, but if you want Committee members to review your comments before the teleconference, please submit your comments no later than January 17, 2022. We are particularly interested in comments on the issues in the ''Agenda'' section below. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number [USCG–2010–0164]. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Decker, Alternate Designated Federal Officer of the National Boating Safety Advisory Committee, 2703 Martin Luther King Jr. Ave SE, Stop 7509, Washington, DC 20593–7509, telephone 202–372–1507 or via email at *NBSAC@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the *Federal Advisory Committee Act,* (5 U.S.C. Appendix). The National Boating Safety Advisory Committee was established on December 4, 2018, by § 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018* (Pub. L. 115–282, 132 Stat. 4192). That authority is codified in 46 U.S.C. 15105. The Committee operates under the provisions of the *Federal Advisory Committee Act* (5 U.S.C. Appendix) in addition to the administrative provisions for the National Maritime Transportation Advisory Committees in 46 U.S.C. 15109. The National Boating Safety Advisory Committee provides advice and recommendations to the Department of Homeland Security on matters relating to recreational vessels and associated equipment and on other safety matters related to recreational vessels.

Agenda

The agenda for the National Boating Safety Advisory Committee meeting is as follows:

Thursday, 20 January 2022

(1) Call to Order.
(2) Roll call of Committee Members and Determination of Quorum.
(3) Opening Remarks.
(4) Swearing-in of New Appointees.
(5) Conflict of Interest Statement.
(6) Receipt and Discussion of the Following Reports From the Office of Auxiliary and Boating Safety:
  (a) Boating Incident Reporting Policy.
  (b) Strategic Planning Wrap-up.
  (c) Update on Throwable Personal Flotation Device Exemption.
  (d) New Fire Protection Regulation for Recreational Vessels.
(7) Public Comment.
(8) Report From Strategic Planning Subcommittee.
(9) Report From Prevention Through People Subcommittee.
(10) Committee Discussion on Subcommittee Recommendations.
(11) Closing Remarks/Plans for Next Meeting.
(12) Adjournment of Meeting.

A copy of all meeting documentation will be available at: *https://homeport.uscg.mil/missions/federal-advisory-committees/national-boating-safety-advisory-committee-(nbsac)/committee-meetings/fr-meeting-announcement* no later than January 17, 2022. Alternatively, you may contact Mr. Jeff Decker as noted in the **FOR FURTHER INFORMATION** section above.

During the January 20, 2022 teleconference, a public comment

period will be held from approximately 1:45 p.m.–2:00 p.m. Public comments will be limited to two minutes per speaker. Please note that the public comment periods will end following the last call for comments.

Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section, to register as a speaker.

Dated: December 14, 2021.

Wayne R. Arguin, Jr.,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2021–27405 Filed 12–17–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2004–17131]

Intent To Request Extension From OMB of One Current Public Collection of Information: Aircraft Repair Station Security

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0060 that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves recordkeeping requirements and petitions for reconsideration by owners and/or operators of repair stations certificated by the Federal Aviation Administration (FAA).

DATES: Send your comments by February 18, 2022.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0060; Aircraft Repair Station Security. In accordance with 49 U.S.C. 44924 and 49 CFR part 1554, TSA performs security reviews and audits of aircraft repair stations located within and outside of the United States.

Section 611 the Vision 100 Century of Aviation Reauthorization Act (the Act) requires the Department of Homeland Security (DHS) to ensure the security of aircraft repair stations. Public Law 108–176 (Oct. 5, 2018) as codified at 49 U.S.C. 44924. The Act further requires a security review and audit of aircraft repair stations located outside the United States, with a 145-certificate issued by the FAA. *Id.* TSA, on behalf of DHS, is the agency to conduct the relevant tasks associated with this legislation. As required by the Act, TSA published a final rule setting forth the new requirements in 2014. *See* 79 FR 2119 (Jan. 13, 2014).

Under TSA's regulations, aircraft repair stations certificated by the FAA under part 145 and located on or adjacent to an airport, as defined in 49 CFR 1554.101(a)(1) and (2), are required to implement security requirements. Unless located on a military installation, these aircraft repair stations are subject to inspection by TSA.

The required security measures include designating a TSA point of contact and preventing the operation of unattended large aircraft that are capable of flight. An aircraft repair station owner or operator also is responsible for maintaining updated employment history records to demonstrate compliance with the regulatory requirements. These records must be made available to TSA upon request. If TSA discovers security deficiencies, an aircraft repair station may be subject to suspension or, in extreme cases, withdrawal of its 145-certificate by the FAA if such deficiencies are not corrected. An aircraft repair station owner or operator may petition for reconsideration (appeal) of a determination by TSA that FAA must suspend or revoke its certificate. TSA uses the collected information to determine compliance with the security measures required under 49 CFR part 1554.

The respondents to this information collection are the owners and/or operators of aircraft repair stations certificated by the FAA under 14 CFR part 145, which is estimated to be over 4,000 aircraft repair stations located within the United States and more than 900 active repair stations located outside the United States.

Respondent aircraft repair stations are required to submit and update security point of contact information, respond to requests to inspect documentation, and may petition for reconsideration. For these activities, TSA estimates that all respondent repair stations will incur a total of 412 hours annually to satisfy the collection requirements.

Dated: December 15, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–27477 Filed 12–17–21; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[222A2100DD/AABB003600/ A0T902020.253G]

Kaw Nation Alcohol Ordinance of 2019; Repeal and Replace

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Kaw Nation Alcohol Ordinance of 2019 which repeals and replaces the Kaw Nation Alcohol Control Ordinance previously published in the **Federal Register** and any and all previous statutes. The Kaw Nation Alcohol Ordinance of 2019 regulates and controls the possession, sale, manufacture, and distribution of liquor on the Kaw Nation trust lands in conformity with the Federal laws and of the State of Oklahoma where applicable

and necessary. The enactment of this Ordinance will provide and important source of tax revenue for the continued operation and strengthening the Kaw Nation government and the delivery of tribal government services and, the economic viability of tribal enterprises.

DATES: This ordinance shall take effect on January 19, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Sherry Lovin, Tribal Government Officer, Southern Plains Regional Office, Bureau of Indian Affairs, Post Office Box 368, Anadarko, Oklahoma 73005, Telephone: (405) 247–1534 or (405) 247–6673, Fax: (405) 247–9240.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian Country.

On April 13, 2018, the Kaw Nation Tribal Council duly adopted the Kaw Nation Alcohol Ordinance of 2019 by Resolution 19–37, which will repeal, upon its effective date, the Kaw Nation Alcohol Control Ordinance, which was published in the **Federal Register** on July 31, 2009 at 74 FR 38220. Although, the Kaw Nation Alcohol Ordinance of 2019 was adopted by the Kaw Nation Tribal Council on April 13, 2019, it does not become effective until published in the **Federal Register**.

This notice is published in accordance with the delegated authority by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the Kaw Nation Tribal Council duly adopted the Kaw Nation Alcohol Ordinance of 2019 by Resolution No. 19–37 on April 13, 2019.

Bryan Newland,

Assistant Secretary—Indian Affairs.

Kaw Nation

Alcohol Ordinance of 2019

Contents

Article I—Introduction

Section 1.1 Title

This Ordinance shall be known as the ''Kaw Nation Alcohol Ordinance of 2019'' (the ''Ordinance''). This Ordinance and Act amends and supercedes all prior laws of the Kaw Nation pertaining to Alcohol including the Kaw Nation Alcohol Control Ordinance, FR Vol. 74, No. 146, 38, 220–38.227.

Section 1.2 Authority

This Ordinance is enacted pursuant to the Act of August 15, 1953. Pub. L. 83–277, 67 Stat. 586, 18 U.S.C. 1161 and Article II, § 4 of the Constitution of the Kaw Nation (hereinafter ''Nation'' or ''Tribe'').

Section 1.3 Purpose

The purpose of this Ordinance is to regulate and control the manufacture, distribution, possession, and Sale of Alcoholic Beverages on Tribal Lands of the Kaw Nation, and to generate revenues to fund necessary Tribal programs and services. The enactment of this Ordinance will enhance the ability of the Kaw Nation to control all such Alcohol-related activities within the jurisdiction of the Tribe and will provide an important source of revenue for the continued operation and strengthening of the Kaw Nation and the delivery of important governmental services.

Section 1.4 Application of Federal Law

Federal law forbids the introduction, possession and Sale of liquor in Indian Country (18 U.S.C. 1154 and other statutes), except when in conformity both with the laws of the State and the Tribe (18 U.S.C. 1161). As such, compliance with this Ordinance shall be in addition to, and not a substitute for, compliance with the laws of the State of Oklahoma.

Section 1.5 Administration of Ordinance

The Tribal Council, through its powers vested under Article II, § 4 of the Constitution of the Kaw Nation and this Ordinance, delegates to the Alcohol Regulatory Authority the authority to

exercise all of the powers and accomplish all of the purposes set forth in this Ordinance, which may include, but are not limited to, the following actions:

A. Adopt and enforce rules and regulations for the purpose of effectuating this Ordinance, which includes the setting of fees, fines and other penalties;

B. Execute all necessary documents; and

C. Perform all matters and actions incidental and necessary to conduct its business and carry out its duties and functions under this Ordinance.

Section 1.6 Sovereign Immunity Preserved

A. The Tribe is immune from suit in any jurisdiction except to the extent that the Tribal Council of the Kaw Nation expressly and unequivocally waives such immunity by approval of such written resolution.

B. Nothing in this Ordinance shall be construed as waiving the sovereign immunity of the Kaw Nation or the Alcohol Regulatory Authority as an agency of the Kaw Nation.

Section 1.7 Applicability

This Ordinance shall apply to all Tribal and commercial enterprises located within Tribal Lands consistent with applicable Federal Liquor Laws.

Section 1.8 Computation of Time

Unless otherwise provided in this Ordinance, in computing any period of time prescribed or allowed by this Ordinance, the day of the act, event, or default from which the designated period time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. For the purposes of this Ordinance, the term ''legal holiday'' shall mean all legal holidays under Tribal or Federal law. All documents mailed shall be deemed served at the time of mailing.

Section 1.9 Liberal Construction

Provisions of this Ordinance shall be liberally construed to achieve the purposes set forth, whether clearly stated or apparent from the context of the language used herein.

Section 1.10 Collection of Applicable Fees, Taxes, or Fines

The Alcohol Regulatory Authority shall have the authority to collect all applicable and lawful fees, taxes, and or fines from any person or Licensee as imposed by this Ordinance. The failure of any Licensee to deliver applicable taxes collected on the Sale of Alcoholic Beverages shall subject the Licensee to penalties, including, but not limited to, the revocation of said License.

Article II—Declaration of Public Policy

Section 2.1 Matter of Special Interest

The manufacture, distribution, possession, Sale, and consumption of Alcoholic Beverages within the jurisdiction of the Kaw Nation are matters of significant concern and special interest to the Tribe. The Tribal Council hereby declares that the policy of the Kaw Nation is to eliminate the problems associated with unlicensed, unregulated, and unlawful importation, distribution, manufacture, possession and Sale of Alcoholic Beverages for commercial purposes and to promote temperance in the use and consumption of Alcoholic Beverages by increasing the Tribe's control over such activities on Tribal lands.

Section 2.2 Federal Law

The introduction of Alcohol within the jurisdiction of the Tribe is currently prohibited by Federal law (18 U.S.C. 1154), except as provided for therein, and the Tribe is expressly delegated the right to determine when and under what conditions Alcohol, including Alcoholic Beverages, shall be permitted thereon (18 U.S.C. 1161).

Section 2.3 Need for Regulation

The Tribe finds that the Federal Liquor Laws prohibiting the introduction, manufacture, distribution, possession, Sale, and consumption of Alcoholic Beverages within the Tribal lands have proven ineffective and that the problems associated with same should be addressed by the laws of the Tribe, with all such business activities related thereto subject to the taxing and regulatory authority of the Alcohol Regulatory Authority.

Section 2.4 Geographic Locations

The Tribe finds that the introduction, manufacture, distribution, possession, Sale, and consumption of Alcohol, including Alcoholic Beverages, shall be regulated under this Ordinance only where such activity will be conducted within or upon Tribal Lands.

Section 2.5 Definitions

Unless otherwise required by the context, the following words and phrases shall have the designated meanings:

A. ''Alcohol'' means and includes hydrated oxide of ethyl, ethyl Alcohol, ethanol, or Spirits of Wine, from whatever source or by whatever process produced. It does not include wood Alcohol or Alcohol which has been denatured or produced as denatured in accordance with Acts of Congress and regulations promulgated thereunder.

B. ''Alcohol Regulatory Authority'' means the Kaw Tax Commission pursuant to Resolution No. 09–69 enacted by the Tribal Council on August 14, 2009.

C. ''Alcoholic Beverage(s)'' means Alcohol, Spirits, Beer and Wine as those terms are defined herein and also includes every liquid or solid, patented or not, containing Alcohol, Spirits, Wine or Beer and capable of being consumed as a Beverage by human beings.

D. ''Applicant'' means any individual, legal or commercial business entity, or any individual involved in any legal or commercial business entity allowed to hold any License under the laws of the Kaw Nation.

E. ''Beer'' means any Beverage of Alcohol by volume and obtained by the Alcoholic fermentation of an infusion or decoction of barley, or other grain, malt or similar products. ''Beer'' may or may not contain hops or other vegetable products. ''Beer'' includes, among other things, Beer, ale, stout, lager Beer, porter and other malt or brewed liquors, but does not include sake, known as Japanese rice Wine.

F. ''Cider'' means any Alcoholic Beverage obtained by the Alcoholic fermentation of fruit juice, including but not limited to flavored, sparkling or carbonated cider.

G. ''Citizen'' or ''Enrolled Member'' means any person whose name appears on the official roll of the Kaw Nation.

H. ''Commercial Sale'' means the transfer, exchange or barter, in any way or by any means whatsoever, for a consideration by any person, association, partnership, or corporation, of Alcoholic Beverages.

I. ''Constitution'' means the Constitution of the Kaw Nation.

J. ''Federal Liquor Laws'' means all laws of the United States of America that apply to or regulate in any way the introduction, manufacture, distribution, possession, or Sale of any form of Alcohol, including, but not limited to 18 U.S.C. 1154 & 1161.

K. ''Legal Age'' means twenty-one (21) years of age.

L. ''License'' or ''Alcoholic Beverage License'' means a License issued by the Alcohol Regulatory Authority authorizing the introduction, manufacture, distribution, or Sale of Alcoholic Beverages for commercial purposes under the provisions of the this Ordinance.

M. ''Licensee'' means any person holding a License under the laws of the Kaw Nation, and any agent, servant or

employee of such Licensee while in the performance of any act or duty in connection with the Licensed business or on the Licensed Premises.

N. ''Liquor Store'' means any business, store, or commercial establishment at which Alcohol is sold and shall include any and all businesses, facilities and events engaged in the Sale of Alcoholic Beverages, whether sold as packaged or by the drink.

O. ''Manufacturer'' means a brewer, distiller, Winemaker, rectifier or bottler of any Alcoholic Beverage and its subsidiaries, affiliates and parent companies.

P. ''Mixed Beverage Cooler'' or ''Wine Cooler'' means any Beverage, by whatever name designated, consisting of an Alcoholic Beverage and fruit or vegetable juice, fruit or vegetable flavorings, dairy products or carbonated water containing more than one-half of one percent (½ of 1%) of Alcohol measured by volume but not more than seven percent (7%) Alcohol by volume at sixty (60) degrees Fahrenheit and which is packaged in a container not larger than three hundred seventy-five (375) milliliters. Such term shall include but not be limited to the Beverage popularly known as a ''Wine cooler.''

Q. ''Operator'' means a person properly Licensed by the Kaw Nation to operate a facility, event, or otherwise that is engaged in the activity of selling Alcoholic Beverages.

R. ''Ordinance'' means this Kaw Nation Alcohol Ordinance of 2018, as amended from time to time pursuant to Resolution of the Kaw Nation Tribal Council.

S. ''Package'' or ''Packaged'' or ''Package Store'' means the Sale of any Alcoholic Beverage by delivery of same by a seller to a purchaser in any container, bag, or receptacle for consumption off the Premises or location designated on the seller's License.

T. ''Person'' means an individual, any type of partnership, corporation, association, limited liability company or any individual involved in the legal structure of any such business entity.

U. ''Premises'' means the grounds and all buildings and appurtenances pertaining to the grounds including any adjacent Premises if under the direct or indirect control of the Licensee and used in connection with or in furtherance of the business covered by a License. Provided that the Alcoholic Beverage Laws Enforcement Commission of the State of Oklahoma (''ABLE Commission'' or ''ABLE'') shall have the authority to designate areas to be excluded from the Licensed Premises solely for the purpose of:

1. Allowing the presence and consumption of Alcoholic Beverages by private parties which are closed to the general public, or

2. allowing the services of a caterer serving Alcoholic Beverages provided by a private party.

This exception shall in no way limit the Licensee's concurrent responsibility for any violations of the Oklahoma Alcoholic Beverage Control Act and/or the Kaw Nation Alcohol Control Ordinance occurring on the Licensed Premises.

V. ''Public Place'' or ''Public Forum'' means and shall include any Tribal, county, State, or Federal highways, roads, and rights-of-way; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; public restaurants, buildings, meeting halls, hotels, theaters, retail stores, and business establishments generally open to the public and to which the public is allowed to have unrestricted access; and all other places to which the general public has unrestricted right of access and that are generally used by the public. For the purpose of this Ordinance, ''Public Place'' or ''Public Forum'' shall also include any privately-owned business property or establishment that is designed for, or may be regularly used by, more persons other than the owner of the same, but shall not include the private, family residence of any person.

W. ''Regulation(s)'' means any Regulation(s) adopted by the Alcohol Regulatory Authority to further the purposes and intent of this Ordinance that comply with Federal and State law as approved by Tribal Council.

X. ''Relative'' means either a biological or adopted parent, spouse, child, step-child, foster child, grandchild, sibling, grandparent, great-grandparent, aunt, uncle, and in-law parental, sibling, or child relationships.

Y. ''Retailer'' means a Package Store, grocery store, convenience store or drug store Licensed to sell Alcoholic Beverages for off-premise consumption pursuant to a Retail Spirits License, Retail Wine License or Retail Beer License.

Z. ''Sale(s)'', ''Sell'', or ''Sold'' means any transfer, exchange or barter of Alcoholic Beverages in any manner or by any means whatsoever, and includes and means all Sales made by any person, whether as principal, proprietor or as an agent, servant or employee. The term ''Sale'' is also declared to be and include the use or consumption upon Tribal Lands of any Alcoholic Beverage obtained within or imported from without this State, upon which the excise tax levied by the Oklahoma Alcoholic Beverage Control Act and/or Kaw Nation has not been paid or exempted.

AA. ''Sparkling Wine'' means champagne or any artificially carbonated Wine.

BB. ''Tribal Council'' means the duly elected legislative body of the Kaw Nation authorized to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future, pursuant to Article V, Section 2 of the Constitution of the Kaw Nation.

CC. ''Tribal Court'' means the Courts of the Kaw Nation, as established under the Constitution of the Kaw Nation, Article VIII, § 1.

DD. ''Tribal Land(s)'' means and reference the geographic area that includes all land included within the definition of ''Indian Country'' as established and described by Federal law and that is under the jurisdiction of the Kaw Nation, including, but not limited to all lands held in trust by the Federal government, located within the same, as are now in existence or may hereafter be added to, and all Tribally owned land and waters and all restricted or trust land belonging to Tribal members within the boundary of the Kaw Nation reservation established by Agreement dated June 26, 1890, and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land, or, interest in land, which may be subsequently acquired.

EE. ''Tribal Law'' means the Constitution of the Kaw Nation and all laws, ordinances, codes, resolutions, and regulations now and hereafter duly enacted by the Tribe.

FF. ''Tribe'' means the Kaw Nation.

GG. ''Wholesale Price'' means the established price for which Alcohol and/or Beer products are sold to the Kaw Nation or to any Licensed Licensee by the Manufacturer or distributor, exclusive of any discount or other reduction.

HH. ''Wine'' means and includes any Beverage containing more than one-half of one percent (½ of 1%) Alcohol by volume and not more than twenty-four percent (24%) Alcohol by volume at sixty (60) degrees Fahrenheit obtained by the fermentation of the natural contents of fruits, vegetables, honey, milk or other products containing sugar, whether or not other ingredients are added, and includes vermouth and sake, known as Japanese rice Wine.

Article III—Sales of Alcoholic Beverages

Section 3.1 Prohibition of the Unlicensed Sale of Alcoholic Beverages

This Ordinance prohibits the introduction, manufacture, distribution, or Sale of Alcoholic Beverages for commercial purposes, other than where conducted by a Licensee in possession of a lawfully issued License in accordance with this Ordinance. The Federal Liquor Laws are intended to remain applicable to any act or transaction that is not authorized by this Ordinance, and violators shall be subject to all penalties and provisions of any and all Federal and or Tribal laws.

Section 3.2 Sales for Cash

All Sales of Alcoholic Beverages conducted by any person or commercial enterprise upon Tribal Lands shall require payment at the time of purchase and consumption of same shall be extended to any person, organization, or entity, except that this provision does not prohibit the payment of same by use of credit cards acceptable to the seller.

Section 3.3 Personal Consumption

All Sales of Alcoholic Beverages shall be for the personal use and consumption of the purchaser and or his/her guest(s) of Legal Age. The re-Sale of any Alcoholic Beverage purchased within or upon Tribal Lands by any person or commercial enterprise not Licensed as required by this Ordinance is prohibited.

Section 3.4 Tribal Enterprises

No employee or Operator of a commercial enterprise owned by the Tribe shall sell or permit any person to open or consume any Alcoholic Beverage on any Premises or location, or any Premises adjacent thereto, under his or her control, unless such activity is properly Licensed as provided in this Ordinance.

Section 3.5 Right of Alcohol Regulatory Authority To Scrutinize Licenses

Every Licensee shall keep the Alcohol Regulatory Authority informed in writing of the identity of Manufacturers, suppliers and/or Wholesalers who supply or are expected to supply Alcohol to their Licensed Premises. The Alcohol Regulatory Authority may, at its discretion, for any reasonable cause, limit or prohibit the purchase of said Alcohol from a supplier or Wholesaler.

Section 3.6 Freedom of Information From Manufacturers, Suppliers, and Wholesalers

Licensees shall in their purchase of Alcohol and in their business relationships with Manufacturers, suppliers, and Wholesalers (''Third Party(ies)'') cooperate with and assist the free flow of information and data to the Alcohol Regulatory Authority from such suppliers relating to the Sales to and business arrangements between the Third Parties and the Licensees. The Alcohol Regulatory Authority may, in its discretion, require from the Licensee and Third Parties all receipts, invoices, bills of lading, other billings or other documentary receipts of Sales to any Licensee. Such records shall be available for inspection by the Alcohol Regulatory Authority upon reasonable request.

Section 3.7 Alcohol Regulatory Authority Retail Sales Regulations

The Alcohol Regulatory Authority may adopt Regulations regarding the retail Sale of Alcohol which shall supplement this Ordinance and facilitate its enforcement. These Regulations may include limitations on hours and days when Premises may be open for business, and other appropriate matters and controls.

Section 3.8 Sales to Minors

No person shall give, sell or otherwise supply Alcoholic Beverages to any person under the Legal Age of twenty-one (21), either for his or her own use or for the use of his or her parents or for the use of any other person.

Section 3.9 Consumption of Alcohol Upon Licensed Premises

Only a Licensee with the appropriate type of License issued by the Alcohol Regulatory Authority shall allow any person to open or consume Alcohol on his or her Premises or any Premises adjacent thereto in his or her control.

Section 3.10 Conduct on Licensed Premises

A. No Licensee shall allow any person to be disorderly, boisterous or intoxicated on their Licensed Premises or on any Public Place adjacent thereto which are under his or her control.

B. No Licensee or employee shall consume Alcohol of any kind while working on the Licensed Premises.

C. No Licensee shall knowingly sell, deliver, or furnish Alcoholic Beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient.

Section 3.11 Employment of Minors

Employees under the Legal Age of twenty-one (21) may only sell or handle Alcohol while under the direct supervision of another employee who is twenty-one (21) years of age or older. Only employees who are twenty-one (21) years of age or older, may serve Alcoholic Beverages in a bar or lounge area where the Alcoholic Beverages are intended for on-site consumption. Employees participating in selling, mixing, or serving Alcoholic Beverages must have an Alcoholic Beverage License.

Section 3.12 Display of License

Any Licensee issued a License shall visually display the License at all times on the Premises specified in the application for such License.

Section 3.13 Licensed Premises Open to Alcohol Regulatory Authority Inspection

The Premises of all Licensees, including vehicles used in connection with Alcohol Sales, shall be open at all times to inspection by the Alcohol Regulatory Authority or its designated representative.

Section 3.14 Licensee's Records

The originals or copies of all Sales slips, invoices, and other memoranda covering all purchases of Alcohol by Licensees shall be kept on file in the Licensed Premises of the Licensee purchasing the same for at least three (3) years after each purchase and shall be filed separately and kept apart from all other records and, as nearly as possible, shall be filed in consecutive order and each month's records kept separate so as to render the same readily available for inspection and checking. All cancelled checks, bank statements and books of accounting covering or involving the purchase of Alcohol, and all memoranda, if any, showing payment of money for Alcohol other than by check, shall be likewise preserved for availability for inspection and checking.

Section 3.15 Records Confidential

All records of the Alcohol Regulatory Authority showing purchase of Alcohol by any individual or group shall be confidential and shall not be inspected except by members of the Alcohol Regulatory Authority or its authorized representative.

Section 3.16 Conformity With Federal and State Law

Licensees shall comply with the laws and regulations of the State of Oklahoma related to Alcohol to the extent required by 18 U.S.C. 1161.

Licensees are subject to all of the enumerated prohibited acts contained in Title 37A of the Oklahoma Statutes, and failure of the Licensee to observe such laws will subject said Licensee to Federal prosecution under 18 U.S.C. 1181.

Article IV—Licensing

Section 4.1 License Required

A. Any and all Sales of Alcoholic Beverages conducted upon Tribal Lands shall be permitted only where the seller (i) holds a current Alcoholic Beverage License, duly issued by the Alcohol Regulatory Authority; and (ii) prominently and conspicuously displays the License on the Premises or location designated on the License.

B. A Licensee has the right to engage only in those activities involving Alcoholic Beverage(s) expressly authorized by such License in accordance with this Ordinance.

Section 4.2 Licensing Procedures

The Alcohol Regulatory Authority shall have authority over the licensing of all persons related to the Sale of Alcohol within the Tribal Lands. The Alcohol Regulatory Authority is empowered to administer this Ordinance by exercising general control, management, and supervision of all Alcoholic Beverage Sales, places of Sale and Sales Premises, as well as exercising all powers necessary to accomplish the purposes of this Ordinance, and adopting and enforcing any additional rules and policies in furtherance of the purposes of this Ordinance and in the performance of its administrative functions as provided herein.

A. *Eligibility.* Any person may apply to the Alcohol Regulatory Authority for a License as provided herein. Only Applicants operating upon Tribal Lands shall be eligible to receive a License for the Sale of Alcohol upon Tribal Lands pursuant to this Ordinance.

B. *Application Process.*

1. *Application Form.* An application for any License shall be made to the Alcohol Regulatory Authority on the appropriate form for such License as provided by the Alcohol Regulatory Authority.

2. *Payment of Fees.* Each application shall be accompanied by a non-refundable application fee as specified herein. All application fees paid to the Alcohol Regulatory Authority are nonrefundable upon submission of any such application. Each application shall require the payment of a separate application fee. Following approval of an application, but prior to issuance of the License, the Applicant shall pay the appropriate nonrefundable License fee to the Alcohol Regulatory Authority. Each License or renewal shall require the payment of a separate License fee or renewal fee.

3. *Processing of Application.* The Alcohol Regulatory Authority shall receive and process applications, and shall be the official representative of the Tribe and Tribal Council in matters relating to Alcohol, licensing related to Alcohol and the collection of taxes on Alcohol and any matters related to Alcohol. The Alcohol Regulatory Authority, or its authorized representative, shall order any Applicant to provide all additional information as deemed necessary for processing, reviewing or revoking an application or License. If the Alcohol Regulatory Authority, or its authorized representative, is satisfied that the Applicant is a suitable and reputable person, the Alcohol Regulatory Authority, or its authorized representative, may issue a License as provided herein.

4. *Investigation.* Upon receipt of an application for the issuance, transfer, or renewal of a License, the Alcohol Regulatory Authority shall make a thorough investigation to determine whether the Applicant and the Premises or location for which a License is applied for qualifies for a License, and whether the provisions of this Ordinance have been complied with. The Alcohol Regulatory Authority shall investigate all matters connected therewith which may affect the public health, welfare, and morals.

5. *Approval and Disapproval.* The Alcohol Regulatory Authority will be responsible for approval or disapproval of all Applications. The Alcohol Regulatory Authority may cause a License to be issued to any Applicant it may deem appropriate, but not contrary to the best interests of the Tribe and its Tribal members. Any Applicant that desires to receive any Alcoholic Beverage License, and that meets the eligibility requirements pursuant to this Ordinance, must apply to the Alcohol Regulatory Authority for the desired class of License. Any such person as may be empowered to make such application, shall:

a. Fully and accurately complete the application provided by the Alcohol Regulatory Authority;

b. pay the Alcohol Regulatory Authority such application fee as may be required; and

c. submit such application to the Alcohol Regulatory Authority for consideration.

6. *Restrictions:*

a. No License for on-site consumption on the Premises shall be issued for a business within 300 feet of a licensed school or licensed child care facility;

b. No License shall be issued to a convicted felon.

7. *Temporary Denial.* If the application is denied solely on the basis of failing to complete the application properly or tendering the appropriate fee, the Alcohol Regulatory Authority shall, within fifteen (15) calendar days of such action, deliver in person or by mail a written notice of temporary denial to the Applicant. Such notice of temporary denial shall: (i) Set forth the reason(s) for denial; and (ii) State that the temporary denial will become a permanent denial if the reason(s) for denial are not corrected within fifteen (15) calendar days following the mailing or personal delivery of such notice unless otherwise extended by the Alcohol Regulatory Authority.

8. *Denial of License or Renewal.* An application for a new License or License renewal may be denied for one or more of the following reasons:

a. The Applicant materially misrepresented facts contained in the application;

b. The Applicant is currently not in compliance with these Regulations, this Ordinance, or any other Tribal, County, State or Federal laws;

c. Granting of the License, or renewal thereof, would create a threat to the peace, safety, morals, health, or welfare of the Tribe;

d. The Applicant has failed to complete the application properly or has failed to tender the appropriate fee; or

e. A verdict or judgment has been entered against, or a plea of nolo contendere has been entered by the Applicant or by any Applicants' officer, director, manager, or any other employee with primary management responsibility related to the Sale of Alcoholic Beverages, to any offense under Tribal, Federal, County, or State laws prohibiting or regulating the Sale, use, possession or giving away of Alcoholic Beverages.

9. *Cure.* If an Applicant is denied a License, the Applicant may cure the deficiency and resubmit the application for consideration. Each re-submission will be treated as a new application for License or renewal of a License, and the appropriate fee shall be due upon re-submission.

10. *Procedures for Appealing a Denial or Condition of Application.* Any Applicant for a License or Licensee who believes the denial of their License, request for renewal, or condition imposed on their License was

wrongfully determined may appeal the decision of the Alcohol Regulatory Authority in accordance with this Ordinance Section 4.3. The Alcohol Regulatory Authority's decision on the appeal shall be considered a final decision by the Kaw Nation and shall only be appealable to the Kaw Nation Tribal Court.

11. *Issuance of Licenses and Renewal Licenses.* Upon approval of an application and payment of the appropriate renewal License fee, the Alcohol Regulatory Authority shall issue the Applicant such License as specified in the application that will be valid from the date of issuance until December 31 of that year. Licenses shall be renewable at the discretion of the Alcohol Regulatory Authority by submission by the Licensee of a subsequent renewal application form, subsequent application fee, and payment of the renewal License fee as adopted by the Alcohol Regulatory Authority in accord this Ordinance. Renewal Licenses shall be effective as of January 1 and shall be valid until December 31 of that year. Any License or Renewal License issued under this Ordinance shall not be transferable.

12. *Final Authority.* The Alcohol Regulatory Authority has full power and final authority to deny any Applicant for any of the above and/or for any other reason where it would be to the detriment of the Tribe.

C. *Term and Renewal of Licenses.*

1. The term of all Licenses issued under this Ordinance shall be for a period not to exceed one (1) year from the original date of issuance and may be renewed thereafter on a year-to-year basis, in compliance with this Ordinance and any rules and/or policies hereafter adopted by the Alcohol Regulatory Authority. Every License shall expire on December 31 following its issuance or renewal, and each Licensee shall be eligible for subsequent renewal terms of one (1) year beginning on the January 1 following each expiration.

2. Each License may be considered for renewal by the Alcohol Regulatory Authority annually upon the Licensee's submission of a new application and payment of all fees. Such renewal application shall be submitted to the Alcohol Regulatory Authority at least twenty (20) days and no more than ninety (90) days prior to the expiration of an existing License. If a License is not renewed prior to its expiration, the Licensee shall cease and desist all activity previously authorized under the License, including the Sale of any Alcoholic Beverages, until the renewal of such License is properly approved by the Alcohol Regulatory Authority.

Section 4.3 Appeals to the Alcohol Regulatory Authority for Denial of License.

Upon receipt of an appeal of a denial of a License, the Alcohol Regulatory Authority shall set the consideration of such appeal for a public hearing. Notice of the time and place of such hearing shall be mailed to the Applicant and provided to the public at least twenty (20) calendar days before the date of the hearing. Notice shall be mailed to the Applicant by prepaid U.S. mail at the address listed in the application. Notice shall be provided to the public in the same method as used to notify the public of meetings pursuant to the Kaw Nation Constitution. The public notice shall include:

A. The name of the Applicant;

B. whether the hearing will consider a new License issuance or renewal of an existing License;

C. the class of License applied for; and

D. an address and general description of the area where the Alcoholic Beverages will be or have been sold.

At such hearings, the Alcohol Regulatory Authority shall hear from any person who wishes to speak for or against the application, subject to any limitations herein. The Alcohol Regulatory Authority shall have the authority to place time limits on each speaker and limit or prohibit repetitive testimony.

Appeals of the Alcohol Regulatory Authority may be appealed to the Kaw Nation Tribal Court.

Section 4.4 Classes of Licenses

The Alcohol Regulatory Authority shall have the authority to issue the following classes of Alcoholic Beverage Licenses and any additional classes of Alcoholic Beverage License as it may determine necessary for the benefit of the Nation so long as such Licenses are in compliance with Tribal, Federal and State law:

A. ''Retail Spirits License'' authorizing the Licensee to Purchase Wine or Spirits from a Wine and Spirits Wholesaler, to purchase Beer from a Beer distributor or from the holder of a small brewer self-distribution License, and to sell same on the Licensed Premises in such containers to consumers for off-Premises consumption only and not for resale.

B. ''Retail Beer and Wine License'' authorizing the Licensee to purchase Beer from a Beer distributor, or from the holder of a small brewer self-distribution License and/or purchase Wine from a Wine and Spirits Wholesaler or a small farm Winemaker who is permitted and has elected to self-distribute as provided in Article XXVIIIA of the Oklahoma Constitution; and to sell same on the Licensed Premises in such containers to consumers for off-Premises consumption only and not for resale. Provided, no holder of a Retail Beer and Wine License may sell a malt Beverage with Alcohol Beverage volume in excess of eight and ninety-nine/one hundredths percent (8.99%).

C. ''Mixed Beverage License'' authorizing the Licensee to purchase Alcohol, Spirits, Beer and/or Wine in retail containers from the holder of a Wine and Spirits Wholesaler and Beer distributor License as specifically provided by law; and to sell, offer for Sale and possess Mixed Beverages for on-Premises consumption only; provided, the holder of a Mixed Beverage License issued for an establishment which is also a restaurant may purchase Wine directly from a Winemaker and Beer directly from a small brewer who is permitted and has elected to self-distribute as provided in Article XXVIIIA of the Oklahoma Constitution.

Sales and service of Mixed Beverages by holders of Mixed Beverage Licenses shall be limited to the Licensed Premises of the Licensee unless the holder of the Mixed Beverage License also obtains a caterer License or a Mixed Beverage/caterer combination License. A Mixed Beverage License shall only be issued where the Sale of Alcoholic Beverages by the individual drink for on-Premises consumption has been authorized. A separate License shall be required for each place of business.

D. '' On Site Beer and Wine License'' authorizing the Licensee to purchase Beer and Wine in retail containers from the holder of a wholesaler, Beer distributor, small brewer self-distribution or brewpub self-distribution License or as specifically provided by law; and to sell, offer for Sale and possess Beer and Wine for on-site consumption only; provided, the holder of an on-site Beer and Wine License issued for an establishment which is also a restaurant may purchase Wine from a Winemaker who is permitted and has elected to self-distribute as provided in Article XXVIIIA of the Oklahoma Constitution. Sales and service of Beer and Wine by holders of on-site Beer and Wine Licenses shall be limited to the Licensed Premises of the Licensee unless the holder of the on-site Beer and Wine License also obtains a caterer License. An on-site Beer and Wine License shall only be issued where the

Sale of Alcoholic Beverages by the individual drink for on-site consumption has been authorized. A separate License shall be required for each place of business. No Spirits shall be stored, possessed or consumed on the Licensed Premises of an on-site Beer and Wine License, unless the Premises also has a Mixed Beverage License.

E. ''Caterer License'' authorizing the Licensee to sell Mixed Beverages for on-Premises consumption incidental to the Sale or distribution of food at particular functions, occasions or events which are temporary in nature. A Caterer License shall not be issued in lieu of a Mixed Beverage License. A Caterer License shall only be issued where the Sale of Alcoholic Beverages by the individual drink for on-site consumption has been authorized. A separate License shall be required for each place of business.

F. ''Special Event License'' A Special Event License may be issued to an organization, association or nonprofit corporation organized for political, fraternal, religious or social purposes. The holder of a Special Event License is authorized to sell and distribute Alcoholic Beverage on the Premises for which the License is issued. The Alcohol Regulatory Authority shall promulgate regulations governing the application for and the issuance of Special Event Licenses. The restrictions and rules which apply to the Sale of Mixed Beverages on the Premises of a Mixed Beverage Licensee also apply to the Sale of such Beverages under the authority of a Special Event License. Any act which if done on the Premises of a Mixed Beverage Licensee would be a ground for revocation or suspension of the Mixed Beverage License is a ground for revocation or suspension of a Special Event License. No Special Event License may be issued for any Premises already Licensed by the Alcohol Regulatory Authority.

G. ''Employee License'' authorizing the holder thereof to work in a Licensed Retail Spirits, Retail Wine or Retail Beer establishment, Mixed Beverage establishment, Beer and Wine establishment, or any establishment where Alcohol or Alcoholic Beverages are sold, Mixed or served. Persons employed by a Mixed Beverage, On-Site Beer and Wine, Retail Wine, or Retail Beer, Licensee who do not participate in the service, mixing or Sale of Mixed Beverages shall not be required to have an Employee License. Provided, however, that a manager employed by a Mixed Beverage Licensee shall be required to have an Employee License whether or not the manager participates in the service, mixing or Sale of Mixed Beverages. Applicants for an Employee License must be at least eighteen (18) years of age and have a health card issued by the county in which they are employed, if the county issues such a card; provided, the provisions of this section shall not be construed to permit any person under twenty-one (21) years of age to be employed to sell Spirits. Employees of a Licensee holding a Special Event, or Caterer License, shall not be required to obtain an Employee License. Persons employed by a hotel Licensee who participate in the stocking of hotel room mini-bars or in the handling of Alcoholic Beverages to be placed in such devices shall be required to have an Employee License. As a prerequisite to the issuance of an Employee License, not later than fourteen (14) days after initial licensure, the first-time Applicant shall be required to have successfully completed a training program conducted by the ABLE Commission, or by another entity approved by the ABLE Commission, including an in-house training program conducted by the employer. Proof of training completion shall be made available for inspection by the ABLE Commission at the business location employing the Licensee. The failure of an Employee Licensee to comply with this section may constitute cause for termination of employment.

H. ''Mixed Beverage/Caterer Combination License'' A Mixed Beverage/caterer combination License shall authorize the holder thereof to purchase or sell Mixed Beverages as specifically provided by law for the holder of a Mixed Beverage License or a caterer License. All provisions of the Oklahoma Alcoholic Beverage Control Act applicable to Mixed Beverage Licenses or caterer Licenses, or the holders thereof, shall also be applicable to Mixed Beverage/caterer combination Licenses or the holders thereof, except where specifically otherwise provided. A Mixed Beverage/caterer combination License shall only be issued in counties of this State where the Sale of Alcoholic Beverages by the individual drink for on-Premises consumption has been authorized. A separate License shall be required for each place of business.

Section 4.5 Revocation of License

The Alcohol Regulatory Authority may initiate an action to revoke a License whenever it is brought to the attention of the Alcohol Regulatory Authority that a Licensee:

A. Has materially misrepresented facts contained in any License application;

B. is not in compliance with this Ordinance or any other Tribal, County, State or Federal laws material to the issue of Alcohol licensing;

C. has failed to comply with any condition of a License, including failure to pay taxes on the Sale of Alcoholic Beverages or failure to pay any fee required by the Alcohol Regulatory Authority;

D. has had a verdict, or judgment entered against, or has had a plea of nolo contendere entered by any of its officers, directors, managers or any employees with primary responsibility over the Sale of Alcoholic Beverages, as to any offense under Tribal, County, Federal or State laws prohibiting or regulating the Sale, use, or possession, of Alcoholic Beverages;

E. has failed to take reasonable steps to correct objectionable conditions constituting a nuisance on the Premises or location designated in the License, or any adjacent area under their control, within a reasonable time after receipt of a notice to make such corrections has been mailed or personally delivered by the Alcohol Regulatory Authority;

F. has had their Oklahoma Alcohol License suspended or revoked; or

G. has sold Alcoholic Beverage(s) to any person under the Legal Age of twenty-one (21) years.

Revocation proceedings shall comply with the requirements of this Ordinance stated below. Such revocation proceedings held on any complaint shall be held under such rules and regulations as the Alcohol Regulatory Authority may prescribe.

Section 4.6 Revocation Proceedings on Revocation of License

The Alcohol Regulatory Authority, shall give ten (10) days' notice to the person holding the License, stating that the License will be revoked and the reason for the revocation. The Licensee must respond to the Alcohol Regulatory Authority via letter within those ten (10) days for any reconsideration. If there is a response, the License will be suspended until the Alcohol Regulatory Authority makes a final determination. The Alcohol Regulatory Authority shall review any response and shall make a final determination within ten (10) business days on whether to revoke the License. Any appeals on the final decision of the Alcohol Regulatory Authority to revoke a License shall be made in the Tribal Court.

Section 4.7 Transferability of Licenses

Alcoholic Beverage Licenses shall be issued to a specific Licensee for use at a single Premises or location (business enterprise) and shall not be transferable for use by any other Premises or location. Separate Licenses shall be

required for each of the Premises of any Licensee having more than one Premises or location where the Sale, distribution, or manufacture of Alcoholic Beverages may occur.

Section 4.8 Posting of License

Every Licensee shall post and keep posted its License(s) in a prominent and conspicuous place(s) on the Premises or location designated in the License. Any License posted on a Premises or location not designated in such License shall not be considered invalid and shall constitute a separate violation of this Ordinance.

Section 4.9 Specification of Premises

Each application shall specify the Premises where the manufacture, Wholesale, or retail Sale of Alcohol will occur, and such Premises shall be managed by the person specified on such application.

Article V—Fees

Section 5.1 License and Filing Fees

Licensing and filing fees may be set and amended from time to time by official action of the Alcohol Regulatory Authority in Regulations.

Article VI—Taxation

Section 6.1 Tribal Excise Tax Imposed Upon Distribution of Alcohol

A. *Tribal Excise Tax.* The Tribal Council shall by resolution, include a provision for the taxing of Sales of Alcohol Beverages to the consumer or purchaser. Such tax shall be determined by the Alcohol Regulatory Authority.

B. *Added To Retail Price.* The excise tax levied hereunder shall be added to the retail selling, price of Alcoholic Beverages sold to the ultimate consumers.

Section 6.2 Taxes Due

All taxes collected on the Sale of Alcoholic Beverages under this Ordinance are due to the Kaw Nation Tax Commission from a Licensee on the fifteenth (15) day of the month following the end of the month for which taxes are due.

Section 6.3 Delinquent Taxes

Past due taxes shall accrue interest at the rate determined by the Kaw Nation Tax Commission.

Section 6.4 Reports

Along with the payment of taxes imposed hereby, the Licensee shall submit a monthly report and accounting of all income from the Sale, distribution, and or manufacture of Alcoholic Beverages within Tribal Lands, and for all taxes collected under this Ordinance to the Kaw Nation Tax Commission.

Section 6.5 Audit

All Licensees are subject to the review or audit of their books and records relating to the Sale of Alcoholic Beverages hereunder by the Alcohol Regulatory Authority. Such review or audit may be performed periodically by Alcohol Regulatory Authority's agents or employees at such times as in the opinion of the Alcohol Regulatory Authority such review or audit is appropriate to the proper enforcement of this Ordinance.

Article VII—Powers of Enforcment

Section 7.1 Alcohol Regulatory Authority

In furtherance of this Ordinance, the Alcohol Regulatory Authority shall have exclusive authority to administer and implement this Ordinance and shall have the following powers and duties hereunder:

A. To adopt and enforce rules and regulations governing the Sale, manufacture, distribution, and possession of Alcoholic Beverages within the Tribal Lands of the Kaw Nation;

B. To employ such persons as may be reasonably necessary to perform all administrative and regulatory responsibilities of the Alcohol Regulatory Authority hereunder. All such employees shall be employees of the Tribe;

C. To issue Licenses permitting the Sale, manufacture, distribution, and possession of Alcoholic Beverages within the Tribal Lands;

D. To give reasonable notice and to hold hearings on violations of this Ordinance, and for consideration of the issuance or revocation of Licenses hereunder;

E. To deny applications and renewals for Licenses and revoke issued Licenses as provided in this Ordinance;

F. To bring such other actions as may be required to enforce this Ordinance;

G. To prepare and deliver such reports as may be required by law or regulation; and

H. To collect taxes, fees, and penalties as may be required, imposed, or allowed by law or regulation, and to keep accurate books, records, and accounts of the same.

Section 7.2 Right of Inspection

Any Premises or location of any commercial enterprise Licensed to manufacture, distribute, or sell Alcoholic Beverages pursuant to this Ordinance shall be open for inspection by the Alcohol Regulatory Authority for the purpose of insuring the compliance or noncompliance of the Licensee with all provisions of this Ordinance and any applicable Tribal Laws or Regulations.

Section 7.3 Limitation on Powers

In the exercise of its powers and duties under this Ordinance, agents, employees, or any other affiliated persons of the Alcohol Regulatory Authority shall not, whether individually or as a whole:

A. Accept any gratuity, compensation, or other thing of value from any Alcoholic Beverage Wholesaler, retailer, or distributor, or from any Applicant or Licensee; or

B. Waive the sovereign immunity of the Kaw Nation, or of any agency, commission, or entity thereof without the express written consent by resolution of the Tribal Council of the Kaw Nation.

Article VIII—Rules, Regulations, and Enforcment

Section 8.1 Public Conveyance

Any person engaged in the business of carrying passengers for hire, and every agent, servant, or employee of such person, who shall knowingly permit any person to consume any Alcoholic Beverage in any such public conveyance shall be in violation of this Ordinance.

Section 8.2 Age of Consumption

No person under the Legal Age of twenty-one (21) years may possess or consume any Alcoholic Beverage on Tribal lands, and any such possession or consumption shall be in violation of this Ordinance.

Section 8.3 Serving Underage Person

No person shall sell or serve any Alcoholic Beverage to a person under the age of twenty-one (21) or permit any such person to possess or consume any Alcoholic Beverages on the Premises or on any Premises under their control. Any Licensee violating this section shall be guilty of a separate violation of this Ordinance for each and every Alcoholic Beverage sold or served and or consumed by such an underage person.

Section 8.4 False Identification

Any person who purchases or who attempts to purchase any Alcoholic Beverage through the use of false, or altered identification that falsely purports to show such person to be over the Legal Age of twenty-one (21) years shall be in violation of this Ordinance.

Section 8.5 Documentation of Age

Any seller or server of any Alcoholic Beverage shall be required to request

proper and satisfactory documentation of age of any person who appears to be thirty-five (35) years of age or younger. When requested by a seller or server of Alcoholic Beverages, every person shall be required to present proper and satisfactory documentation of the bearer's age, signature, and photograph prior to the purchase or delivery of any Alcoholic Beverage. For purposes of this Ordinance, proper and satisfactory documentation shall include one or more of the following:

A. Driver's License or personal identification card issued by any State department of motor vehicles or Tribal or Federal government agency showing birthdate;

B. United States active duty military credentials; or

C. Passport.

Any seller, server, or person attempting to purchase an Alcoholic Beverage, who does not comply with the requirements of this section shall be in violation of this Ordinance and subject to civil penalties, as determined by the Alcohol Regulatory Authority.

Section 8.6 General Penalties

Any person or commercial enterprise determined by the Alcohol Regulatory Authority to be in violation of this Ordinance, including any lawful regulation promulgated pursuant thereto, shall be subject to a civil penalty as adopted by the Alcohol Regulatory Authority for each such violation, except as provided herein. The Alcohol Regulatory Authority may adopt by resolution a separate written schedule for fines for each type of violation, taking into account the seriousness and threat the violation may pose to the general public health and welfare. The civil penalties provided for herein shall be in addition to any criminal penalties that may be imposed under any other Tribal, Federal, or State laws.

Section 8.7 Initiation of Action

Any violation of this Ordinance shall constitute a public nuisance. The Alcohol Regulatory Authority may initiate and maintain an action in Tribal Court to abate and permanently enjoin any nuisance declared under this Ordinance. Any action taken under this section shall be in addition to any other civil penalties provided for in this Ordinance. The Alcohol Regulatory Authority shall not be required to post any form of bond in such action.

Section 8.8 Contraband; Seizure; Forfeiture

A. All Alcoholic Beverages held, owned, or possessed within Tribal Lands by any person, commercial enterprise, or Licensee operating in violation of this Ordinance are hereby declared to be contraband and subject to seizure and forfeiture to the Tribe.

B. Seizure of contraband as defined in this Ordinance shall be done by the Alcohol Regulatory Authority, with the assistance of law enforcement upon request, and all such contraband seized shall be inventoried and maintained by the Alcohol Regulatory Authority pending a final order of the Tribal Court. The owner of the contraband seized may alternatively request that the contraband seized be sold and the proceeds received therefrom be maintained by law enforcement pending a final order of the Tribal Court. The proceeds from such a Sale are subject to forfeiture in lieu of the seized contraband.

C. Any complaint regarding the seizure or forfeiture of contraband shall be heard in Tribal Court.

Article IX— Nuisance and Abatement

Section 9.1 Nuisance

Any room, house, building, vehicle, structure, Premises, or other location where Alcoholic Beverages are sold, manufactured, distributed, bartered, exchanged, given away, furnished, or otherwise possessed or disposed of in violation of this Ordinance, or of any other Tribal, Federal, or State laws related to the transportation, possession, distribution or Sale of Alcoholic Beverages, and including all property kept therein, or thereon, and used in, or in connection with such violation is hereby declared to be a nuisance upon any second or subsequent violation of the same.

Section 9.2 Action To Abate Nuisance

Upon a determination by the Alcohol Regulatory Authority that any such place or activity is a nuisance under any provision of this Ordinance, the Tribe or the Alcohol Regulatory Authority may bring a civil action in the Tribal Court to abate and to perpetually enjoin any such activity declared to be a nuisance. Such injunctive relief may include a closure of any business or other use of the property for up to one (1) year from the date of the such injunctive relief, or until the owner, lessee or tenant shall: (i) Give bond set by the Tribal Court and be conditioned that any further violation of this Ordinance or other Tribal laws will result in the forfeiture of such bond; and (ii) pay all fines, costs and assessments against him/her/it. If any condition of the bond is violated, the bond shall be forfeited and the proceeds recoverable by the Alcohol Regulatory Authority through an order of the Tribal Court. Any action taken under this section shall be in addition to any other civil penalties provided for in this Ordinance.

Article X— Revenue and Reporting

Section 10.1 Use and Appropriation of Revenue Received

All fees, taxes, payments, fines, costs, assessments, and any other revenues collected by the Kaw Nation Tax Commission under this Ordinance, from whatever sources, shall be expended first for the administrative costs incurred in the administration and enforcement of this Ordinance. Any excess funds shall be subject to and available for appropriation by the Tribal Council to the Tribe.

Section 10.2 Audit

The Alcohol Regulatory Authority and its handling of all funds collected under this Ordinance is subject to review and audit by the Tribe as part of the annual financial audit of the Alcohol Regulatory Authority.

Section 10.3 Reports

The Alcohol Regulatory Authority shall submit to the Kaw Nation Tax Commission a monthly report and accounting of all fees, taxes, payments, fines, costs, assessments, and all other revenues collected and expended pursuant to this Ordinance.

Article XI—Miscellaneous

Section 11.1 Liability for Unpaid Amounts Due to Vendors or Authorities

The Tribe shall have absolutely no legal responsibility for any amounts owed by a Licensee to a Wholesale supplier or any other person, including Federal or State regulatory authorities.

Section 11.2 Other Business by Operator

A Licensee may conduct another business simultaneously with the Sale of Alcohol and/or Alcoholic Beverages, so long as such additional business complies with Tribal, Federal, County, or State law. Said additional business may be conducted on the same Premises, but the Licensee shall be required to maintain subsidiary books of account to insure accountability of Alcohol and/or Alcoholic Beverage Sales and other separate business operations.

Section 11.3 Tribal Liability and Credit

Licensees are forbidden to represent or give the impression to any supplier or person with whom he or she does business that he or she is an official

representative of the Tribe or the Alcohol Regulatory Authority authorized to pledge Tribal credit or financial responsibility for any of the expenses of his or her business operation. The Licensee shall hold the Kaw Nation harmless from all claims and liability of whatever nature. The Alcohol Regulatory Authority shall revoke the License related to any Premises if said Premises is not operated in a businesslike manner or if it does not remain financially solvent or does not pay its operating expenses and bills before they become delinquent.

Section 11.4 Insurance

The Licensee shall maintain at his or her expense adequate insurance covering liability risk as determined by Regulations adopted by the Alcohol Regulatory Authority.

Section 11.5 Audit and Inspection

All of the books and other business records of the Licensed business shall be available for inspection and audit by the Alcohol Regulatory Authority or its authorized representative at any reasonable time.

Section 11.6 Payment of Tax; Reports; Bonding

The tax, together with financial reports showing all Sales of Alcohol shall be remitted to the Kaw Nation Tax Commission monthly unless otherwise specified, in writing, by the Alcohol Regulatory Authority. The Alcohol Regulatory Authority may require a Licensee to furnish a satisfactory bond to the Tribe in an amount to be specified by the Alcohol Regulatory Authority guaranteeing his or her payment of taxes provided herein.

Section 11.7 Violation—Penalties

Any person violating the Ordinance shall be guilty of a civil offense and subject to a fine set by the Alcohol Regulatory Authority. Any person who violates the provisions set forth herein shall forfeit all of the Alcohol on the Premises. The Alcohol Regulatory Authority shall be empowered to seize all forfeited Alcohol. Specific fines shall be set by the Alcohol Regulatory Authority and may be amended from time to time by official action of the Alcohol Regulatory Authority.

Section 11.8 Severability

If any provision of this Ordinance in its application to any person or circumstance is held invalid, the remainder of this Ordinance and its application to other persons or circumstances is not affected.

Section 11.9 Amendments

Any amendments to this Ordinance shall be approved by the Tribal Council and will be effective as of the date approved by the Bureau of Indian Affairs.

[FR Doc. 2021–27496 Filed 12–17–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[2221A2100DD/AAKC001030/A0A501010.999900 253G; OMB Control Number 1076–0018]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Bureau of Indian Education Tribal Colleges and Universities; Application for Grants and Annual Report Form

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Education (BIE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 19, 2022.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to Steven Mullen, Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1001 Indian School Road NW, Suite 229, Albuquerque, New Mexico 87104; or by email to *comments@bia.gov.* Please reference OMB Control Number 1076–0018 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Dr. Katherine Campbell by email at *Katherine.Campbell@bie.edu,* or by telephone at (703) 390–6697. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on May 20, 2021 (86 FR 27465). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How 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. 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: Each tribally-controlled college or university requesting financial assistance under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (the Act) (25 U.S.C. Sec.1801 *et seq*), which provides grants to Tribally Controlled Colleges or Universities for the purpose of ensuring continued and expanded educational

opportunities for Indian students. Similarly, each Tribally Controlled College or University that receives financial assistance is required by Sec.107(c)(1) of the Act and 25 CFR 41 to provide a report on the use of funds received.

Title of Collection: Bureau of Indian Education Tribal Colleges and Universities; Application for Grants and Annual Report Form.

OMB Control Number: 1076–0018.

Form Number: BIE–62107, BIE–6259, BIE Form 22, and the Third Week Monitoring Form.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Tribal college and university administrators.

Total Estimated Number of Annual Respondents: 29 per year, on average.

Total Estimated Number of Annual Responses: 174 per year, on average.

Estimated Completion Time per Response: Varies from 1 hour to 11 hours.

Total Estimated Number of Annual Burden Hours: 870 hours.

Respondent's Obligation: Required to Obtain a Benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: $0.

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*).

Steven Mullen,

Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2021–27403 Filed 12–17–21; 8:45 am]

BILLING CODE 4337–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1105 (Second Review)]

Notice of Commission Determination To Conduct a Full Five-Year Review; Lemon Juice From Argentina

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with a full review pursuant to the Tariff Act of 1930 to determine whether termination of the suspended antidumping duty investigation on lemon juice from Argentina would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the review will be established and announced at a later date.

DATES: December 6, 2021.

FOR FURTHER INFORMATION CONTACT: Tyler Berard (202–205–3354), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov* .

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

SUPPLEMENTARY INFORMATION: On December 6, 2021, the Commission determined that it should proceed to a full review in the subject five-year review pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)). The Commission found that both the domestic and respondent interested party group responses to its notice of institution (86 FR 49054, September 1, 2021) were adequate. A record of the Commissioners' votes will be available from the Office of the Secretary and at the Commission's website.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 15, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–27502 Filed 12–17–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (''Commission'') has published in the **Federal Register** reports on the status of its practice with respect to breaches of its administrative protective orders (''APOs'') under title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under title VII and violations of the Commission's rules, including the rule on bracketing business proprietary information (the ''24-hour rule''). This notice provides a summary of APO breach investigations completed during fiscal years 2020 and 2021. This summary addresses APO breach investigations related to proceedings under both title VII and section 337 of the Tariff Act of 1930. The Commission intends for this summary to inform representatives of parties to Commission proceedings of the specific types of APO breaches before the Commission and the corresponding types of actions that the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Ryan Glanzer, Office of the General Counsel, U.S. International Trade Commission, telephone (202) 708–2508. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website at *https://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: Statutory authorities for Commission investigations provide for the release of business proprietary information (''BPI'') or confidential business information (''CBI'') to certain authorized representatives in accordance with requirements set forth in Commission regulations. Such statutory and regulatory authorities include: 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 4572(f); 19 CFR 208.22; 19 U.S.C. 1516a(g)(7)(A); and 19 CFR 207.100–

207.120. The discussion below describes APO breach investigations that the Commission completed during fiscal years 2020 and 2021, including descriptions of actions taken in response to any breaches.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and rule violations. *See* 85 FR 7589 (Feb. 10, 2020); 83 FR 42140 (Aug. 20, 2018); 83 FR 17843 (Apr. 24, 2018); 82 FR 29322 (June 28, 2017); 81 FR 17200 (Mar. 28, 2016); 80 FR 1664 (Jan. 13, 2015); 78 FR 79481 (Dec. 30, 2013); 77 FR 76518 (Dec. 28, 2012); 76 FR 78945 (Dec. 20, 2011); 75 FR 66127 (Oct. 27, 2010); 74 FR 54071 (Oct. 21, 2009); 73 FR 51843 (Sept. 5, 2008); 72 FR 50119 (Aug. 30, 2007); 71 FR 39355 (July 12, 2006); 70 FR 42382 (July 22, 2005); 69 FR 29972 (May 26, 2004); 68 FR 28256 (May 23, 2003); 67 FR 39425 (June 7, 2002); 66 FR 27685 (May 18, 2001); 65 FR 30434 (May 11, 2000); 64 FR 23355 (Apr. 30, 1999); 63 FR 25064 (May 6, 1998); 62 FR 13164 (Mar. 19, 1997); 61 FR 21203 (May 9, 1996); 60 FR 24880 (May 10, 1995); 59 FR 16834 (Apr. 8, 1994); 58 FR 21991 (Apr. 26, 1993); 57 FR 12335 (Apr. 9, 1992); and 56 FR 4846 (Feb. 6, 1991). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. The Commission considers APO breach investigations on a case-by-case basis.

As part of the Commission's effort to educate practitioners about the Commission's current APO practice, the Secretary to the Commission (''Secretary'') issued in April 2020 a fifth edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. No. 5052). This document is available on the Commission's website at *http://www.usitc.gov.*

I. In General

A. Antidumping and Countervailing Duty Investigations

The current APO application form for antidumping and countervailing duty investigations, which the Commission revised in May 2020, requires an APO applicant to agree to:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than—

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for U.S. judicial or review pursuant to the North American Free Trade Agreement the determination resulting from such investigation of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (*e.g.,* documents, computer disks or similar media) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: Storage of BPI on so-called hard disk computer media or similar media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) With a cover sheet identifying the document as containing BPI,

(ii) With all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) If the document is to be filed by a deadline, with each page marked ''Bracketing of BPI not final for one business day after date of filing,'' and

(iv) Within two envelopes, the inner one sealed and marked ''Business Proprietary Information—To be opened only by [name of recipient]'', and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules

(i) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.* change in personnel assigned to the investigation),

(ii) Report promptly and confirm in writing to the Secretary any possible breach of this APO, and

(iii) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

The APO form for antidumping and countervailing duty investigations also provides for the return or destruction of the BPI obtained under the APO on the order of the Secretary, at the conclusion of the investigation, or at the completion of Judicial Review. The BPI disclosed to an authorized applicant under an APO during the preliminary phase of the investigation generally may remain in the applicant's possession during the final phase of the investigation.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

APOs issued in cross-border long-haul trucking (''LHT'') investigations, conducted under the United States-Mexico-Canada Agreement Implementation Act, 19 U.S.C. 4571–4574 (19 U.S.C. 4501 note), and safeguard investigations, conducted under the statutory authorities listed in 19 CFR 206.1 and 206.31, contain similar (though not identical) provisions.

B. Section 337 Investigations

APOs in section 337 investigations differ from those in title VII investigations: There is no set form like the title VII APO application, and provisions of individual APOs may differ depending on the investigation and the presiding administrative law judge. However, in practice, the provisions are often similar in scope and applied quite similarly. Any person seeking access to CBI during a section 337 investigation (including outside counsel for parties to the investigation, secretarial and support personnel

assisting such counsel, and technical experts and their staff who are employed for the purposes of the investigation) is required to read the APO, file a letter with the Secretary indicating agreement to be bound by the terms of the APO, agree not to reveal CBI to anyone other than another person permitted access by the APO, and agree to utilize the CBI solely for the purposes of that investigation.

In general, an APO in a section 337 investigation will define what kind of information is CBI and direct how CBI is to be designated and protected. The APO will state which persons may have access to CBI and which of those persons must sign onto the APO. The APO will provide instructions on how CBI is to be maintained and protected by labeling documents and filing transcripts under seal. It will provide protections for the suppliers of CBI by notifying them of a Freedom of Information Act request for the CBI and providing a procedure for the supplier to seek to prevent the release of the information. There are provisions for disputing the designation of CBI and a procedure for resolving such disputes. Under the APO, suppliers of CBI are given the opportunity to object to the release of the CBI to a proposed expert. The APO requires a person who discloses CBI, other than in a manner authorized by the APO, to provide all pertinent facts to the supplier of the CBI and to the administrative law judge and to make every effort to prevent further disclosure. Under Commission practice, if the underlying investigation is before the Commission at the time of the alleged breach or if the underlying investigation has been terminated, a person who discloses CBI, other than in a manner authorized by the APO, should report the disclosure to the Secretary. *See* 19 CFR 210.25, 210.34(c). The APO requires all signatories to the APO to either return to the suppliers or destroy the originals and all copies of the CBI obtained during the investigation.

The Commission's regulations provide for certain sanctions to be imposed if the APO is violated by a person subject to its restrictions. The names of the persons being investigated for violating an APO are kept confidential unless the sanction imposed is a public letter of reprimand. 19 CFR 210.34(c)(1). The possible sanctions are:

(1) An official reprimand by the Commission.

(2) Disqualification from or limitation of further participation in a pending investigation.

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to 19 CFR 201.15(a).

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice.

(5) Making adverse inferences and rulings against a party involved in the violation of the APO or such other action that may be appropriate. 19 CFR 210.34(c)(3).

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI or CBI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI and CBI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

II. Investigations of Alleged APO Breaches

The Commission conducts APO breach investigations for potential breaches that occur in title VII, safeguard, and LHT investigations, as well as potential breaches in section 337 investigations that are before the Commission or have been terminated.[1] Administrative law judges handle potential APO breaches in section 337 investigations when the breach occurred and is discovered while the underlying investigation is before the administrative law judge. The Commission may review any decision that the administrative law judge makes on sanctions in accordance with Commission regulations. *See* 19 CFR 210.25, 210.34(c).

For Commission APO breach investigations, upon finding evidence of an APO breach or receiving information that there is reason to believe that one has occurred, the Secretary notifies relevant Commission offices that the Secretary has opened an APO breach file and that the Commission has commenced an APO breach investigation. The procedure for investigating alleged breaches of APOs has historically had two steps. First, the Commission determines whether a breach has occurred and, if so, who is responsible for it. This is done after the alleged breaching parties have been provided an opportunity to present their views on the matter. The breach investigation may conclude after this first step if: (1) The Commission determines that no breach occurred and issues a letter so stating; or (2) the Commission finds that a breach occurred but that no further action is warranted and issues a warning letter. Second, if the Commission determines that a breach occurred and that further action is warranted, the Commission will then determine what sanction, if any, to impose. The breaching parties are provided an opportunity to present their views on the appropriate sanction and any mitigating circumstances. The Commission can decide as part of either the first or second step to issue a warning letter. A warning letter is not a sanction, but the Commission will consider a warning letter as part of a subsequent APO breach investigation.

The Commission has found that the two-step process can result in duplicative work for the alleged breaching party and Commission staff in some APO breach investigations. For example, parties who self-report their own breach often address mitigating circumstances and sanctions in their initial response to the Commission's letter of inquiry on the breach. But under the Commission's two-step process, they must await a Commission decision on breach and then submit again their views on mitigating circumstances and sanctions. To streamline this process and accelerate processing times, the Commission has begun to offer alleged breaching parties in pending and new APO breach investigations the option to voluntarily elect a one-step APO breach investigation process. Under this process, the Commission will determine simultaneously whether a breach occurred and, if so, the appropriate sanction to impose, if any.

Sanctions for APO violations serve three basic interests: (a) Preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; (b) disciplining breachers; and (c) deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed: ''[T]he effective enforcement of limited disclosure under [APO] depends in part on the extent to which private parties have confidence that there are effective sanctions against

[1] Procedures for investigations to determine whether a prohibited act, such as a breach, has occurred and for imposing sanctions for violation of the provisions of a protective order issued during a NAFTA panel or committee proceedings are set out in 19 CFR 207.100–207.120. The Commission's Office of Unfair Import Investigations conducts those investigations initially.

violation.'' H.R. Conf. Rep. 100–576, at 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not authorized under the APO actually viewed the BPI/CBI. The Commission considers whether there have been prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a title VII, safeguard, or LHT investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. *See* 19 CFR 207.7(a)(3)(i)(B) and (C); 19 CFR 206.17(a)(3)(i)(B) and (C); and 19 CFR 208.22(a)(3)(i)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the Commission may also hold the attorney exercising direction or control over the economist or consultant responsible for the breach of the APO. In section 337 investigations, technical experts and their staff who are employed for the purposes of the investigation are required to sign onto the APO and agree to comply with its provisions.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases, section 337 investigations, safeguard investigations, and LHT investigations are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. *See, e.g.,* 19 U.S.C. 1677f(g); 19 U.S.C. 1333(h); 19 CFR 210.34(c).

The two types of breaches most frequently investigated by the Commission involve: (1) The APO's prohibition on the dissemination of BPI or CBI to unauthorized persons; and (2) the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed with the Commission indicating what actions were taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included the failure to bracket properly BPI/CBI in proprietary documents filed with the Commission, the failure to report immediately known or suspected violations of an APO, and the failure to adequately supervise non-lawyers in the handling of BPI/CBI.

Occasionally, the Commission conducts APO breach investigations that involve members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In many of these cases, the firm and the person using the BPI/CBI mistakenly believed an APO application had been filed for that person. The Commission has determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. However, under Commission rule 201.15 (19 CFR 201.15), the Commission may take action against these persons for good cause shown. In all cases in which the Commission has taken such action, it decided that the non-signatory was a person who appeared regularly before the Commission, who was aware of the requirements and limitations related to APO access, and who should have verified his or her APO status before obtaining access to and using the BPI/CBI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances in which they did not technically breach the APO, but their action or inaction did not demonstrate diligent care of the APO materials, even though they appeared regularly before the Commission and were aware of the importance that the Commission places on the proper care of APO materials.

Counsel participating in Commission investigations have reported to the Commission potential breaches involving the electronic transmission of public versions of documents. In these cases, the document transmitted appears to be a public document with BPI/CBI omitted from brackets. However, the confidential information is actually retrievable by manipulating codes in software. The Commission has found that the electronic transmission of a public document containing BPI/CBI in a recoverable form was a breach of the APO.

The Commission has cautioned counsel to be certain that each authorized applicant files with the Commission within 60 days of the completion of an import injury investigation or at the conclusion of judicial or binational review of the Commission's determination, a certificate stating that, to his or her knowledge and belief, all copies of BPI/CBI have been returned or destroyed, and no copies of such materials have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has access to BPI/CBI. One firm-wide certificate is insufficient.

Attorneys who are signatories to the APO representing clients in a section 337 investigation should inform the administrative law judge and the Secretary if there are any changes to the information that was provided in the application for access to the CBI. This is similar to the requirement to update an applicant's information in title VII investigations.

In addition, attorneys who are signatories to the APO representing clients in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession, or the Commission could hold them responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

III. Specific APO Breach Investigations

A. Fiscal Year 2020

Case 1. The Commission determined that a supervisory attorney at a law firm breached an APO in a title VII investigation when he directed legal support staff at his firm to distribute two APO releases containing BPI to consultants before the filing, and the Commission's acceptance, of the

consultants' APO amendment application. The Commission issued a warning letter to the supervisory attorney but found that the supervisory attorney's legal support staff and the consultants had not breached the APO.

Before the first APO release at issue, the supervisory attorney, an APO signatory, directed his legal assistant to file an APO amendment application for the consultants. Due to technical issues, the legal assistant did not file the APO amendment application and did not inform anyone that she never completed the filing. The legal assistant stated that she was not aware of the time sensitivity of the APO amendment application. Without confirming whether the retained consultants had been added to the APO, the supervisory attorney instructed legal support staff to provide APO release materials from two releases to the retained consultants. Legal support staff at the firm did not confirm whether the consultants had been added to the APO before transferring the APO release materials. The day after the second release, the firm's staff discovered that the consultants' APO amendment application had not been filed with the Commission, and staff filed the APO amendment application on the same day as this discovery. The Commission ultimately granted the application and placed the consultants on the APO.

The Commission first became aware of this breach through opposing counsel. The supervisory attorney did not notify the Secretary of the potential breach until twelve days after his firm's discovery.

In determining whether to issue a sanction for the breach, the Commission considered mitigating factors, including that: (1) The breach was unintentional; (2) the supervisory attorney had not previously been found in breach of an APO; (3) he and his firm took immediate corrective action upon discovery of the breach; (4) his firm implemented new procedures to prevent similar breaches in the future; and (5) the retained consultants were eventually added to the APO, handled the BPI at all times as if they were subject to the APO, and did not disclose the BPI to unauthorized individuals. The Commission also considered the following aggravating factors: (1) The retained consultants were not authorized under the APO when they first received and viewed BPI; (2) opposing counsel, not the supervisory attorney or his firm, first notified the Commission of the breach; and (3) the supervisory attorney and his firm waited twelve days after discovering the breach to report it to the Commission. Ultimately, the Commission determined that the mitigating factors outweighed the aggravating factors, and it issued a warning letter rather than a sanction. The consultants were the only non-signatories to view the BPI, and they were eventually added to the APO.

The Commission also considered whether to find the supervisory attorney's legal support staff and the consultants in breach of the APO, and it determined not to do so. The Commission found that the supervisory attorney's lack of oversight resulted in his staff's failure to comply with APO procedures. He had not relayed the urgency of the APO amendment application filing, and he did not instruct his staff to ensure that the consultants were on the APO before transferring APO release materials to them. The Commission similarly determined not to find the consultants in breach because they did not know that they were not authorized under the APO to view the BPI when they received it. Further, the consultants handled the BPI at all times as if they were under the APO, and they did not share the APO materials with unauthorized individuals.

B. Fiscal Year 2021

Case 1. The Commission determined that an attorney breached the APO in a section 337 investigation when he disclosed CBI in open court before the U.S. Court of Appeals for the Federal Circuit (''CAFC''). The Commission issued a private letter of reprimand.

The attorney's disclosure of CBI occurred during his rebuttal to opposing counsel's opening oral argument. Opposing counsel objected to the disclosure and moved that the CAFC not post a transcript or recording. In response to opposing counsel's objection, the attorney ended his rebuttal. A Commission attorney was present at the time of the disclosure and notified the Secretary of the breach. Following additional briefing from the parties on the disclosure, the CAFC ultimately granted opposing counsel's motion to withhold the transcript and recording of the oral argument from its website, and no transcript or recording was ever posted. However, individuals not authorized to receive CBI under the APO were present at the CAFC oral argument at the time of the disclosure.

In determining the appropriate sanction in response to the breach, the Commission considered mitigating factors, including: (1) The breach was inadvertent and unintentional; (2) the Commission was immediately aware of the breach due to its staff's presence at the oral argument; and (3) the attorney took prompt corrective action to mitigate the effect of the breach. The Commission also considered the following aggravating factors: (1) Opposing counsel discovered the breach; and (2) the Commission presumed that non-signatories to the APO who were present at the CAFC oral argument heard the CBI, and the attorney did not present any evidence to the contrary. The Commission determined to issue a private letter of reprimand.

By order of the Commission.

Issued: December 14, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–27413 Filed 12–17–21; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Appellate Rules; Meeting of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Advisory Committee on Appellate Rules; Notice of cancellation of open hearing.

SUMMARY: The following virtual public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing on January 14, 2022. The announcement for this hearing was previously published in the **Federal Register** on August 11, 2021.

DATES: January 14, 2022.

FOR FURTHER INFORMATION CONTACT: Bridget Healy, Esq., Acting Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

(Authority: 28 U.S.C. 2073.)

Dated: December 15, 2021.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2021–27468 Filed 12–17–21; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Timothy C. Sapp, M.D.; Decision and Order

On June 7, 2021, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Timothy C. Sapp, M.D. (hereinafter, Registrant) of Phoenix, Arizona. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. BS7608396. It alleged that Registrant is without ''authority to handle controlled substances in Arizona, the state in which [Registrant is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that the Arizona Medical Board (hereinafter, the Board) issued an Interim Findings of Fact, Conclusions of Law and Order for Summary Restriction of License on April 22, 2020. *Id.* This Order, according to the OSC, summarily restricted Registrant's Arizona state medical license and prohibited Registrant from prescribing controlled substances pending the outcome of a formal hearing following the Board's finding, *inter alia,* that Registrant's treatment of six patients to whom he had prescribed controlled substances deviated from the standard of care. *Id.* On September 4, 2020, the Board issued its Findings of Fact, Conclusions of Law and Order finding, *inter alia,* that Registrant's prescribing of controlled substances to six patients deviated from the standard of care and accordingly, the Board revoked Registrant's Arizona state medical license, effective October 9, 2020. *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2–3 (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated October 29, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Phoenix Field Division stated that on June 9, 2021, she sent a copy of the OSC via USPS certified mail to four addresses associated with Registrant, including: An address in Hawkinsville, GA where Registrant registered a new driver's license issued on May 14, 2021; two of Registrant's last-known residential addresses, one in Phoenix, AZ and another in Columbia, SC; and one of Registrant's former residential addresses in Phoenix, AZ. Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 2, at 1–2. The DI stated that she did not mail a copy of the OSC to Registrant's registered address in Phoenix, AZ because she had ''previously learned that the address was no longer a medical facility.'' *Id.* at 2. According to the DI, on April 22, 2021, she had traveled with a DEA Special Agent to Registrant's registered address and ''discovered that Registrant's registered address [was] operating as a tutoring facility called 'The Art of Learning.'" *Id.* Further, according to the DI, ''[t]he staff at 'The Art of Learning' had no knowledge of [Registrant].'' *Id.*

On or around June 30, 2021, the DI discovered that the OSC mailings delivered to Hawkinsville, GA and Columbia, SC were returned as undeliverable. *Id.; see also* RFAAX 2, Appendix (hereinafter, App.) A. On or around July 28, 2021, the DI discovered that the OSC mailed to Registrant's last known residential address in Phoenix, AZ was returned as undeliverable. *Id.* The DI stated that as of the date of the Declaration, she had not received any returned mail in connection with the OSC mailing to Registrant's former residential address in Phoenix, AZ. RFAAX 2, at 2. The DI stated that on October 29, 2021, she checked the status of her mailing to Registrant's former residential address in Phoenix, AZ and the USPS website ''showed the status of the mailing as 'Delivered, Front Desk/Reception/Mail Room' on June 14, 2021 at 12:54 p.m.'' *Id.* at 2–3*; see also* RFAAX 2, App. B.

On August 9, 2021, the DI emailed copies of the OSC to three email addresses associated with Registrant, including Registrant's registered email address and two email addresses listed in Registrant's comprehensive LexisNexis report. RFAAX 2, at 3. The DI stated that she received undeliverable confirmations from Registrant's registered email address and one of the email addresses listed in Registrant's comprehensive LexisNexis report. *Id.; see also* RFAAX 2, App. C. As of the date of the Declaration, the DI did not receive any undeliverable message or error message regarding to other email address listed in Registrant's comprehensive LexisNexis report. *Id.* The DI concluded that as of the date of the Declaration, ''DEA [had] not received any correspondence or communication from [Registrant] regarding the [OSC].'' RFAAX 2, at 3.

The Government forwarded its RFAA, along with the evidentiary record, to this office on November 2, 2021. In its RFAA, the Government represents that ''more than thirty days have passed since the Government both mailed and emailed the [OSC] to [Registrant]'' and ''[n]either [Registrant] nor his attorney filed any Request for Hearing'' ''[n]or has DEA received any other response, either from [Registrant] or his attorney, regarding the [OSC].'' RFAA, at 2 and 4. The Government requests that Registrant's DEA registration be revoked because ''[Registrant] lacks authority to handle controlled substances in the state of Arizona, the state where he is registered with DEA.'' *Id.* at 1.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on (or before) August 9, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

According to Agency records, Registrant is the holder of DEA Certificate of Registration No. BS7608396 at the registered address of 1130 E Missouri Ave, Ste 206, Phoenix, AZ 85014. *See* RFAAX 2, at 1 (DI Declaration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. Registrant's registration expires on February 28, 2023 and is currently in an ''active pending'' status. *Id.*

The Status of Registrant's State License

On April 22, 2020, the Arizona Medical Board (hereinafter, the Board) issued an Interim Findings of Fact, Conclusions of Law and Order for Summary Restriction of License

(hereinafter, Interim Order). RFAAX 2, App. D. According to the Interim Order, the Board initiated a case after receiving a complaint regarding Registrant's care and treatment of patient E.R. that alleged inappropriate prescribing and medication management. *Id.* at 1. Based on the complaint, the Board requested Medical Consultant (hereinafter, MC) review of Registrant's care of patient E.R. and three other patients, which found that Registrant had deviated from the standard of care, including ''prescribing Adderall without adequate clinical rationale, prescribing two benzodiazepines concurrently without adequate clinical rationale, [and] prescribing Lamictal for off-label use without adequate clinical rationale.'' *Id.* at 1–3. The review concluded that ''[t]here was the potential for patient harm including that patients were at risk for misuse of controlled substances, dependence and addiction.'' *Id.* at 3.

The Board initiated a second case after receiving a complaint regarding Registrant's care and treatment of patient W.F. that alleged inappropriate prescribing and failing to obtain drug screens. *Id.* An MC review of Registrant's care and treatment of W.F. ''opined that [Registrant] deviated from the standard of care by prescribing high dose benzodiazepines and stimulants without adequate clinical rationale, and by prescribing a stimulant and antidepressant concurrently in a patient with bipolar disorder without a mood stabilizer.'' *Id.* at 4. The review concluded that ''[t]here was the potential for patient harm in that [W.F.] was at risk of a 'manic switch' due to the lack of concurrently prescribed mood stabilizer.'' *Id.*

Finally, the Board initiated a third case after receiving a complaint regarding Registrant's care and treatment of patient R.P. that alleged inappropriate discharge of a patient. *Id.* An MC review of Registrant's care and treatment of R.P. ''opined that [Registrant] deviated from the standard of care by failing to appropriately discharge the patient.'' *Id.* at 5. The review concluded that ''[t]here was actual patient harm in that R.P. experienced withdrawal symptoms from abrupt cessation of benzodiazepines.'' *Id.*

On April 21, 2020, the Board ''voted unanimously to offer [Registrant] an Interim Consent Agreement for Practice Restriction ('ICA'), and if not accepted by 12:00 p.m. on April 22, 2020, to summarily restrict [Registrant's] license, based on a finding that the public health, safety and welfare imperatively required imminent action.'' *Id.* According to the Interim Order, ''[Registrant] failed to accept the proposed ICA within the time frame specified by the Board,'' and thus, the Board ordered the summary restriction of Registrant's Arizona medical license and prohibited Registrant ''from prescribing controlled substances in the State of Arizona pending the outcome of a Formal Hearing in [the] matter.'' *Id.* at 5–6. On September 4, 2020, the Board issued its Findings of Fact, Conclusions of Law and Order (License Revocation) and ordered Registrant's Arizona medical license revoked. RFAAX 2, App. E, at 19.

According to Arizona's online records, of which I take official notice, Registrant's license is expired.[1] Arizona Medical Board Licensee Search, *https://azbomprod.azmd.gov/glsuiteweb/clients/azbom/public/WebVerificationSearch.aspx* (last visited date of signature of this Order). Arizona's online records show that Registrant's medical license remains expired. *Id.*

Accordingly, I find that Registrant is not currently licensed to engage in the practice of medicine in Arizona, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to Arizona statute, ''[e]very person who manufactures, distributes, dispenses, prescribes or uses for scientific purposes any controlled substance within this state or who proposes to engage in the manufacture, distribution, prescribing or dispensing of or using for scientific purposes any controlled substance within this state must first: (1) Obtain and possess a current license or permit as a medical practitioner as defined in § 32–1901 . . .'' Ariz. Rev. Stat. Ann. § 36–2522(A) (2021). Arizona Statute § 32–1901 defines a ''[m]edical practitioner'' as ''any medical doctor . . . or other person who is licensed and authorized by law to use and prescribe drugs and devices to treat sick and injured human beings or animals or to diagnose or prevent sickness in human beings or animals in this state or any state, territory or district of the United States.'' Ariz. Rev. Stat. Ann. § 32–1901 (2021). Arizona regulations further clarify that ''[a] physician who wishes to dispense a controlled substance . . . a prescription-only drug . . . or a prescription-only device . . . shall be

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

currently licensed to practice medicine in Arizona.'' Ariz. Admin. Code § R4–16–301(A) (2021).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Arizona, as he no longer retains a medical license in that state. As already discussed, a physician can only dispense controlled substances if he is licensed to practice medicine in Arizona. Thus, because Registrant lacks authority to practice medicine in Arizona and, therefore, is not authorized to dispense controlled substances in Arizona, Registrant is not eligible to maintain a DEA registration in Arizona. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BS7608396 issued to Timothy C. Sapp, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Timothy C. Sapp to renew or modify this registration, as well as any other pending application of Timothy C. Sapp for additional registration in Arizona. This Order is effective January 19, 2022.

Anne Milgram,

Administrator.

[FR Doc. 2021–27485 Filed 12–17–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Peter S. Klainer, M.D.; Decision and Order

On August 20, 2021, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Peter S. Klainer, M.D. (hereinafter, Registrant) of Morehead City, North Carolina. OSC, at 1 and 3. The OSC proposed the revocation of Registrant's Certificate of Registration No. BK4940741. It alleged that Registrant is ''without authority to handle controlled substances in North Carolina, the state in which [Registrant is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on November 13, 2020, the North Carolina Medical Board issued an Order suspending Registrant's state medical license after finding that ''there was probable cause to believe [Registrant] committed unprofessional conduct . . . after [he was] arrested and charged with nine felony counts of sexual exploitation of a minor in the second degree.'' *Id.* The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated November 10, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Raleigh District Office of the Atlanta Field Division stated that on August 26, 2021, she ''personally served the [OSC] on [Registrant] at the Carteret County Sheriff's Office.'' Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 3, at 1–2. The DI stated that as of the date of the Declaration, ''neither [Registrant] nor any attorney representing [Registrant] has requested a hearing or submitted a written statement.'' *Id.* at 2.

The Government forwarded its RFAA, along with the evidentiary record, to this office on November 10, 2021. In its RFAA, the Government represents that ''[Registrant] has not submitted a timely request for a hearing'' and that as of November 10, 2021, ''neither [Registrant] nor any attorney representing [Registrant] has requested a hearing or submitted a written statement.'' RFAA, at 1–2. The Government ''seeks to revoke [Registrant's DEA registration] because [Registrant] lacks authority to handle controlled substances in the State of North Carolina, the state where [Registrant] is registered with DEA'' and ''requests that the Administrator revoke [Registrant's] [DEA registration] and deny any applications for renewal.'' *Id.* at 1 and 5.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on August 26, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. BK4940741 at the registered address of 3700 Symi Cir, Morehead City, NC 28557. RFAAX 1 (Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expires on December 31, 2022. *Id.*

The Status of Registrant's State License

On November 13, 2020, the North Carolina Medical Board (hereinafter, the Board) issued an Order of Summary Suspension of License (hereinafter, Order). RFAAX 2, Appendix (hereinafter, App.) A, at 1 and 6. In its Order, the Board found that on or about November 4, 2020, ''[Registrant] was arrested and charged with nine felony counts of Sexual Exploitation of a Minor in the Second Degree.'' *Id.* at 1. The Board found that probable cause existed that Registrant committed the conduct for which he was arrested and charged and that ''such conduct constitutes unprofessional conduct within the meaning of N.C. Gen. Stat. § 90–14(a)(6) and grounds exist under that section of the North Carolina General Statutes for the Board to annul, suspend, revoke, or limit [Registrant's] license to practice medicine or to deny any application he might make in the future for a license to practice medicine.'' *Id.* at 5. As such, the Board found that ''the public health, safety, or welfare requires emergency action'' and ordered Registrant's medical license summarily suspended. *Id.* at 6.

According to North Carolina's online records, of which I take official notice, Registrant's license is still revoked.[1]

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a

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North Carolina Medical Board Licensee Search, *https://portal.ncmedboard.org/verification/search.aspx* (last visited date of signature of this Order). North Carolina's online records show that Registrant's medical license remains inactive and that Registrant is not authorized in North Carolina to practice medicine. *Id.*

Accordingly, I find that Registrant is not currently licensed to engage in the practice of medicine in North Carolina, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to North Carolina statute, ''dispense'' means ''to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.'' N.C. Gen. Stat. Ann. § 90–87(8) (West 2021). Further, a ''practitioner'' means a ''physician . . . or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.'' *Id.* at § 90–87(22)(a) (West 2021). Because Registrant is not currently licensed as a practitioner in North Carolina, he is not authorized to dispense controlled substances in North Carolina.

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in North Carolina. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in North Carolina. Thus, because Registrant lacks authority to practice medicine in North Carolina and, therefore, is not authorized to handle controlled substances in North Carolina, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BK4940741 issued to Peter S. Klainer, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Peter S. Klainer, M.D. to renew or modify this registration, as well as any other pending application of Peter S. Klainer, M.D. for additional registration in North Carolina. This Order is effective January 19, 2022.

Anne Milgram,

Administrator.

[FR Doc. 2021–27430 Filed 12–17–21; 8:45 am]

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party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Washington Bryan, M.D.; Decision and Order

On June 16, 2021, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Washington Bryan, M.D., (hereinafter, Applicant), of Los Angeles, California. Order to Show Cause (hereinafter, OSC), at 1. The OSC proposed the denial of Applicant's application No. W19097421C for a DEA Certificate of Registration, because the United States Department of Health and Human Services, Office of Inspector General (hereinafter, HHS/OIG) mandatorily excluded Applicant from participation in Medicare, Medicaid, and all Federal health care programs for a minimum period of 10 years pursuant to 42 U.S.C. 1320a–7(a); and such exclusion ''warrants denial of [Applicant's] application for DEA registration pursuant to 21 U.S.C. 824(a)(5).'' *Id.* at 2. The OSC also alleged that Applicant had ''been convicted of a felony relating to controlled substances.'' *Id.* (citing 21 U.S.C. 824(a)(2)).

The OSC alleged that on November 17, 2016, Applicant was ''convicted of twenty-nine felony counts of currency transaction structuring, resulting in a thirty-three month federal incarceration. The funds involved in the illegal structuring transactions were related to [Applicant's] writing of controlled substance prescriptions.'' OSC, at 1. The OSC alleged that as a result of this conviction, Applicant surrendered his then-active DEA registration. *Id.* at 2. It proposed denial of Applicant's application based on 21 U.S.C. 824(a)(2). *Id.* The OSC further alleged that, based on such conviction, HHS/OIG ''mandatorily excluded [Applicant] from participation in Medicare, Medicaid, and all Federal health care programs'' for a minimum period of 10 years pursuant to 42 U.S.C. 1320a–7(a), effective January 18, 2018. *Id.* The OSC additionally proposed denial of Applicant's application based on 21 U.S.C. 824(a)(5).

The Show Cause Order notified Applicant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Applicant of the opportunity to submit a corrective action plan. OSC, at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration dated October 8, 2021, a Diversion Investigator (hereinafter, DI) assigned to the Orange County District office, Los Angeles Field Division, stated that on July 12, 2021, she sent the OSC to Applicant's proposed registered address via United States Postal Service (USPS) registered mail, but on July 15, 2021, the website indicated that there was ''No Access To Delivery Location,'' and that service would be attempted the next day, July 16, 2021. Request for Final Agency Action dated October 12, 2021 (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 1 (DI's Declaration).[1] The DI stated that there was ''no further tracking information on the USPS website,'' and that she contacted USPS, who attempted delivery again, but it was unclear what occurred thereafter. *Id.* at 2. Therefore, on September 8, 2021, DI herself travelled to the proposed registered address and personally handed the OSC to Applicant. *Id.* at 3.

The Government forwarded its RFAA, along with the evidentiary record, to this office on October 13, 2021. In its RFAA, the Government represents that ''Applicant did not request a hearing.'' RFAA, at 1. The Government requests that Applicant's Certificate of Registration as a practitioner be denied ''due to his federal felony conviction related to controlled substances'' [2] and ''due to his mandatory exclusion from Medicare, Medicaid, and all Federal health care programs by HHS/OIG due to his felony controlled substance conviction.'' *Id.* at 3.

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Applicant on or before September 8, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Applicant, nor anyone purporting to represent the Applicant, requested a hearing, submitted a written statement while waiving Applicant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Applicant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Applicant's DEA Registration

On August 22, 2019, Applicant submitted an application for a DEA Certificate of Registration as a practitioner in Schedules II through V with a proposed registered address at 201 Veteran Avenue, Los Angeles, California 90024. RFAAX 2 (Application). Applicant's application was assigned Control No. W19097421C. RFAAX 1, at 1.

On November 21, 2017, Applicant surrendered his previous DEA registration No. 684743414, ''because [his] California Medical License Physician and Surgeon's Certificate No. A61799, [was] suspended by the Medical Board of California by operation of law effective April 5, 2017.'' RFAAX 5 (email from Applicant surrendering his prior DEA registration).

Applicant's Exclusion

The evidence in the record demonstrates that on March 6, 2017, the United States District Court for the Central District of California issued a ''Judgment and Probation/Commitment Order'' in *U.S.* v. *Washington Bryan, II,* Docket No. Cr–16–00320–RGK (hereinafter, Judgment). RFAAX 4. According to the Judgment, Applicant was found guilty of ''Structuring of Currency Transactions in violation of Title 31 U.S.C. 5324(a)(3), as charged in Counts 1 through 29 of the Indictment.'' *Id.* at 1.

In a decision from an HHS Administrative Law Judge (HHS ALJ), dated September 18, 2018, HHS excluded Applicant from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. 1320a–7(a) for a minimum period 10 years based on Applicant's felony conviction in the United States District Court for the Central District of California. RFAAX 6 (hereinafter, HHS Exclusion), at 1. The HHS ALJ found that Applicant's conviction of ''29 felony counts of structuring cash deposits'' was ''related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance,'' as defined in Section 1128(a)(4) of the Social Security Act, such that Applicant was mandatorily excluded under 42 U.S.C. 1320a–7(a). *Id.* at 5–6. The HHS Exclusion stated that the exclusion would become effective on January 18, 2018. *Id.* at 8.

Accordingly, I find that HHS excluded Applicant from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. 1320a–7(a) for a minimum of 10 years effective January 18, 2018.

Discussion

In its OSC, the Government relied upon grounds Congress provided to support revocation/suspension, not denial of an application. Prior Agency decisions have addressed whether it is appropriate to consider a provision of 21 U.S.C. 824(a) when determining whether or not to grant a practitioner registration application. For over forty-five years, Agency decisions have concluded that it is. *Robert Wayne*

[1] The DI also stated that she emailed a copy of the OSC on July 14, 2021, to the email address Applicant had provided with his application and that she did not receive a ''failure to send'' and therefore believed that the email was received. *Id.* at 2.

[2] It is noted that one of the alleged bases for denial of Applicant's application in the OSC and the RFAA is 21 U.S.C. 824(a)(2) due to Applicant's alleged conviction of a felony related to controlled substances. As evidence of the felony conviction, the Government submitted a ''Judgment and Probation/Commitment Order'' from the United States District Court for the Central District of California in *U.S.* v. *Washington Bryan, II,* Docket No. Cr–16–00320–RGK, which demonstrates that Applicant was convicted of ''Structuring of Currency Transactions in violation of Title 31 U.S.C. 5324(a)(3), as charged in Counts 1 through 29 of the Indictment.'' RFAAX 4, at 1. There is no mention of controlled substances or any other details of the underlying conviction in this document. In its RFAA, the Government cited to the DI's declaration as support for this statement: ''The funds involved in the illegal structuring transactions were related to Applicant's writing of fraudulent controlled substance prescriptions.'' *Id.* The DI similarly stated in her Declaration, ''The funds involved in the illegal structuring transactions were related to Applicant's writing of fraudulent controlled substance prescriptions.'' RFAAX 1, at 1–2 (citing the ''Judgment and Probation/Commitment Order''). Although the Applicant has not contested the OSC, I do not have any direct evidence to support the allegation that this conviction constitutes a felony conviction ''relating to'' controlled substances as those terms are defined in 21 U.S.C. 824(a)(2). The evidence related to mandatory exclusion does contain an indication that the conviction was related to controlled substances as defined under 1128(a)(4) of the Social Security Act; however, according to the HHS decision, the HHS ALJ drew this conclusion based on transcripts of proceedings in District Court, which I do not similarly have in evidence, and furthermore, he drew the conclusion under a different statutory context than the CSA. RFAAX 6, at 4. Due to the limited evidence before me regarding whether Applicant's conviction was relating to controlled substances, and the fact that there are adequate reasons to deny Applicant's registration under 21 U.S.C. 824(a)(5), I decline to consider the felony conviction in this Decision.

Locklear, M.D., 86 FR 33,738 33,744–45 (2021) (collecting cases); *see also, William Ralph Kincaid, M.D.,* 86 FR 40,636, 40,641 (2021). A provision of section 824 may be the basis for the denial of a practitioner registration application and allegations related to section 823 remain relevant to the adjudication of a practitioner registration application when a provision of section 824 is involved. *See Robert Wayne Locklear, M.D.,* 86 FR at 33,744–45.

Accordingly, when considering an application for a registration, I will consider any actionable allegations related to the grounds for denial of an application under 823 and will also consider any allegations that the applicant meets one of the five grounds for revocation or suspension of a registration under section 824. *Id. See also Dinorah Drug Store, Inc.,* 61 FR 15,972, 15,973–74 (1996).

1. 21 U.S.C. 823(f): The Five Public Interest Factors

Pursuant to section 303(f) of the Controlled Substances Act (hereinafter, the CSA), ''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Section 303(f) further provides that an application for a practitioner's registration may be denied upon a determination that ''the issuance of such registration . . . would be inconsistent with the public interest.'' *Id.*

In this case, there is no indication that Applicant does not hold a valid state medical license or is not authorized to dispense controlled substances in the State of California where he practices.

Because the Government has not alleged that Applicant's registration is inconsistent with the public interest under section 823, and although I have considered 823, I will not analyze Applicant's application under the public interest factors. Therefore, in accordance with prior agency decisions, I will move to assess whether the Government has proven by substantial evidence that a ground for revocation exists under 21 U.S.C. 824(a). *Supra* II.C.

2. 21 U.S.C. 824(a)(5): Mandatory Exclusion From Federal Health Care Programs Pursuant to 42 U.S.C. 1320a–7(a)

Under Section 824(a) of the CSA, a registration ''may be suspended or revoked'' upon a finding of one or more of five grounds. 21 U.S.C. 824. The ground in 21 U.S.C. 824(a)(5) requires that the registrant ''has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42.'' *Id.* Here, the undisputed record evidence demonstrates that HHS mandatorily excluded Applicant from federal health care programs. RFAAX 6. Accordingly, I will sustain the Government's allegation that Applicant has been excluded from participation in a program pursuant to section 1320a–7(a) of Title 42 and find that the Government has established that a ground exists upon which a registration could be revoked pursuant to 21 U.S.C. 824(a)(5). Although the language of 21 U.S.C. 824(a)(5) discusses suspension and revocation of a registration, for the reasons discussed above, it may also serve as the basis for the denial of a DEA registration application. *Dinorah Drug Store, Inc.,* 61 FR at 15,973 (interpreting 21 U.S.C. 824(a)(5) to serve as a basis for the denial of a registration because it ''makes little sense . . . to grant the application for registration, only to possibly turn around and propose to revoke or suspend that registration based on the registrant's exclusion from a Medicare program''). Applicant's exclusion from participation in a program under 42 U.S.C. 1320a–7(a), therefore, serves as an independent basis for denying his application for DEA registration. 21 U.S.C. 824(a)(5).

Where, in Section 824(a)(5) cases, the applicant offers no mitigating evidence upon which the Administrator can analyze the facts, the agency has consistently held that revocation is warranted. *See, e.g., Sassan Bassiri, D.D.S.,* 82 FR 32,200, 32,201 (2017); *Richard Hauser, M.D.,* 83 FR 26,308, 26,310 (2018) (revocation was sought under Section 824(a)(5) and the registrant's certificate of registration was revoked ''based on the unchallenged basis for his mandatory exclusion.'') When the basis for revocation or suspension is clear and the registrant has had notice and the opportunity to present evidence, whether in a hearing or a written statement in accordance with 21 CFR 1301.43, but has chosen not to present any such evidence that could inform the Administrator's decision, it is reasonable that the Administrator should revoke or suspend. *See KK Pharmacy,* 64 FR 49,507, 49,510 (1999); *Orlando Ortega-Ortiz, M.D.* 70 FR 15,122 (2005); *Lazaro Guerra,* 68 FR 15,266 (2003) (basis for revocation was both (a)(3) and (a)(5)).

In this case, the HHS ALJ found that the evidence in front of him demonstrated that Applicant ''was convicted of structuring cash deposits and both the district court and the court of appeals accepted evidence that those cash deposits were derived from unlawful distribution or prescription of controlled substances.'' RFAAX 6, at 5.[3] The HHS ALJ also applied aggravating factors to extend his exclusion period, because Applicant's illegal activity spanned over a year and Applicant was sentenced to 33 months of incarceration. RFAAX 6, at 7.

Sanction

Here, there is no dispute in the record that Applicant is mandatorily excluded pursuant to Section 1320a–7(a) of Title 42 and, therefore, that a ground for the denial of Applicant's application exists.

Where, as here, the Government has met its *prima facie* burden of showing that a ground for denial exists, the burden shifts to the Applicant to show why he can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases).

In this case, Applicant failed to respond to the Government's Order to Show Cause and did not avail himself of the opportunity to refute the Government's case. *See* RFAA, at 6. Therefore, Applicant has not provided any remorse or assurances that he would implement remedial measures to ensure such conduct is not repeated. Such silence weighs against the Applicant's continued registration. *Zvi H. Perper, M.D.,* 77 FR at 64,142, citing *Medicine Shoppe,* 73 FR at 387; *see also Samuel S. Jackson,* 72 FR at 23,853. Further, due to the lack of a statement or testimony from Applicant, it is unclear whether Applicant can be entrusted with a DEA registration; and therefore, I find that sanction is appropriate to protect the public from a recurrence of Applicant's unlawful actions in the context of his CSA registration. *See Leo R. Miller, M.D.,* 53 FR 21,931, 21,932 (1988).

[3] It is noted that this Agency has concluded repeatedly that the underlying crime requiring exclusion from federal health care programs under Section 1320a–7(a) of Title 42 does not require a nexus to controlled substances in order to be used as a ground for revocation or suspension of a registration. *Narciso Reyes, M.D.,* 83 FR 61,678, 61,681 (2018); *KK Pharmacy,* 64 FR at 49,510 (collecting cases); *Melvin N. Seglin, M.D.,* 63 Red. Reg. 70,431, 70,433 (1998); *Stanley Dubin, D.D.S.,* 61 FR 60,727, 60,728 (1996). Applicant's extensive unlawful activity over the course of over a year demonstrates a severe lack of honesty and a proclivity to prioritize his greed over the public welfare, which also demonstrates the potential for abuse of his CSA registration, and therefore, I need not consider the HHS ALJ's finding that the underlying unlawful activity in this case involved controlled substances under Section 1128(a)(4) of the Social Security Act. The substantial evidence favors revocation.

Consequently, I find that the factors weigh in favor of sanction and I shall order the sanctions the Government requested, as contained in the Order below.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny the pending application for a Certificate of Registration, Control Number W19097421C, submitted by Washington Bryan, M.D., as well as any other pending application of Washington Bryan, M.D. for additional registration in California. This Order is effective January 19, 2022.

Anne Milgram,

Administrator.

[FR Doc. 2021–27431 Filed 12–17–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Cypress Creek Pharmacy, LLC; Order

On October 18, 2019, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Cypress Creek Pharmacy, LLC (hereinafter, Applicant), of Wesley Chapel, Florida. Order to Show Cause (hereinafter, OSC), at 1. The OSC proposed the denial of Applicant's application for a DEA Certificate of Registration because, according to the OSC, Applicant's registration with DEA would be inconsistent with the public interest. *Id.* (citing 21 U.S.C. 823(f) and 824(a)(4)).

In a Declaration dated August 3, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Tampa District Office, Miami Field Division, stated that on October 25, 2019, she met with Applicant's Registered Agent and Manager at the DEA Tampa District Office and ''personally served him with a copy of the [OSC].'' Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) B, at 1–2. The DI also stated that since the service of the OSC, she has ''received no communications from anyone acting on behalf of [Applicant] regarding the [OSC].'' *Id.* at 2.

The Government filed a Request for Final Agency Action (hereinafter, RFAA) on September 3, 2021. In its RFAA, the Government stated that Applicant is without authority to handle controlled substances in Florida, because its state pharmacy license recently expired. RFAA, at 1. The Government provided documentation from the Florida Department of Health to support this claim. *See* RFAAX B–1 and B–2. The Government then requested that I deny Applicant's application for a DEA registration based solely [1] on the ground that Applicant lacks authority to handle controlled substances in Florida, the state where Applicant seeks a DEA registration. RFAA, at 1 and 6. The Government did not allege that Applicant lacked state authority in the OSC. *See generally* OSC.

Previous Agency decisions have stated that the Government is not required to issue an amended OSC to notice an allegation of a registrant's lack of state authority that arises during the pendency of a proceeding regarding a DEA registration. *Hatem M. Ataya, M.D.,* 81 FR 8221, 8244 (2016). Additionally, previous Agency decisions have stated that because the possession of state authority is a prerequisite for obtaining and maintaining a registration, the issue of state authority can be raised at any stage of a proceeding, even *sua sponte* by the Administrator. *See id.; see also Joe M. Morgan, D.O.,* 78 FR 61,961, 61,973–74 (2013). In those matters, however, the registrant had a meaningful opportunity, during at least one stage in the proceeding, to refute the Government's claim that the registrant lacked state authority. *See, e.g., Ataya,* 81 FR at 8245 (Administrator issued order directing parties to address whether registrant possessed state authority); *Lesly Pompy, M.D.,* 84 FR 57,749, 57,749–50 (2019) (notice provided during administrative hearing); *Morgan,* 78 FR at 61,973–74 (Government's post-hearing Motion for Summary Disposition provided adequate notice).

Here, the Government cited to *Lawrence E. Stewart, M.D.,* 86 FR 15,257 (2021), to support the proposition that it was not required to issue a new OSC demonstrating lack of state authority. RFAA, at 3–4. Although *Stewart* is accurately quoted, it also supports the notion that the Agency must give some sort of notice and an opportunity to contest the new allegations. In this case, in spite of changing the grounds for denial two years after issuance of the OSC, the Government had not demonstrated that it had given any such opportunity to the Applicant. Accordingly, on October 15, 2021, I issued an Interim Order to Applicant permitting it to submit a response addressing whether Applicant currently holds state authority to handle controlled substances in Florida within fifteen calendar days from the date that my office served the Order on Applicant. Applicant sent an email in reply to my Interim Order on October 20, 2021, stating, ''I have closed the pharmacy and wish to close out of all matters dealing with the pharmacy and the process of all licensure.'' [2] Email dated October 20, 2021. I have received no further correspondence from Applicant regarding the Government's allegations of its lack of state authority.

Because Applicant has presented no evidence or statements related to its lack of state authority, I consider the evidence submitted by the Government on the lack of state authority allegation to be uncontested.

I make the following findings of fact based on the record before me.

Findings of Fact

Applicant's Application for a DEA Registration

On or about September 6, 2018, Applicant submitted an application for a DEA Certificate of Registration as a retail pharmacy in Schedules II through V with a proposed registered address at 26829 Tanic Drive, Suite 101, Wesley Chapel, Florida 33544. Applicant's application was assigned Control No. W18097945A. RFAAX B, at 1.

The Status of Applicant's State License

In her Declaration, the DI sated that Applicant's state pharmacy license ''expired, without renewal, on February 28, 2021.'' RFAAX B, at 2. The Declaration noted that ''that expiration was automatically extended until June 30, 2021 as part of the State of Florida's COVID–19 response.'' *Id.* at n.3.

According to Florida Department of Health's online records, of which I take official notice, Applicant's state pharmacy registration PH31651 is ''delinquent'' [3] with a ''license expiration date'' of February 28, 2021.[4]

[1] The Government appears to have abandoned its public interest allegations in the RFAA, and therefore, I am not considering them.

[2] In spite of Applicant's statement regarding its discontinuance of business, its application remains pending and I will continue to assess the application under 21 U.S.C. 823. *See Lawrence E. Stewart, M.D.,* 86 FR 15,257 (2021).

[3] According to the state website, ''delinquent'' means ''[t]he license practitioner who held a CLEAR ACTIVE or CLEAR INACTIVE license, but failed to renew the license by the expiration date. The licensed practitioner is not authorized to practice in the [S]tate of Florida.'' *https://mqa-internet.doh.state.fl.us/MQASearchServices//LicStatus.html#DELINQUENT.*

[4] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure

Continued

Florida Department of Health's License Verification, Licensee Lookup, *https://mqa-internet.doh.state.fl.us/MQASearchServices/Home* (last visited date of signature of this Order).

Accordingly, I find that Registrant currently is not licensed to engage in the practice of pharmacy in Florida, the state in which Applicant applied for registration with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had [its] State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a pharmacy . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to Florida statute, ''It is unlawful for any person to own, operate, maintain, open, establish, conduct, or have charge of, either alone or with another person or persons, a pharmacy: (a) Which is not registered under the provisions of this chapter.'' [5] Fla. Stat. Ann. § 465.015(1). Further, ''the practice of the profession of pharmacy'' definition ''includes compounding, dispensing, and consulting concerning contents, therapeutic values, and uses of any medicinal drug [6] . . . .'' Fla. Stat. Ann. § 465.003(13) (West, 2021).

Here, the undisputed evidence in the record is that Applicant currently lacks authority to operate a pharmacy in Florida. As already discussed, a pharmacy must be a licensed to dispense a medicinal drug, including a controlled substance, in Florida. Thus, because Applicant lacks authority to practice pharmacy in Florida and, therefore, is not authorized to dispense controlled substances in Florida, Applicant is not eligible to receive a DEA registration. Accordingly, I will order that Applicant's application for a DEA registration be denied.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby order that the pending application for a Certificate of Registration, Control Number W18097945A, submitted by Cypress Creek Pharmacy, LLC is denied, as well as any other pending application of Cypress Creek Pharmacy, LLC for additional registration in Florida. This Order is effective January 19, 2022.

Anne Milgram,

Administrator.

[FR Doc. 2021–27486 Filed 12–17–21; 8:45 am]

BILLING CODE 4410–09–P

Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by email (*dea.addo.attorneys@dea.usdoj.gov*).

[5] The Government included an email from a Florida Medical Quality Assurance Investigator stating that ''[p]harmacies are not allowed to operate *at all* on a delinquent license.'' RFAA B–2, at 1 (emphasis in original). This statement is supported by my analysis of Florida law.

[6] ''Medicinal Drugs'' or ''Drugs'' means ''those substances or preparations commonly known as 'prescription' or 'legend' drugs which are required by federal or state law to be dispensed only on a prescription . . . .'' Fla. Stat. Ann. § 465.003(8).

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; COVID–19 Symptom Tracker for Students, Emotional Wellness Form for Students, and Student Vaccination Status and Test Consent Form Collection

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''COVID–19 Symptom Tracker for Students, Emotional Wellness Form for Students, and Student Vaccination Status and Test Consent Form Collection''. This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by February 18, 2022.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Lawrence Lyford by telephone at 202–693–3121 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *Lyford.Lawrence@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Job Corps, 200 Constitution Avenue NW, Room N4459 Washington DC 20210; by email: *Lyford.Lawrence@dol.gov;* or by fax 202–693–3113.

FOR FURTHER INFORMATION CONTACT: Lawrence Lyford by telephone at 202–693–3121 (this is not a toll-free number) or by email at *Lyford.Lawrence@dol.gov.*

Authority: 44 U.S.C. 3506(c)(2)(A).

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce

paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Job Corps is the nation's largest residential, educational, and career technical training program for the economically disadvantaged youths. The Economic Opportunity Act established Job Corps in 1964, and it currently operates under the authority of the Workforce Innovation and Opportunity Act (WIOA) of 2014. For over 56 years, Job Corps has helped prepare over three million at-risk young people between the ages of 16 and 24 for success in our nation's workforce. With 121 centers in 50 states, Puerto Rico, and the District of Columbia, Job Corps assists students across the nation in attaining academic credentials, including High School Diplomas (HSD) and/or High School Equivalency (HSE), and career technical training credentials, including industry-recognized certifications, state licensures, and pre-apprenticeship credentials.

Job Corps is a national program administered by the U.S. Department of Labor (DOL) through the Office of Job Corps and six Regional Offices. DOL awards and administers contracts for the recruiting and screening of new students, center operations, and the placement and transitional support of graduates and former enrollees. Large and small corporations and nonprofit organizations manage and operate 95 Job Corps centers under contractual agreements with DOL. These contract Center Operators are selected through a competitive procurement process that evaluates potential operators' technical expertise, proposed costs, past performance, and other factors, in accordance with the Competition in Contracting Act and the Federal Acquisition Regulations. Many of the current contractors operate more than one center. The two centers operated under demonstration grants are run by the State of Idaho and the National Guard Job Challenge program respectively. Of the 121 current centers, 24 are managed and operated by the U.S. Department of Agriculture—Forest Service (USDA) through an interagency agreement. Additionally, there are 26 public colleges and universities operating Job Corps Scholars Program demonstration grants.

The Workforce Innovation Opportunity Act (WIOA), Section 116(b) (2) (A) (i), Section 159(c) (4) and Section 156 (a) authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless OMB approves the collection 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 penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB control number 1205–0219.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (*e.g.,* permitting electronic submission of responses)

Agency: DOL.

Type of Review: Regular Clearance.

Title of Collection: COVID–19 Symptom Tracker for Students, Emotional Wellness Form for Students, and Student Vaccination Status and Test Consent Form Collection Standard Job Corps Contractor and Grantee Information Gathering.

Forms: ETA 9194: Job Corps COVID–19 Student Symptom Tracker and Attestation, ETA 9196: Student Daily Emotional Wellness Checklist, ETA 9197: Student COVID–19 Vaccine Certification, Authorizations, and Acknowledgements and Testing Consent.

OMB Control Number: 1205–0548.

Affected Public: Individuals or Households and Private Sector businesses, grantees or other for-profits.

Estimated Number of Respondents: 60,000.

Frequency: Various.

Total Estimated Annual Responses: 7,140,000.

Estimated Average Time per Response: 0.33 hours.

Estimated Total Annual Burden Hours: 360,360.

Total Estimated Annual Other Cost Burden: $0.

Angela Hanks,

Acting Assistant Secretary.

[FR Doc. 2021–27410 Filed 12–17–21; 8:45 am]

BILLING CODE 4510–FT–P

NATIONAL SCIENCE FOUNDATION

Business and Operations Advisory Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Business and Operations Advisory Committee (9556) virtual meeting.

Date and Time: January 21, 2022; 1:00 p.m. to 2:00 p.m. (EST).

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia, 22314 (Virtual attendance only).

To attend the virtual meeting, please send your request for the meeting link to the following email address: *negglest@nsf.gov.*

Type of Meeting: Open.

Contact Person: NaChanza Eggleston, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA, 22314; Telephone: (703) 292–8100.

Purpose of Meeting: To provide advice concerning issues related to the

oversight, integrity, development and enhancement of NSF's business operations.

Agenda

- Welcome/Introductions
- Report of the Subcommittee on Information Technology and Enterprise Architecture Strategy

Dated: December 15, 2021.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2021–27465 Filed 12–17–21; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Open to the Public Meetings of the Networking and Information Technology Research and Development (NITRD) Program

AGENCY: Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), National Science Foundation.

ACTION: Notice of public meetings.

SUMMARY: The NITRD Program holds meetings that are open to the public to attend. The Joint Engineering Team (JET) and Middleware and Grid Interagency Coordination (MAGIC) Team provide an opportunity for the public to engage and participate in information sharing with Federal agencies. The JET and MAGIC Team report to the NITRD Large Scale Networking (LSN) Interagency Working Group (IWG).

DATES: January 2022–December 2022.

FOR FURTHER INFORMATION CONTACT: Paul Love for the JET and Mallory Hinks for the MAGIC Team at *nco@nitrd.gov* or (202) 459–9674. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday, except for U.S. Federal Government holidays.

SUPPLEMENTARY INFORMATION: The Joint Engineering Team (JET), established in 1997, provides an opportunity for information sharing among Federal agencies and non-Federal participants who have an interest in high-performance research and engineering or research and education networking (REN) and networking to support science applications.

The MAGIC Team, established in 2002, provides for information sharing among Federal agencies and non-Federal participants with interests and responsibility for middleware, Grid, and cloud projects; individuals involved in middleware, Grid, and cloud research and infrastructure; individuals involved in implementing or operating Grids and clouds; and users of Grids, clouds and middleware. The JET and MAGIC Team meetings are hosted by the NITRD NCO with Zoom participation available for each meeting.

Public Meetings website: The JET and MAGIC Team meetings are scheduled 30 days in advance of the meeting date. Please reference the NITRD Public Meetings web page (*https://www.nitrd.gov/meetings/public/*) for each Team's upcoming meeting dates and times, in addition to the agendas, minutes, and other meeting materials and information.

Public Meetings Mailing Lists: Members of the public may be added to the mailing lists by sending their full name and email address to *jet-signup@nitrd.gov* for JET and *magic-signup@nitrd.gov* for MAGIC, with the subject line: ''Add to JET'' and/or ''Add to MAGIC.'' Meeting notifications and information are shared via the mailing lists.

Public Comments: The government seeks individual input; attendees/participants may provide individual advice only. Members of the public are welcome to submit their comments for JET to *jet-comments@nitrd.gov* and for MAGIC to *magic-comments@nitrd.gov.* Please note that under the provisions of the Federal Advisory Committee Act (FACA), all public comments and/or presentations will be treated as public documents and may be made available to the public via the JET and MAGIC web pages.

Reference website: NITRD website at: *http://www.nitrd.gov/.*

Submitted by the National Science Foundation in support of the Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO) on December 13, 2021.

(Authority: 42 U.S.C. 1861)

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2021–27316 Filed 12–17–21; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–255; NRC–2021–0206]

Holtec Decommissioning International, LLC; Palisades Nuclear Plant

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to a December 23, 2020, request from Holtec Decommissioning International, LLC (HDI). The exemption permits HDI to make withdrawals from the Palisades Nuclear Plant (PNP) Decommissioning Trust Fund (DTF) for spent fuel management and site restoration activities at PNP without prior notification to the NRC. This exemption is effective upon issuance, but only applies to HDI upon the consummation of the indirect transfer of the license for PNP to Holtec International and the transfer of the operating authority under the license to HDI.

DATES: The exemption was issued on December 13, 2021.

ADDRESSES: Please refer to Docket ID NRC–2021–0206 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0206. Address questions about Dockets 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.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Scott P. Wall, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2855; email: *Scott.Wall@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: December 15, 2021.

For the Nuclear Regulatory Commission.

Scott P. Wall,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

NUCLEAR REGULATORY COMMISSION

Docket No. 50–255

Holtec Decommissioning International, LLC

Palisades Nuclear Plant

Exemption

I. Background.

The Palisades Nuclear Plant (PNP) is a pressurized-water reactor located in Van Buren County, Michigan. Entergy Nuclear Operations, Inc. (ENOI) and Entergy Nuclear Palisades, LLC (ENP) hold the U.S. Nuclear Regulatory Commission (NRC, the Commission) license for PNP, Renewed Facility Operating License No. DPR–20. This license is subject to the rules, regulations, and orders of the NRC. Operation of PNP is scheduled to permanently cease by May 31, 2022.

By application dated December 23, 2020 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML20358A075), ENOI, on behalf of itself, ENP, Holtec International (Holtec), and Holtec Decommissioning International, LLC (HDI), requested that the NRC consent to (1) the indirect transfer of control of Renewed Facility Operating License No. DPR–20 for PNP, the general license for the PNP Independent Spent Fuel Storage Installation (ISFSI), Facility Operating License No. DPR–6 for Big Rock Point Plant (Big Rock Point), and the general license for the Big Rock Point ISFSI (referred to collectively as the Sites and the licenses) to Holtec; and (2) the transfer of ENOI's operating authority (*i.e.,* its authority to conduct licensed activities at the Sites) to HDI.

In support of the license transfer application, by letter dated December 23, 2020 (ADAMS Accession No. ML20358A232), HDI provided to the NRC a post-shutdown decommissioning activities report (PSDAR) and site-specific decommissioning cost estimate (SSCE) for PNP. These documents reflected HDI's proposal to decommission PNP over a period (inclusive of 2022) of 20 years if the license transfer application is approved and the proposed license transfer transaction is consummated. Specifically, the decommissioning of PNP would begin following the permanent cessation of power operations in 2022 and the majority of license termination activities would be completed by 2040 (*i.e.,* releasing for unrestricted use the entirety of the PNP site with the exception of the ISFSI). HDI would then remove the fuel and Greater than Class C waste from the site, decommission the ISFSI, terminate the NRC license, and release the remainder of the site for unrestricted use in 2041.

II. Request/Action.

In support of the license transfer application, in addition to providing a PSDAR and an SSCE, by letter dated December 23, 2020 (ADAMS Accession No. ML20358A239), HDI also submitted to the NRC a request for exemption from specific requirements of sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) of title 10 of the *Code of Federal Regulations* (10 CFR). The exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would permit HDI to make withdrawals from the PNP Decommissioning Trust Fund (DTF) for spent fuel management and site restoration activities at PNP, in accordance with the HDI SSCE. The exemption from 10 CFR 50.75(h)(1)(iv) would also permit HDI to make these withdrawals without prior notification to the NRC, similar to withdrawals for decommissioning activities made in accordance with 10 CFR 50.82(a)(8). The exemption would only apply to HDI if and when the proposed license transfer transaction is consummated.

As part of its exemption request, HDI provided Table 1, which shows the annual cash flows for the PNP DTF while conducting decommissioning activities under the proposal to decommission PNP discussed in the HDI PSDAR. The table contains the projected withdrawals from the PNP DTF needed to cover the estimated costs for PNP for radiological decommissioning, spent fuel management, and site restoration activities in accordance with the HDI SSCE. By letter dated March 25, 2021 (ADAMS Accession No. ML21084A811), pursuant to 10 CFR 50.75(f)(1), ENOI reported to the NRC the balance of the PNP DTF as of December 31, 2020. The NRC staff considered all of this information in its review of the exemption request.

The requirements of 10 CFR 50.82(a)(8)(i)(A) restrict the use of DTF withdrawals to expenses related to legitimate decommissioning activities consistent with the definition of decommissioning that appears in 10 CFR 50.2, ''Definitions.'' The definition of ''decommission'' in 10 CFR 50.2 is:

to remove a facility or site safely from service and reduce residual radioactivity to a level that permits—

(1) Release of the property for unrestricted use and termination of the license;

or

(2) Release of the property under restricted conditions and termination of the license.

This definition does not include activities associated with spent fuel management and site restoration activities. The requirements of 10 CFR 50.75(h)(1)(iv) also restrict the use of DTF disbursements (other than for ordinary administrative costs and other incidental expenses of the fund in connection with the operation of the fund) to decommissioning expenses until final radiological decommissioning is completed. Therefore, an exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) is needed to allow HDI to use funds from the PNP DTF for spent fuel management and site restoration activities at PNP. The requirements of 10 CFR 50.75(h)(1)(iv) further provide that, except for withdrawals being made under 10 CFR 50.82(a)(8) or for payments of ordinary administrative costs and other incidental expenses of the fund in connection with the operation of the fund, no disbursement may be made from the DTF without written notice to the NRC at least 30 working days in advance. Therefore, an exemption from 10 CFR 50.75(h)(1)(iv) is also needed to allow HDI to use funds from the PNP DTF for spent fuel management and site restoration activities at PNP without prior NRC notification.

III. Discussion.

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 (1) when 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) when any of the special circumstances listed in 10 CFR 50.12(a)(2) are present. These special circumstances include, among others:

(ii) 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; and

(iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

A. Authorized by Law

The requested exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow HDI to use a portion of the funds from the PNP DTF for spent fuel management and site restoration activities at PNP without prior notice to the NRC in the same manner that withdrawals are made under 10 CFR 50.82(a)(8) for decommissioning activities. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50 when the exemptions are authorized by law. The NRC staff has determined, as explained below, that granting HDI's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

B. No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) is to provide reasonable assurance that adequate funds will be available for the radiological decommissioning of power reactors. Based on the HDI SSCE and the cash flow analyses, use of a portion of the PNP DTF for spent fuel management and site restoration activities at PNP will not adversely impact HDI's ability to complete radiological decommissioning within 60 years and terminate the PNP license. Furthermore, an exemption from 10 CFR 50.75(h)(1)(iv) to allow HDI to make withdrawals from the PNP DTF for spent fuel management and site restoration activities at PNP without prior written notification to the NRC will not affect the sufficiency of funds in the DTF to accomplish radiological decommissioning, because such withdrawals are still constrained by the provisions of 10 CFR 50.82(a)(8)(i)(B)—(C) and are reviewable under the annual reporting requirements of 10 CFR 50.82(a)(8)(v)—(vii).

Based on the above, there are no new accident precursors created by using the PNP DTF in the proposed manner. Thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. No changes are being made in the types or amounts of effluents that may be released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, the requested exemption will not present an undue risk to public health and safety.

C. Consistent With the Common Defense and Security

The requested exemption would allow HDI to use funds from the PNP DTF for spent fuel management and site restoration activities at PNP. Spent fuel management under 10 CFR 50.54(bb) is an integral part of the planned HDI decommissioning and license termination process and will not adversely affect HDI's ability to physically secure the site or protect special nuclear material. This change to enable the use of a portion of the funds from the DTF for spent fuel management and site restoration activities has no relation to security issues. Therefore, the common defense and security is not impacted by the requested exemption.

D. 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 is not necessary to achieve the underlying purpose of the regulation.

The underlying purpose of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), which restrict withdrawals from DTFs to expenses for radiological decommissioning activities, is to provide reasonable assurance that adequate funds will be available for radiological decommissioning of power reactors and license termination. Strict application of these requirements would prohibit the withdrawal of funds from the PNP DTF for activities other than radiological decommissioning activities at PNP, such as for spent fuel management and site restoration activities, until final radiological decommissioning at PNP has been completed.

The PNP DTF contained $553.84 million as of December 31, 2020. HDI's analyses project the total radiological decommissioning costs at PNP to be approximately $443,215,000 (in 2020 dollars), including the costs for decommissioning the ISFSI. As required by 10 CFR 50.54(bb), HDI estimated the costs associated with spent fuel management at PNP to be approximately $166,122,000 (in 2020 dollars).

The NRC staff performed independent cash flow analyses of the PNP DTF over the proposed 20-year decommissioning period (assuming an annual real rate of return of 2 percent, as allowed by 10 CFR 50.75(e)(1)(ii)) and determined the projected earnings of the DTF. The NRC staff confirmed that the current funds in the DTF and projected earnings provide reasonable assurance of adequate funding to complete all NRC-required radiological decommissioning activities at PNP and also to pay for spent fuel management and site restoration activities. Therefore, the NRC staff finds that HDI has provided reasonable assurance that adequate funds will be available for the radiological decommissioning of PNP, even with the disbursement of funds from the DTF for spent fuel management and site restoration activities. Consequently, the NRC staff concludes that application of the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), that funds from the DTF only be used for radiological decommissioning activities and not for spent fuel management and site restoration activities, is not necessary to achieve the underlying purpose of the rule. Thus, special circumstances are present supporting approval of the exemption request.

In its submittal, HDI also requested exemption from the requirement of 10 CFR 50.75(h)(1)(iv) concerning prior written notification to the NRC of withdrawals from DTFs for activities other than radiological decommissioning. The underlying purpose of notifying the NRC prior to such withdrawals of funds from DTFs is to provide an opportunity for NRC intervention, when deemed necessary, if the withdrawals are for expenses other than those authorized by 10 CFR 50.75(h)(1)(iv) and 10 CFR 50.82(a)(8) that could result in there being insufficient funds in the DTFs to accomplish radiological decommissioning.

By granting the exemption to 10 CFR 50.75(h)(1)(iv) and 10 CFR 50.82(a)(8)(i)(A), the NRC staff considers that withdrawals consistent with HDI's submittal dated December 23, 2020, are authorized. As stated previously, the NRC staff determined that there are sufficient funds in the DTF to complete radiological decommissioning activities, as well as to conduct spent fuel management and site restoration activities, consistent with HDI's PSDAR, SSCE, and December 23, 2020, exemption request. Pursuant to the requirements in 10 CFR 50.82(a)(8)(v) and (vii), licensees are required to monitor and annually report to the NRC the status of the DTF and the licensee's funding for spent fuel management. These reports provide the NRC staff

with awareness of, and the ability to take action on, any actual or potential funding deficiencies. Additionally, 10 CFR 50.82(a)(8)(vi) requires that the annual financial assurance status report must include additional financial assurance to cover the estimated cost of completion if the sum of the balance of any remaining decommissioning funds, plus earnings on such funds calculated at not greater than a 2-percent real rate of return, together with the amount provided by other financial assurance methods being relied upon, does not cover the estimated cost to complete the decommissioning. The requested exemption would not allow the withdrawal of funds from the DTF for any other purpose that is not currently authorized in the regulations without prior notification to the NRC. Therefore, the granting of the exemption to 10 CFR 50.75(h)(1)(iv) to allow HDI to make withdrawals from the PNP DTF to cover authorized expenses for spent fuel management and site restoration activities at PNP without prior written notification to the NRC will still meet the underlying purpose of the regulation.

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(iii), are present whenever compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated. HDI states that the DTF contains funds in excess of the estimated costs of radiological decommissioning and that these excess funds are needed for spent fuel management and site restoration activities. The NRC does not preclude the use of funds from the DTF in excess of those needed for radiological decommissioning for other purposes, such as for spent fuel management or site restoration activities.

The NRC has stated that funding for spent fuel management and site restoration activities may be commingled in DTFs, provided that the licensee is able to identify and account for the radiological decommissioning funds separately from the funds set aside for spent fuel management and site restoration activities (see NRC Regulatory Issue Summary 2001–07, Rev. 1, ''10 CFR 50.75 Reporting and Recordkeeping for Decommissioning Planning,'' dated January 8, 2009 (ADAMS Accession No. ML083440158), and Regulatory Guide 1.184, Revision 1, ''Decommissioning of Nuclear Power Reactors,'' dated October 2013 (ADAMS Accession No. ML13144A840)). Preventing access to those excess funds in DTFs because spent fuel management and site restoration activities are not associated with radiological decommissioning would create an unnecessary financial burden without any corresponding safety benefit. The adequacy of the PNP DTF to cover the cost of activities associated with spent fuel management and site restoration, in addition to radiological decommissioning, is supported by the HDI SSCE. If HDI cannot use the PNP DTF for spent fuel management and site restoration activities, it would need to obtain additional funding that would not be recoverable from the DTF, or it would have to modify its decommissioning approach and methods. The NRC staff concludes that either outcome would impose an unnecessary and undue burden significantly in excess of that contemplated when 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) were adopted.

The underlying purposes of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would be achieved by allowing HDI to use a portion of the PNP DTF for spent fuel management and site restoration activities at PNP without prior NRC notification, and compliance with the regulations would result in an undue hardship or other costs that are significantly in excess of those contemplated when the regulations were adopted. Thus, the special circumstances in 10 CFR 50.12(a)(2)(ii) and 10 CFR 50.12(a)(2)(iii) exist and support the approval of the requested exemption.

E. Environmental Considerations

In accordance with 10 CFR 51.31(a), the Commission has determined that granting the exemption will not have a significant effect on the quality of the human environment (see Environmental Assessment and Finding of No Significant Impact published in the **Federal Register** on November 26, 2021 (86 FR 67503)).

IV. Conclusions.

In consideration of the above, the NRC staff finds that the proposed exemption confirms the adequacy of funding in the PNP DTF, considering growth, to complete radiological decommissioning of the site and to terminate the licenses and also to cover estimated spent fuel management and site restoration activities.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants HDI an exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) to allow the use of a portion of the funds from the PNP DTF for spent fuel management and site restoration activities at PNP in accordance with HDI's PSDAR and SSCE, dated December 23, 2020. Additionally, the Commission hereby grants HDI an exemption from the requirement of 10 CFR 50.75(h)(1)(iv) to allow such withdrawals without prior NRC notification.

This exemption is effective upon issuance.

Dated: December 13, 2021.

For the Nuclear Regulatory Commission.

/RA/

Brian D. Wittick,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–27491 Filed 12–17–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2022–36; Order No. 6063]

Inbound Competitive Multi-Service Agreements With Foreign Postal Operators

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is acknowledging a recent filing by the Postal Service that it has entered into the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators (FPOs). This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 21, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

On December 13, 2021, the Postal Service filed a notice with the Commission pursuant to 39 CFR 3035.105 and Order No. 546,[1] concerning the inbound portions of an Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator (FPO) which the Postal Service seeks to include within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 (MC2010–34 product).[2]

II. Summary of the FPO–USPS Agreement FY22–2

The FPO–USPS Agreement FY22–2 is intended to become effective on January 1, 2022, and will, unless terminated earlier, expire on December 31, 2023. Except as otherwise agreed by contract, the FPO exchanges mail with the Postal Service and applies the Universal Postal Convention and Universal Postal Convention Regulations to those exchanges. The competitive services offered by the Postal Service to the FPO in FPO–USPS Agreement FY22–2 include rates for inbound parcels, packets, and international Express Mail Service. Notice at 5–6. The Postal Service states that ''[m]any rates will be based on a per-piece and per-kilo structure and in Special Drawing Rights. . . .'' *Id.* at 6 (footnote omitted). Only the inbound portions of the FPO–USPS Agreement FY22–2 that concern competitive products are included in the proposal filed in this docket. *Id.* Outbound delivery of competitive postal products within the FPO's country have not previously been presented to the Commission and are not presented in this Notice. *Id.*

Accompanying the Notice are:

- Attachment 1—an application for non-public treatment of materials to maintain redacted portions of the agreement and supporting documents under seal;
- Attachment 2—a redacted copy of FPO–USPS Agreement FY22–2;
- Attachment 3—a copy of the Governors' Decision No. 19–1;
- Attachment 4—a certified statement required by 39 CFR 3035.105(c)(2); and
- Supporting financial documentation as separate Excel files.

The Postal Service asserts that ''[t]he FPO–USPS Agreement FY22–2 is functionally equivalent to the baseline agreement filed in Docket No. MC2010–34 because the terms of this agreement are similar in scope and purpose to the terms of the CP2010–95 Agreement'' that is used for functional equivalency analyses of the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.'' [3] The Postal Service states that ''[b]ecause the FPO–USPS Agreement FY22–2 and the CP2010–95 Agreement incorporate the same cost attributes and methodology, the relevant cost and market characteristics are similar.'' Notice at 9.

Additionally, the Postal Service asserts that the FPO–USPS Agreement FY22–2 is in compliance with 39 U.S.C. 3633. *Id.* The Postal Service states further that the FPO–USPS Agreement FY22–2 is essentially an updated version of the FPO–USPS Agreement FY20–1, which was previously included in the Inbound Competitive Multi-Service Agreements with Postal Operators 1 product.[4]

The Postal Service asserts that its proposed addition of FPO–USPS Agreement FY22–2 to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product is also supported by prior Commission determinations that bilateral agreements with FPOs and negotiated service agreements should be included in the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. Notice at 3–4.

III. Notice of Commission Action

The Commission establishes Docket No. CP2022–36 for consideration of the Notice pertaining to FPO–USPS Agreement FY22–2 and the related rates and classifications. The Commission invites comments on whether the Postal Service's filing is consistent with the requirements of 39 U.S.C. 3633 and 39 CFR 3035.105 and whether it is functionally equivalent to the baseline agreement included in the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product (MC2010–34). Comments are due no later than December 21, 2021. Public portions of this filing can be accessed via the Commission's website (*www.prc.gov*).

The Commission appoints Jennaca D. Upperman to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2022–36 for consideration of the matters raised in this docket.
2. Pursuant to 39 U.S.C. 505, Jennaca D. Upperman is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.
3. Comments are due no later than December 21, 2021.
4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2021–27414 Filed 12–17–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] Docket Nos. MC2010–34 and CP2010–95, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Service Operators 1 to the Competitive Product List and Approving Included Agreement, September 29, 2010 (Order No. 546).

[2] *See* Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY22–2, December 13, 2021, at 1 (Notice). The Postal Service refers to the agreement as ''FPO–USPS Agreement FY22–2.'' *Id.*

[3] Notice at 3. An agreement (the CP2010–95 Agreement) was originally presented to the Commission in Docket No. CP2010–95 for inclusion in the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. Order No. 546 at 8–10. The CP2010–95 Agreement was subsequently accepted by the Commission as the baseline agreement for functional equivalency analyses of the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. Docket No. CP2011–69, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, September 7, 2011, at 5 (Order No. 840). *See also* Notice at 7–9.

[4] Notice at 3. *See* Docket No. CP2020–144, Order Approving Additional Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY20–1, June 25, 2020, at 7 (Order No. 5565).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–218, OMB Control No. 3235–0242]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 206(4)–3

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 206(4)–3 (17 CFR 275.206(4)–3) under the Investment Advisers Act of 1940, which is entitled ''Cash Payments for Client Solicitations,'' provides restrictions on cash payments for client solicitations. The rule requires that an adviser pay all solicitors' fees pursuant to a written agreement. When an adviser will provide only impersonal advisory services to the prospective client, the rule imposes no disclosure requirements. When the solicitor is affiliated with the adviser and the adviser will provide individualized advisory services to the prospective client, the solicitor must, at the time of the solicitation or referral, indicate to the prospective client that he is affiliated with the adviser. When the solicitor is not affiliated with the adviser and the adviser will provide individualized advisory services to the prospective client, the solicitor must, at the time of the solicitation or referral, provide the prospective client with a copy of the adviser's brochure and a disclosure document containing information specified in rule 206(4)–3.

Amendments to rule 206(4)–3, adopted in 2010 in connection with rule 206(4)–5, specify that solicitation activities involving a government entity, as defined in rule 206(4)–5, are subject to the additional limitations of rule 206(4)–5. In December 2020, the Commission adopted a single marketing rule which merged certain existing provisions of rule 206(4)–3 into amendments to rule 206(4)–1. In light of these 2020 amendments, the Commission has rescinded rule 206(4)–3, effective November 2, 2022. Notwithstanding the rescission of rule 206(4)–3, the Office of Management and Budget (the ''OMB'') has requested that the Commission submit documents in connection with the extension of rule 206(4)–3 for the period covering February 28, 2022 to November 2, 2022, the effective date of the discontinuance of rule 206(4)–3.

To the extent that the OMB has requested this collection of information, the information rule 206(4)–3 requires is necessary to inform advisory clients about the nature of the solicitor's financial interest in the recommendation so the prospective clients may consider the solicitor's potential bias, and to protect clients against solicitation activities being carried out in a manner inconsistent with the adviser's fiduciary duty to clients. Rule 206(4)–3 is applicable to all Commission-registered investment advisers. The Commission believes that approximately 3,829 of these advisers have cash referral fee arrangements. The rule requires approximately 7.04 burden hours per year per adviser and results in a total of approximately 26,956 total burden hours (7.04 × 3,829) for all advisers.

Please direct your written comments within 60 days to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O John R. Pezzullo, 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 1, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27498 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–489, OMB Control No. 3235–0541]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:

Rule 606 of Regulation NMS

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 606 of Regulation NMS (''Rule 606'') (17 CFR 242.606), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 606 (formerly known as Rule 11Ac1–6) requires disclosure by broker-dealers of (1) pursuant to Rule 606(a)(1), a quarterly aggregated public report on the handling of orders in NMS stocks that are submitted on a held basis and orders in NMS securities that are option contracts with a market value less than $50,000; (2) pursuant to Rule 606(b)(1), a report, upon request of a customer, on the routing of that customer's orders in NMS stocks that are submitted on a held basis, orders in NMS stocks that are submitted on a not held basis and do not qualify for two de minimis exceptions, and orders in NMS securities that are option contracts, containing certain information on the broker-dealer's routing of such orders for that customer for the prior six months; and (3) pursuant to Rule 606(b)(3), a report, upon request of a customer that places with the broker-dealer, directly or indirectly, NMS stock orders of any size that are submitted on a not held basis (subject to two de minimis exceptions), containing certain information on the broker-dealer's handling of such orders for that customer for the prior six months.

The total annual time burden associated with Rule 606 is approximately 190,240 hours per year and the total annual cost burden associated with Rule 606 is approximately $1,300,000 per year, calculated as described below.

The Commission estimates that out of the currently 3,585 broker-dealers that are subject to the collection of information obligations of Rule 606(a)(1), clearing brokers bear a substantial portion of the burden of complying with the reporting and recordkeeping requirements of Rule 606 on behalf of small to mid-sized introducing firms. There currently are approximately 186 clearing brokers. In addition, there are approximately 78 introducing brokers that receive funds or securities from their customers. Because at least some of these firms also may have greater involvement in determining where customer orders are routed for execution, they have been included, along with clearing brokers, in estimating the total burden of Rule 606(a)(1).

The Commission staff estimates that each firm significantly involved in order routing practices incurs an average burden of 40 hours to prepare and disseminate the quarterly report required by Rule 606(a)(1), or a burden of 160 hours per year. With an estimated 264 [1] broker-dealers significantly involved in order routing practices, the total industry-wide time burden per year to comply with the quarterly reporting requirement in Rule 606 is estimated to be 42,240 hours (160 × 264). Additionally, for each of the 264 broker-dealers subject to disclosure requirements of Rule 606(a)(1), the Commission estimates the annual burden under Rule 606(a)(1)(iv) to monitor payment for order flow and profit-sharing relationships and potential self-regulatory organization rule changes that could impact their order routing decisions and incorporate any new information into their reports to be 10 hours and the annual burden for each broker-dealer to describe and update any terms of payment for order flow arrangements and profit-sharing relationships with a Specified Venue

[1] 186 clearing brokers + 78 introducing brokers = 264.

that may influence their order routing decisions to be 15 hours, for a total annual time burden of approximately 6,600 hours (25 × 264). Therefore, the estimated total annual time burden to comply with Rule 606(a)(1) is 48,840 hours (42,240 + 6,600).

Clearing brokers generally bear the burden of responding to individual customer requests under Rule 606(b)(1) for order handling information. The Commission staff estimates that an average clearing broker incurs an annual burden of 400 hours (2000 responses × 0.2 hours/response) to prepare, disseminate, and retain responses to customers required by Rule 606(b)(1). With an estimated 186 clearing brokers subject to Rule 606(b)(1), the total industry-wide time burden per year to comply with the customer response requirement in Rule 606(b)(1) is estimated to be 74,400 hours (186 × 400).

The Commission estimates that approximately 200 broker-dealers are involved in routing orders subject to the disclosure requirements of Rule 606(b)(3). The Commission believes that some such broker-dealers will respond to requests for customer-specific reports in house, while others will engage a third-party service provider to do so. The Commission estimates that approximately 135 broker-dealers will respond in-house to individual customer requests for information on order handling under Rule 606(b)(3), and that for each, the individual annual time burden will be 400 hours (200 responses × 2 hours/response), with a total annual time burden of 54,000 hours (400 × 135).

The Commission estimates that approximately 65 broker-dealers will engage a third party to respond to individual customer requests, and that for each, the individual annual time burden will be 200 hours (200 responses × 1 hour/response), with a total annual time burden of 13,000 hours (200 × 65). The total annual cost burden associated with engaging such third parties is approximately $1,300,000 (65 × 200 annual requests × $100 per request to engage a third-party service provider). Therefore, the estimated total annual burden to comply with Rule 606(b)(3) is 67,000 hours (54,000 + 13,000) and $1,300,000.

The total annual time burden associated with Rule 606 is thus approximately 190,240 hours per year (48,840 + 74,400 + 67,000) and the total annual cost burden associated with Rule 606 is approximately $1,300,000 per year.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27497 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93769; File No. SR–FINRA–2021–032]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend FINRA Rule 2251 (Processing and Forwarding of Proxy and Other Issuer-Related Materials)

December 14, 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 December 7, 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to amend the provisions of FINRA Rule 2251 (Processing and Forwarding of Proxy and Other Issuer-Related Materials) relating to seeking reimbursement from issuers for forwarding proxy and other materials and to make minor conforming revisions.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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

FINRA Rule 2251 requires FINRA members to transmit proxy materials and other communications to beneficial owners of securities and limits the circumstances in which FINRA members may vote proxies without instructions from those beneficial owners.[4] The Supplementary Material under FINRA Rule 2251 (FINRA Rule 2251.01) sets forth the rate reimbursement provisions pursuant to which FINRA members are entitled to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] FINRA Rule 2251 was adopted as a consolidation of former NASD Rule 2260 and IM–2260 as part of FINRA's rulebook consolidation process. *See* Securities Exchange Act Release No. 61052 (November 23, 2009), 74 FR 62857 (December 1, 2009) (Order Granting Approval of Proposed Rule Change to Adopt FINRA Rule 2251 (Forwarding of Proxy and Other Issuer-Related Materials) in the Consolidated FINRA Rulebook; File No. SR–FINRA–2009–066).

receive fees in connection with the rule's forwarding obligations. FINRA has previously indicated that, in the interest of ensuring regulatory clarity and harmonization with respect to proxy rate reimbursement, it intends to conform the rate reimbursement provisions of FINRA Rule 2251 with the New York Stock Exchange (''NYSE'') provisions in this area.[5] Consistent with this approach, FINRA is proposing amendments to Supplementary Material .01 under Rule 2251, as described further below, in alignment with rulemakings by the NYSE that have amended certain provisions under NYSE rules.

i. Proposed ''Notice and Access'' Amendments

In 2018, the SEC adopted[6] Investment Company Act (''ICA'') Rule 30e–3,[7] which permits specified registered investment companies to satisfy their shareholder report delivery obligations by making the reports available electronically on a website using a ''notice and access'' process, subject to conditions as set forth in the rule. When Rule 30e–3 was proposed, but not yet adopted by the SEC, the NYSE proposed[8] to adopt amendments under NYSE Rule 451 that set maximum fees its member organizations could charge to issuers utilizing a notice and access process for proxy distribution. The NYSE noted that, absent amendment to NYSE Rule 451, the notice and access fees under the NYSE rule would not apply to the distribution of investment company shareholder reports.[9]

The SEC approved[10] the NYSE's proposal to amend the notice and access fee provisions under NYSE Rule 451 to provide that the notice and access fees set forth under the rule apply with respect to the distribution of investment company shareholder reports pursuant to any notice and access rules adopted by the SEC in relation to such distributions. The amendments provide that NYSE member organizations may not charge the notice and access fee for any account with respect to which an investment company pays a ''preference management fee'' in connection with a distribution of investment company shareholder reports.[11] In addition, to address investment companies that issue multiple classes of shares, the NYSE amendments also provide that all accounts holding shares of any class of stock of the investment company eligible to receive the same report distribution will be aggregated in determining the appropriate pricing tier as specified under the notice and access fee provisions of the rule.[12]

FINRA Rule 2251.01(a)(6) sets forth the notice and access fees that are designed to correspond with NYSE Rule 451.90(5). FINRA proposes to amend FINRA Rule 2251.01(a)(6) to conform the rule, in virtually identical language,[13] with the NYSE's notice and access amendments. FINRA believes this is appropriate to ensure harmonized treatment of notice and access fees under NYSE and FINRA rules. As such, FINRA Rule 2251.01(a)(6), as proposed to be revised pursuant to this rule change, would provide: ''The Notice and Access fees set forth herein will also be charged with respect to the distribution of investment company shareholder reports pursuant to the SEC's 'notice and access' rules in relation to such distributions. The Notice and Access fee will not be charged for any account with respect to which an investment company pays a Preference Management Fee in connection with a distribution of investment company shareholder reports.''[14] Further, the rule as revised would provide: ''In calculating the rates at which the issuer will be charged Notice and Access fees for investment company shareholder report distributions, all accounts holding shares of any class of stock of the applicable issuer eligible to receive the same distribution will be aggregated in determining the appropriate pricing tier under this Supplementary Material .01(a)(6).''[15]

ii. Proposed Prohibition on Processing Fees for Securities Transferred at No Cost

On August 13, 2021, the SEC approved a proposed rule change by the NYSE[16] that, in connection with forwarding proxy and related materials to beneficial owners, prohibits NYSE member organizations from imposing a fee[17] for a nominee[18] account that contains only shares or units of the securities involved that were transferred to the account holder by the member organization at no cost.[19] The NYSE

[5] *See* Securities Exchange Act Release No. 71272 (January 9, 2014), 79 FR 2741 (January 15, 2014) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend FINRA Rule 2251 (Forwarding of Proxy and Other Issuer-Related Materials), Which Includes Fees for Processing and Forwarding Proxy and Other Issuer Communications to Beneficial Owners, and Establish a Fee Under Certain Conditions for an Enhanced Brokers' internet Platform; File No. SR–FINRA–2013–056); *see also* Securities Exchange Act Release No. 47392 (February 21, 2003), 68 FR 9730 (February 28, 2003) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to an Amendment to NASD Interpretive Material 2260 (''IM–2260''); File No. SR–NASD–2003–019).

[6] *See* Securities Exchange Act Release No. 83380 (June 5, 2018), 83 FR 29158 (June 22, 2018) (Final Rule: Optional internet Availability of Investment Company Shareholder Reports).

[7] 17 CFR 270.30e–3 (hereinafter referred to as ''Rule 30e–3'').

[8] *See* Securities Exchange Act Release No. 78589 (August 16, 2016), 81 FR 56717 (August 22, 2016) (Notice of Filing of Proposed Rule Change Adopting Maximum Fees Member Organizations May Charge in Connection with the Distribution of Investment Company Shareholder Reports Pursuant to Any Electronic Delivery Rules Adopted by the Securities and Exchange Commission; File No. SR–NYSE–2016–55).

[9] *See supra* note 8, at 81 FR 56717, 56718.

[10] *See* Securities Exchange Act Release No. 79355 (November 18, 2016), 81 FR 85291 (November 25, 2016) (Order Granting Approval of Proposed Rule Change Adopting Maximum Fees Member Organizations May Charge in Connection with the Distribution of Investment Company Shareholder Reports Pursuant to Any Electronic Delivery Rules Adopted by the Securities and Exchange Commission; File No. SR–NYSE–2016–55) (the ''Notice and Access Fee Approval Order'').

[11] Under the NYSE rule, and corresponding FINRA Rule 2251.01(a)(5), a ''preference management fee'' refers to specified fees that the member may charge for each account for which the need to send materials in paper format through the mails or by courier service has been eliminated. The Notice and Access Fee Approval Order noted that, as a result of the rule change, notice and access fees would only be charged with respect to accounts that actually receive a notice and access mailing. Prior to the rule change, an issuer utilizing notice and access for proxy distributions would pay the notice and access fee for all shareholder accounts, including those for which it also would pay the preference management fee. *See supra* note 10, at 81 FR 85291, 85293.

[12] *See supra* note 10, at 81 FR 85291, 85293; *see also* NYSE Rule 451.90(5).

[13] The proposed rule change makes minor adjustments to the NYSE rule provisions to conform with FINRA rules.

[14] *See* Exhibit 5.

[15] *See* Exhibit 5.

[16] *See* Securities Exchange Act Release No. 92667 (August 13, 2021), 86 FR 46733 (August 19, 2021) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, to Amend Its Rules to Prohibit Member Organizations from Seeking Reimbursement, in Certain Circumstances, from Issuers for Forwarding Proxy and Other Materials to Beneficial Owners; File No. SR–NYSE–2020–98) (the ''Prohibited Fee Approval Order''). *See also* Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 (December 18, 2020) (Notice of Filing of Proposed Rule Change to Amend Its Rules to Prohibit Member Organizations from Seeking Reimbursement, in Certain Circumstances, from Issuers for Forwarding Proxy and Other Materials to Beneficial Owners; File No. SR–NYSE–2020–98).

[17] The NYSE stated that the prohibition on ''fees'' does not apply to reimbursements for postage, envelope and voting return communication expenses incurred in connection with a distribution of proxy and other materials. *See* 86 FR 46733, 46734. The same would be the case under FINRA's corresponding amendments pursuant to this rule filing.

[18] The term ''nominee'' is defined under NYSE Rule 451.90, and correspondingly under FINRA Rule 2251.01, to mean a broker or bank subject to SEA Rule 14b–1 or SEA Rule 14b–2, respectively.

[19] The NYSE stated that the rule would not limit a broker's right to reimbursement for distributions

Continued

stated that the rule is meant to address a recent practice in which retail brokers provide customers, without charge, a small number of shares with a very small dollar value as a commercial incentive, for example, upon opening a new account or referring a new customer to the broker.[20] The NYSE said that, in certain cases, issuers can experience a significant increase in their distribution reimbursement expenses solely due to their shares being included in these broker promotional schemes, and that it would be more appropriate for the broker to bear the proxy distribution costs in these circumstances.[21]

FINRA believes that some member firms that are not NYSE members engage in the promotional practices as described by the NYSE, and the costs to affected issuers may be significant. FINRA believes that it is appropriate to amend FINRA Rule 2251 to align with the NYSE's new rule provision, both for the reasons provided by the NYSE and, as discussed above, in the interest of ensuring regulatory clarity and harmonization with respect to proxy rate reimbursement. As such, FINRA proposes to amend FINRA Rule 2251.01(a)(7) by adding, in language virtually identical to the corresponding NYSE provision,[22] a sentence stating: ''Further, notwithstanding any other provision of this Supplementary Material, no fee shall be imposed for a nominee account that contains only shares or units of the securities involved that were transferred to the account holder by the member at no cost.'' [23]

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[24] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that, by conforming the rate reimbursement provisions under FINRA Rule 2251 with the NYSE proxy rate rules, as amended pursuant to the Notice and Access Fee Approval Order and the Prohibited Fee Approval Order, and thereby establishing these requirements under the FINRA rule, the proposed rule change would help to ensure regulatory clarity and harmonization with respect to proxy rate reimbursement. This will facilitate the processing and transmittal of proxy and other issuer-related materials to investors and conduce to the orderly administration of the Commission's proxy rules. Further, for the reasons set forth in the Notice and Access Fee Approval Order and the Prohibited Fee Approval Order, the Commission found that the NYSE proxy rate rule amendments as set forth pursuant to those respective rulemakings are, with respect to the Notice and Access Fee Approval Order, consistent with the requirements of Section 6(b)(4),[25] Section 6(b)(5) [26] and Section 6(b)(8) [27] of the Act and, with respect to the Prohibited Fee Approval Order, consistent with Section 6(b)(4) and Section 6(b)(5) of the Act. Because the proposed rule change conforms with the NYSE's proxy rate reimbursement amendments, FINRA believes that the proposed rule change is consistent with the corresponding provisions under Section 15A(b)(5),[28] Section 15A(b)(6) [29] and Section 15A(b)(9) [30] of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

Issuers have an obligation to distribute certain communications to their shareholders of record; however, they typically lack contact information for shareholders who hold their stock in ''street name'' (beneficial owners) with a broker-dealer. As discussed above, SEA Rule 14b–1 requires a broker-dealer to forward issuer communications to beneficial owners of the issuer's stock, unless the issuer does not provide assurance of reimbursement of the broker-dealer's reasonable expenses incurred in connection with performing this obligation. The proposed rule change will conform FINRA Rule 2251 to changes made by the NYSE to its rules regarding the reimbursement of expenses concerning the processing and forwarding of issuer communications to beneficial owners.

i. Proposed ''Notice and Access'' Amendments

As discussed above, Rule 30e–3 permits specified registered investment companies to satisfy their shareholder report delivery obligations by making the reports available electronically on a website using a ''notice and access'' process, subject to conditions as set forth in the rule. The NYSE's processing fee rule applies the notice and access maximum fee schedule to shareholder reports from investment companies that choose to rely on Rule 30e–3. Under the NYSE rule, the notice and access fee may not be charged if the preference management fee is charged.[31] While

to any beneficial owner if any part of that beneficial owner's position in an issuer's securities was received by any means other than a transfer without charge from the broker. The NYSE also stated that the new rule would not limit a broker's right to receive reimbursement under NYSE Rules 451 and 465 unless that broker itself transferred the issuer's shares without charge into the account of the beneficial owner. Further, the NYSE stated that NYSE Rules 451 and 465 would continue to apply to all distributions, so the broker would continue to be fully obligated to solicit votes from, and make other distributions on behalf of issuers to, all beneficial owners notwithstanding the limitations on reimbursement of expenses imposed by the new rule. *See* 86 FR 46733, 46735. These statements would apply under FINRA's corresponding amendments pursuant to this rule filing.

[20] *See* 86 FR 46733, 46734.

[21] *See supra* note 20.

[22] The proposed rule change makes minor adjustments to the NYSE rule provisions to conform with FINRA rules.

[23] FINRA notes that the proposed rule change would not impact members that are funding portals and would not impact members that have elected to be treated as capital acquisition brokers (''CABs''). These members are not subject to FINRA Rule 2251.

[24] 15 U.S.C. 78*o*–3(b)(6).

[25] 15 U.S.C. 78f(b)(4). Section 6(b)(4) requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities.

[26] 15 U.S.C. 78f(b)(5). Section 6(b)(5) requires that the rules of an exchange be designed, among other things, 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.

[27] 15 U.S.C. 78f(b)(8). Section 6(b)(8) prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.

[28] 15 U.S.C. 78*o*–3(b)(5). Section 15A(b)(5) requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. Relatedly, SEA Rule 14b–1 conditions a broker-dealer's obligation to forward issuer proxy materials to beneficial owners on the issuer's assurance that it will reimburse the broker-dealer's reasonable expenses, both direct and indirect, incurred in connection with performing that obligation. *See* 17 CFR 240.14b–1.

[29] 15 U.S.C. 78*o*–3(b)(6).

[30] 15 U.S.C. 78*o*–3(b)(9).

[31] As noted earlier, under the NYSE rule as revised, notice and access fees would only be charged with respect to accounts that actually receive a notice and access mailing. *See supra* note 11.

FINRA Rule 2251 currently has a notice and access maximum fee schedule for proxy materials, absent amendment to align the rule with the NYSE provisions, the notice and access portion of the fee schedules under Rule 2251 would not apply to fund shareholder reports. The proposed rule change could impact any investment companies electing to distribute shareholder reports using notice and access through member broker-dealers that charge fees higher than the notice and access maximum fee schedule.[32] Several factors in addition to notice and access impact fees charged to investment companies for distributing shareholder reports. Thus, it is not possible to determine whether costs would increase or decrease for any individual investment company. FINRA has been informed that a substantial majority of eligible registered investment companies rely on Rule 30e–3.

ii. Proposed Prohibition on Processing Fees for Securities Transferred at No Cost

Recently, certain retail broker-dealers have begun offering free shares of stock as a commercial incentive, in many cases to acquire new customers or reward current customers who refer a new customer. A broker-dealer may choose to engage in such a practice because it believes it will result in a benefit to the firm. By so doing, the recent proliferation of this practice has led to substantial increases for certain issuers in their shareholder rolls as well as costs for distributing communications to those shareholders.[33] Many of these shareholders own very few shares and thus have little voting power at these issuers and do little to affect the liquidity of the issuers' stock.[34] Further, FINRA notes that customers of at least one broker-dealer do not independently select an issuer's shares, as the firm selects issuers' free shares randomly. Therefore, issuers would likely incur significant costs to communicate with shareholders having limited voting power.

The proposed rule change will transfer the fee-related costs of providing shareholder communications from issuers to broker-dealers in the instance where an account contains only shares of stock transferred at no cost to the account holder by the broker-dealer. This transfer would more closely align the cost burden with the benefits received from the practice. FINRA estimates that approximately 12 to 15 member firms will be impacted by the proposed change.[35] The amount by which these firms will be impacted depends on the number of accounts that contain only the free promotional stock and the costs for the firms to process and forward issuer-related communications. Given the voluntary nature of the practice, firms may decide to modify or eliminate free stock promotions if the costs outweigh the benefits. FINRA notes that the firms engaging in this practice today represent a limited set of business models. Thus, to the extent that shifting these costs to the broker-dealer is material, it could have a competitive impact. These broker-dealers, however, may identify alternative inducements that retain most of their intended benefit.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[36] and Rule 19b–4(f)(6) thereunder.[37]

A proposed rule change filed under Rule 19b–4(f)(6)[38] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[39] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that FINRA can implement the proposed rule change immediately, in the interest of regulatory clarity and harmonization. The Commission previously approved substantively similar rule changes on NYSE and found them consistent with Section 6(b)(5) of the Act.[40] For these reasons, the Commission believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[41]

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 under Section 19(b)(2)(B)[42] 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:

[32] FINRA understands that most, if not all, firms outsource the distribution of shareholder reports to third party vendors and that the majority of those vendors already use the notice and access fee schedules.

[33] For example, *see* Letter from Patrick J. McEnany, Chairman and CEO, Catalyst Pharmaceuticals, Inc., to Vanessa Countryman, Secretary, SEC, dated June 9, 2021 (''Catalyst'') (letter commenting on File No. SR–NYSE–2020–98). Catalyst estimates that the number of beneficial owners increased from approximately 25,000 in 2019 to about 280,000 in 2020, largely due to free shares given to investors by Robinhood Markets, Inc. Distributing materials to those additional shareholders increased Catalyst's costs by 1779%, approximately $221,500 in one year. While this is only one example, it is likely illustrative of the potential increase in costs that issuers may experience due to broker-dealer stock promotions.

[34] The average number of Catalyst shares held by shareholders through Robinhood was less than 1.25. *Id. See also* Letter from Kim O. Warnica, Senior Vice President, General Counsel and Secretary, Marathon Oil Corporation, to Vanessa A. Countryman, Secretary, SEC, dated April 27, 2021 (''Marathon Oil'') (letter commenting on File No. SR–NYSE–2020–98). Marathon Oil estimates that as of 2020, 80% of Robinhood's Marathon Oil stockholder base held fewer than five shares.

[35] FINRA has approximately 1,370 member firms with retail clients.

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

[40] *See supra* notes 10 and 16.

[41] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[42] 15 U.S.C. 78s(b)(2)(B).

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–FINRA–2021–032 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–FINRA–2021–032. 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 FINRA. 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–FINRA–2021–032 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27418 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93771; File No. SR–MIAX–2021–60]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt a Tiered-Pricing Structure for Additional Limited Service MIAX Express Interface Ports

December 14, 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 December 1, 2021, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to amend certain port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt a tiered-pricing structure for additional Limited Service MIAX Express Interface (''MEI'') Ports [3] available to Market Makers.[4] The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient and economical when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.[5]

The Exchange initially filed the proposed fee changes on August 2, 2021, with the changes being immediately effective.[6] The First Proposed Rule Change was published for comment in the **Federal Register** on August 19, 2021.[7] The Commission received one comment letter on the First Proposed Rule Change.[8] The Exchange withdrew the First Proposed Rule Change on September 28, 2021 and resubmitted its proposal (''Second Proposed Rule Change'').[9] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 5, 2021.[10] The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Second Proposed Rule Change.[11] The Commission

[3] MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. *See* Fee Schedule, note 26.

[4] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100.

[5] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[6] *See* Securities Exchange Act Release No. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37).

[7] *Id.*

[8] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[9] *See* Securities Exchange Act Release No. 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR–MIAX–2021–43).

[10] *Id.*

[11] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''); *and* Ellen Green, Managing

suspended the Second Proposed Rule Change on November 22, 2021.[12] The Exchange withdrew the Second Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness (''Third Proposed Rule Change''). This Third Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[13] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Second Proposed Rule Change.

Additional Limited Service MEI Port Tiered-Pricing Structure

The Exchange proposes to amend the fees for additional Limited Service MEI Ports.

Currently, the Exchange allocates two (2) Full Service MEI Ports [14] and two (2) Limited Service MEI Ports [15] per matching engine [16] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports, Limited Service MEI Ports and the additional Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports for which they are assessed a $100 monthly fee for each additional Limited Service MEI Port for each matching engine. This fee has been unchanged since 2016.[17]

The Exchange now proposes to move from a flat monthly fee per additional Limited Service MEI Port for each matching engine to a tiered-pricing structure for additional Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of additional Limited Service MEI Ports the Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second additional Limited Service MEI Ports for each matching engine free of charge, as described above, per the initial allocation of Limited Service MEI Ports that Market Makers receive. The Exchange now proposes the following tiered-pricing structure: (i) The third and fourth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $150 per port; (ii) the fifth and sixth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $200 per port; and (iii) the seventh to the twelfth additional Limited Service MEI Ports will increase from the current monthly flat fee of $100 to $250 per port (collectively, the ''Proposed Access Fees'').

The Exchange believes the other exchange's port fees are a useful example of alternative approaches to providing and charging for port access and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar port access. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar port access provided by other options exchanges.

Exchange	Type of port	Monthly fee (per port)
MIAX (as proposed)	Limited Service MEI Port	1–2 ports. FREE (not changed in this proposal) 3–4 ports. $150 5–6 ports. $200 7 or more ports. $250.
NYSE American, LLC (''Amex'') [18]	Order/Quote Entry Port	$450.
NYSE Arca, Inc. (''Arca'') [19]	Order/Quote Entry Port	$450.
The NASDAQ Stock Market LLC (''NASDAQ'') [20].	SQF Port	1–5 ports. $1,500.00 6–20 ports. $1,000.00 21 or more ports. $500.

Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter''). The Exchange notes that the Healthy Markets Association (''HMA'') submitted a comment letter on a related filing to amend fees for 10Gb ULL connections, on which SIG Letters 1, 2, and 3 as well as the SIFMA Letter also commented. *See* letter from Tyler Gellasch, Executive Director, HMA (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe–BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (emphasis added) (''HMA Letter'').

[12] *See* Securities Exchange Act Release No. 93640 (November 22, 2021), 86 FR 67745 (November 29, 2021).

[13] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

[14] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, Section (5)(d)(ii), note 27.

[15] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. *See* Fee Schedule, Section (5)(d)(ii), note 28.

[16] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section (5)(d)(ii), note 29.

[17] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[18] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees.

[19] *See* NYSE Arca Options Fee Schedule, Port Fees.

[20] *See* Nasdaq Stock Market, Nasdaq Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [21] in general, and furthers the objectives of Section 6(b)(4) of the Act [22] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [23] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[24] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [25] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX Emerald, LLC (''MIAX Emerald'') and MIAX PEARL, LLC (''MIAX Pearl''), to amend other non-transaction fees.[26]

The Proposed Access Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems ports to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In its Guidance, the Commission Staff stated that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [27] The Commission Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [28] In its Guidance, the Commission staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, or will not result in excessive pricing or supracompetitive profit, specific information, including quantitative information, should be provided to support that argument.'' [29] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply additional Limited Service MEI Ports and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines ''supra-competitive profit'' as ''profits that exceed the profits that can be obtained in a competitive market.'' [30] The Commission Staff further states in the Guidance that ''the SRO should provide an analysis of the SRO's baseline revenues, costs, and profitability (before the proposed fee change) and the SRO's expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.'' [31] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [32] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the Proposed Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access Fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange's aggregate costs of offering additional Limited Service MEI Port access to the Exchange.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide port access, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports) to estimate such costs,[33] as well as the

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(4).

[23] 15 U.S.C. 78f(b)(5).

[24] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[25] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[26] *See* Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01) (proposal to increase connectivity fees); 91460 (April 2, 2021), 86 FR 18349 (SR–EMERALD–2021–11) (proposal to adopt port fees, increase connectivity fees, and increase additional limited service ports); 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (proposal to adopt trading permit fees).

[27] *See* Guidance, *supra* note 25.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Guidance, *supra* note 25.

[33] For example, the Exchange only included the costs associated with providing and supporting additional Limited Service MEI Port access and excluded from its cost calculations any cost not directly associated with providing and maintaining such additional Limited Service MEI Port access. Thus, the Exchange notes that this methodology underestimates the total costs of providing and

relative costs of providing and maintaining additional Limited Service MEI Ports, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining additional Limited Service MEI Ports because of the uncertainty of forecasting subscriber decision making with respect to firms' additional Limited Service MEI Port needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access Fees.

The Exchange also provides detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [34] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Market Makers currently utilizing additional Limited Service MEI Ports and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[35] As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the first seven months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are reasonable because they will allow the Exchange to recover its costs associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $1,320,000 per annum or an average of $110,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 1,248 additional Limited Service MEI Ports for which the Exchange charged approximately $124,800. This resulted in a gain of $14,800 for that month (a profit margin of approximately 12%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 1,672 additional Limited Service MEI Ports, for which the Exchange charged approximately $248,950 for that month. This resulted in a profit of $138,950 for that month (a profit margin of approximately 56%). The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are able to add and drop ports at any time based on their own business decisions, which they frequently do. This profit margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.[36] The Exchange has been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

Further, the Exchange chose to provide additional Limited Service MEI Ports at a discounted price to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees. The Exchange

maintaining additional Limited Service MEI Port access.

[34] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fees is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 11.

[35] *Id.*

[36] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry, which resulted in lower initial revenues. The Exchange now proposes to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $1,320,000 per annum or an average of $110,000 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.[37] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide access services associated with the Proposed Access Fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2008.[38] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems.[39] To do so, the Exchange chose to waive the fees for some non-transaction related services or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As mentioned above, for 2021,[40] the total annual expense for providing the access services associated with the Proposed Access Fees is projected to be approximately $1,320,000, or approximately $110,000 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[41] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[42] The $1,320,000 projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

External Expense Allocations

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees, is projected to be $0.16 million. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group

[37] For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their Secure Financial Transaction Infrastructure (''SFTI'') network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

[38] The Exchange has incurred a cumulative loss of $175 million since its inception in 2008 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000460.pdf.*

[39] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[40] The Exchange has not yet finalized its 2021 year end results.

[41] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[42] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87875 (December 31, 2019), 85 FR 770 (January 7, 2020) (SR–MIAX–2019–51). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) SFTI,[43] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.). For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees.

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. Further, the Exchange notes that, with respect to the expenses included herein, those expenses only cover the MIAX market; expenses associated with MIAX Pearl for its options and equities markets and MIAX Emerald, are accounted for separately and are not included within the scope of this filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 4.95% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX Pearl and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 2.64% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 4.95% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[46]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 4.95% of the total applicable hardware and software provider expense. The Exchange

[43] *See supra* note 37.

[44] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

[45] *Id.*

[46] *Id.*

believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[47]

Internal Expense Allocations

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be $1.16 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately $0.91 million, which is only a portion of the $12.6 million total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), and Trade Operations. As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 7.24% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[48]

The Exchange's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.22 million, which is only a portion of the $4.8 million total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 4.60% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[49]

The Exchange's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.03 million, which is only a portion of the $0.60 million total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, NJ office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 4.69% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated

[47] *Id.*

[48] *Id.*

[49] *Id.*

with the Proposed Access Fees, and not any other service, as supported by its cost review.[50]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide the access services associated with the Proposed Access Fees is projected to be approximately $1,320,000, or approximately $110,000 per month on average. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 1,248 additional Limited Service MEI Ports, for which the Exchange charged approximately $124,800. This resulted in a gain of $14,800 for that month (a profit margin of approximately 12%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 1,672 additional Limited Service MEI Ports, for which the Exchange charged approximately $248,950 for that month. This resulted in a profit of $138,950 for that month (a profit margin of approximately 56%). The Exchange believes this profit margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are free to add and drop ports at any time based on their own business decisions. This profit margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[51] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Proposed Tiered-Pricing Structure is not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and other Charges

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of additional Limited Service MEI Ports they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of ports a Market Maker utilizes. Charging a higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the Exchange incurs in providing and maintaining those additional ports. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System while still providing the first and second additional Limited Service MEI Ports for each matching engine free of charge.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange access resources, but also those firms that most heavily consume Exchange access resources, network consumers, and purchasers of Limited Service MEI Ports. Limited Service MEI Ports are not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional ports. The Exchange also needs to provide personnel to set up new ports, service requests related to adding new and/or deleting existing ports, respond to performance queries, and to maintain those ports on behalf of Members and non-Members. Also, those firms that utilize additional Limited Service MEI Ports typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network access expense for storage and network

[50] *Id.*

[51] *See supra* note 36.

transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[52]

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fee to relate to the number of ports a firm purchases. The Exchange notes that Limited Service MEI Ports are primarily utilized by firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two per matching engine that are currently provided free of charge. Accordingly, the firms engaged in advanced trading strategies generate higher costs by utilizing more of the Exchange's resources. Those firms purchase higher amounts of Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in order routing as part of their best-execution obligations.

The use of such additional Limited Service MEI Ports is a voluntary business decision of each Market Maker. Additional Limited Service MEI Ports are primarily used by Market Makers seeking to remove liquidity and, for competitive reasons, a Market Maker may choose to utilize numerous ports in an attempt to access the market quicker by using one port that may have less latency. The more ports purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange will continue to provide the first and second additional Limited Service MEI Ports free of charge. The Exchange notes that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more ports resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase numerous additional Limited Service MEI Ports essentially do so for competitive reasons amongst themselves and choose to utilize numerous ports based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more ports so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one or more of their additional Limited Service MEI Ports that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other additional Limited Service MEI Ports with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically require multiple ports and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their ports and drop and simultaneously add ports mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those ports in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[53] As stated above, additional Limited Service MEI Ports is not an unlimited resource and the Exchange's network is limited in the amount of ports it can provide. However, the Exchange must accommodate requests for additional Limited Service MEI Ports and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional Limited Service MEI Ports on top of current network capacity constraints, requires that the Exchange to purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new ports and to maintain those ports on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Market Makers to be more efficient and economical in selecting the amount of Limited Service MEI Ports they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional Limited Service MEI Ports.

The Proposed Fees Are Reasonable When Compared to The Fees of Other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other equities exchanges' costs to provide port access or their fee markup over those costs, and therefore cannot use other exchange's port fees as a benchmark to determine a reasonable markup over the costs of providing port access. Nevertheless, the Exchange believes the other exchange's port fees are a useful example of alternative approaches to providing and charging for port access. To that end, the Exchange believes the proposed tiered-pricing structure for Limited Service MEI Ports is reasonable because the proposed highest tier is still less than fees charged for similar port access provided by other options exchanges with comparable market shares. For example, Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November) [54] and Arca (equity options market share of 14.88% as of November 26, 2021 for the month of November) [55] both charge $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater,[56] all on a per matching engine basis, with Amex and Arca having 17 match engines and 19 match engines, respectively.[57] Similarly, NASDAQ

[52] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[53] 15 U.S.C. 78f(b)(5).

[54] See ''The market at a glance,'' available at *https://www.miaxoptions.com/* (last visited November 26, 2021).

[55] *See id.*

[56] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees; NYSE Arca Options Fee Schedule, Port Fees.

[57] *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020)

(equity options market share of 8.88% as of November 23, 2021 for the month of November) [58] charges $1,500 per port for SQF ports 1–5, $1,000 per SQF port for ports 6–20, and $500 per SQF port for ports 21 and greater,[59] all on a per matching engine basis, with NASDAQ having multiple matching engines.[60] The NASDAQ SQF Interface Specification provides that PHLX/NOM/BX Options trading infrastructures may consist of multiple matching engines with each matching engine trading only a range of option underlyings. Further, the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.[61]

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is similar to or significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive port alternatives. Each of the port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

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.

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that the proposed pricing structure is associated with relative usage of the various market participants. Firms that are primarily order routers seeking best-execution do not utilize Limited Service MEI Ports on MIAX and therefore will not pay the fees associated with the tiered-pricing structure. Rather, the fees described in the proposed tiered-pricing structure will only be allocated to Market Making firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two that are free. Accordingly, the firms engaged in a Market Making business generate higher costs by utilizing more of the Exchange's resources. Those Market Making firms that purchase higher amounts of additional Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in best-execution order routing business. Additionally, the use of such additional Limited Service MEI Ports is entirely voluntary.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to access all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and ports is constrained by competition among exchanges and third parties. There are other options markets of which market participants may access in order to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As described above, the Exchange received one comment letter on the First Proposed Rule Change [62] and three comment letters on the Second Proposed Rule Change.[63] The Exchange now responds to the comment letters in this filing.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.'' [64] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's

(providing a link to an Excel file detailing the number of matching engines per options exchange).

[58] *See supra note 54.*

[59] *See* NASDAQ Stock Market, NASDAQ Options 7 Pricing Schedule, Section 3, NASDAQ Options Market—Ports and Other Services.

[60] *See* NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.4 (October 2017), Section 2, Architecture (the ''NASDAQ SQF Interface Specification'').

[61] *See id.*

[62] *See supra* note 8.

[63] *See supra* note 11.

[64] *See* SIG Letter 2, *supra* note 11, at page 1.

Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [65] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2008.[66] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First and Second Proposed Rule Changes. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX Emerald and MIAX Pearl, and SIG did not submit a comment letter on those filings.[67] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[68] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [69] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [70]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. With regards to the First and Second Proposed Rule Changes, the SIG Letters do not directly address the proposed fees or lay out specific arguments as to why the proposal is not consistent with Section 6(b)(4) of the Act. Rather, SIG simply describes the proposed fee change and flippantly states that its claims concerning the 10Gb ULL fee change proposals by the Exchange, and its affiliates, apply to these changes. Nonetheless, the Exchange submits the below response to the SIG Letter concerning the Initial Proposed Fee Change.

Furthermore, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG's remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments regarding additional Limited Service MEI Port fees from SIG Letter 1 (while excluding arguments that pertain solely to connectivity), which the Exchange will first respond to in turn, below:

''(1) the prospect that a member may withdraw from the Exchanges if a fee is too

[65] 17 CFR 201.700(b)(3).

[66] *See supra* note 38.

[67] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[68] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

[69] *See* HMA Letter, *supra* note 11.

[70] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit . . . and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison . . . (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory . . . . '' [71]

General

First, the SIG Letter 1 states that additional Limited Service MEI Ports ''are critical to Exchange members to be competitive *and to provide essential protection from adverse market events*'' (emphasis added).[72] The Exchange notes that this statement is generally not true for additional Limited Service MEI Ports as those ports are completely voluntary and used primarily for entering liquidity removing orders and not risk protection activities like purging quotes resting on the MIAX Book. Additional Limited Service MEI Ports are essentially used for competitive reasons and Market Makers may choose to utilize one or two Limited Service MEI Ports that are provided for free, or purchase additional Limited Service MEI Ports based on their business needs and desire to attempt to access the market quicker by using one port that may have less latency. For instance, a Market Maker may have just sent numerous messages and/or orders over one of their additional Limited Service MEI Ports that are in queue to be processed. That same Market Maker then seeks to enter an order to remove liquidity from the Exchange's Book. That Market Maker may choose to send that order simultaneously over all of their Limited Service MEI Ports that they elected to purchase to ensure that their liquidity taking order accesses the Exchange as quickly as possible.

If the Exchanges Were to Attempt to Establish Unreasonable Pricing, then No Market Participant Would Join or Connect to the Exchange, and Existing Market Participants Would Disconnect

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [73] SIG misinterprets the Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of access are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [74] Nonetheless, the Third Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Access Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.'' [75]

The Exchange has provided ample data that the Proposed Access Fees would not result in excessive pricing or a supra-competitive profit. In this Third Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First or Second Proposed Rule Changes did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe it is necessary to respond to SIG's assertion here.

The Proposed Tiered Pricing Structure is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange [ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange [ ] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [76] argument to

[71] *See* SIG Letter 3, *supra* note 11.

[72] *See* SIG Letter 1 at page 2, *supra* note 11.

[73] *Id.*

[74] *See Guidance, supra note 25.*

[75] *See supra* note 11.

[76] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 25.

justify the Proposed Access Fees in the First or Second Proposed Rule Changes nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [77] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) Whether the Exchange has shown that the fees are equitable and non-discriminatory; (ii) that a tiered pricing structure will encourage market participants to be more economical with the usage; (iii) greater number of ports use greater Exchange resources; and (iv) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[78] and Rule 19b–4(f)(2) [79] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[77] *See* SIFMA Letter, *supra* note 11.

[78] 15 U.S.C. 78s(b)(3)(A)(ii).

[79] 17 CFR 240.19b–4(f)(2).

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–MIAX–2021–60 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2021–60. 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–MIAX–2021–60 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[80]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27420 Filed 12–17–21; 8:45 am]

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[80] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93774; File No. SR–PEARL–2021–57]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

December 14, 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 December 1, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'') to amend certain connectivity fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt a tiered-pricing structure for the 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection available to Members [3] and non-Members. The Exchange initially filed this proposal on July 30, 2021, with the proposed fee changes effective beginning August 1, 2021 (''First Proposed Rule Change'').[4] The First Proposed Rule Change was published for comment in the **Federal Register** on August 17, 2021.[5] The Commission received one comment letter on the First Proposed Rule Change.[6] The Exchange withdrew the First Proposed Rule Change on September 24, 2021 and re-submitted the proposal on September 24, 2021, with the proposed fee changes being immediately effective (''Second Proposed Rule Change'').[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 4, 2021.[8] The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Second Proposed Rule Change.[9] The Commission suspended the Second Proposed Rule Change on November 22, 2021.[10] The Exchange withdrew the Second Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness (''Third Proposed Rule Change''). This Third Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[11] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Second Proposed Rule Change.

10Gb ULL Tiered-Pricing Structure

The Exchange proposes to amend Sections 5(a)–(b) of the Fee Schedule to provide for a tiered-pricing structure for 10Gb ULL connections for Members and non-Members. Currently, the Exchange assesses Members and non-Members a flat monthly fee of $10,000 per 10Gb ULL connection for access to the Exchange's primary and secondary facilities.

The Exchange now proposes to move from a flat monthly fee per connection to a tiered-pricing structure under which the monthly fee would vary depending on the number of 10Gb ULL connections each Member or non-Member elects to purchase per exchange. Specifically, the Exchange proposes to decrease the fee for the first and second 10Gb ULL connections for each Member and non-Member from the current flat monthly fee of $10,000 to $9,000 per connection. To encourage more efficient connectivity usage, the Exchange proposes to increase the per connection fee for Members and non-Members that purchase more than two 10Gb ULL connections. In particular, (i) the third and fourth 10Gb ULL connections for each Member or non-Member will increase from the current flat monthly fee of $10,000 to $11,000 per connection; and (ii) for the fifth 10Gb ULL connection, and each 10Gb ULL connection purchased by Members and non-Members thereafter, the fee will increase from the flat monthly fee of $10,000 to $13,000 per connection. The proposed 10Gb ULL tiered-pricing structure and fees are collectively referred to herein as the ''Proposed Access Fees.''

The Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar connectivity. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges.

Exchange	Type of port	Monthly fee
MIAX Pearl (as proposed)	10Gb ULL	1–2 connection. $9,000.00 3–4 connections. $11,000.00 5 or more. $13,000.00.
The NASDAQ Stock Market LLC (''NASDAQ'') [12]	10Gb Ultra fiber	$15,000.00.
Nasdaq ISE LLC (''ISE'') [13]	10Gb Ultra fiber	$15,000.00.
Nasdaq PHLX LLC (''PHLX'') [14]	10Gb Ultra Fiber	$15,000.00.
NYSE American LLC (''Amex'') [15]	10Gb LX LCN	$22,000.00.

[3] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of these Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release No. 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36).

[5] *Id.*

[6] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[7] *See* Securities Exchange Act Release No. 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR–PEARL–2021–45).

[8] *Id.*

[9] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''). *See also* letter from Tyler Gellasch, Executive Director, Healthy Markets Association (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe-BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (emphasis added) (''HMA Letter''); *and* Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter'').

[10] *See* Securities Exchange Act Release No. 93639 (November 22, 2021), 86 FR 67758 (November 29, 2021).

[11] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange proposes to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate. The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the disaster recovery facility in each month during which the Member or non-Member has established connectivity with the disaster recovery facility.

The Exchange's MIAX Express Network Interconnect (''MENI'') can be configured to provide Members and non-Members of the Exchange network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of both the Exchange and its affiliate, Miami International Securities Exchange, LLC (''MIAX''), via a single, shared connection. Members and non-Members utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX via a single, shared connection will continue to only be assessed one monthly connectivity fee per connection, regardless of the trading platforms, market data systems, test systems, and disaster recovery facilities accessed via such connection.

2. Statutory Basis

The Exchange believes that the Proposed Access Fees are consistent with Section 6(b) of the Act [16] in general, and furthers the objectives of Section 6(b)(4) of the Act [17] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the Proposed Access Fees further the objectives of Section 6(b)(5) of the Act [18] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[19] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [20] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX Emerald, LLC (''MIAX Emerald'') and MIAX, to amend other non-transaction fees.[21]

The Proposed Access Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems connectivity to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In its Guidance, the Commission Staff stated that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [22] The Commission Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [23] In its Guidance, the Commission staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, or will not result in excessive pricing or supracompetitive profit, specific information, including quantitative information, should be provided to support that argument.'' [24] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply 10Gb ULL connectivity and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines ''supra-competitive profit'' as ''profits that exceed the profits that can be obtained in a competitive market.'' [25] The Commission Staff further states in the Guidance that ''the SRO should provide an analysis of the SRO's baseline revenues, costs, and profitability (before the proposed fee change) and the SRO's expected revenues, costs, and profitability (following the proposed fee

[12] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[13] *See* PHLX Rules, General 8: Connectivity.

[14] *See* ISE Rules, General 8: Connectivity.

[15] *See* NYSE American Options Fee Schedule, Section IV.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[20] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[21] *See* Securities Exchange Act Release Nos. 91460 (April 2, 2021), 86 FR 18349 (SR–EMERALD–2021–11) (proposal to adopt port fees, increase connectivity fees, and increase additional limited service ports); 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (proposal to adopt trading permit fees); 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02) (proposal to increase connectivity fees).

[22] *See* Guidance, *supra* note 20.

[23] *Id.*

[24] *Id.*

[25] *Id.*

change) for the product or service in question.'' [26] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [27] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the Proposed Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access Fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange's aggregate costs of offering connectivity to the Exchange and MIAX.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs and MIAX's costs to provide connectivity, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity) to estimate such costs,[28] as well as the relative costs of providing and maintaining 10Gb ULL connectivity, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining 10Gb ULL connectivity because of the uncertainty of forecasting subscriber decision making with respect to firms' connectivity needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access Fees.

The Exchange also provides detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [29] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Members and non-Members currently utilizing the 10Gb ULL fiber connection and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[30] As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the first seven months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are reasonable because they will allow the Exchange to recover its costs associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange and MIAX project that the annualized expense for 2021 to provide all network connectivity services (that is, the shared network connectivity of all connectivity alternatives of the Exchange and MIAX, but excluding MIAX Emerald) to be approximately $15.9 million per annum or an average of $1,325,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange and MIAX Members and non-Members purchased a total of 156 10Gb ULL connections for which the Exchange and MIAX charged a total of approximately $1,547,620 (this includes MIAX Pearl and MIAX Members and non-Members dropping or adding connections mid-month, resulting a pro-rated charge at times). This resulted in a profit of

[26] *Id.*

[27] *See* Guidance, *supra* note 20.

[28] For example, the Exchange only included the costs associated with providing and supporting connectivity and excluded from its connectivity cost calculations any cost not directly associated with providing and maintaining such connectivity. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining connectivity.

[29] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fees is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 9.

[30] *Id.*

$222,620 for that month (a profit margin of 14.4%). For the month of October 2021, which includes the tiered rates for 10Gb ULL connectivity for the Proposed Access Fees, MIAX Pearl and MIAX Exchange Members and non-Members purchased a total of 154 10Gb ULL connections for which the Exchange and MIAX charged a total of approximately $1,684,000 for that month (also including pro-rated connection charges). This resulted in a profit of $359,000 for that month for a profit margin of 21.3% (a modest 6.9% profit margin increase from July 2021 to October 2021 from 14.4% to 21.3%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 6.9% of profit margin per-month (reflecting a 21.3% profit margin).[31] The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are able to add and drop connections at any time based on their own business decisions, which they frequently do. This profit margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.[32]

The Exchange and MIAX have been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

As mentioned above, the Exchange and MIAX project that the annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $15.9 million per annum or an average of $1,325,000 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.[33] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide access services associated with the Proposed Access Fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2017.[34] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems.[35] To do so, the Exchange chose to waive the fees for some non-transaction related services or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As mentioned above, for 2021,[36] the total annual expense for MIAX Pearl and MIAX for providing the access services associated with the Proposed Access Fees is projected to be approximately $15.9 million, or approximately $1,325,000 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[37] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[38]

[31] The Exchange notes that this profit margin differs from the First and Second Proposed Rule Changes because the Exchange now has the benefit of using a more recent billing cycle under the Proposed Access Fees (October 2021) and comparing it to a baseline month (July 2021) from before the Proposed Access Fees were in effect.

[32] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[33] For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

[34] The Exchange has incurred a cumulative loss of $86 million since its inception in 2017 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000461.pdf.*

[35] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[36] The Exchange has not yet finalized its 2021 year end results.

[37] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[38] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the

The $15.9 million projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange or MIAX. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice. Further, the Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with MIAX Pearl Equities are accounted for separately and are not included within the scope of this filing.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

External Expense Allocations

For 2021, expenses relating to fees paid by the Exchange and MIAX to third-parties for products and services necessary to provide the access services associated with the Proposed Access Fees is projected to be $3.9 million. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix for data center services, including for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's and its affiliates' office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[39] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all fees paid to such third-parties is included in the third-party expenses described herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, the Exchange notes that expenses associated with its affiliate, MIAX Emerald, are accounted for separately and are not included within the scope of this filing. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing. Therefore, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange and MIAX to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 62% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[40]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 62% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed

section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87876 (December 31, 2019), 85 FR 757 (January 7, 2020) (SR–PEARL–2019–36). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

[39] *See supra* note 33.

[40] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

Access Fees, and not any other service, as supported by its cost review.[41]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 75% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[42]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 51% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[43]

Internal Expense Allocations

For 2021, total projected internal expenses relating to the internal costs of the Exchange and MIAX to provide the access services associated with the Proposed Access Fees is projected to be approximately $12 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below.

For clarity, and as stated above, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange and MIAX to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's and MIAX's combined employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be $6.1 million, which is only a portion of the approximately $12.6 million (for MIAX) and $9.2 million (for MIAX Pearl) total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by employees on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 28% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange's and MIAX's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $5.3 million, which is only a portion of the $4.8 million (for MIAX) and $2.9 million (for MIAX Pearl) total projected expense for depreciation and amortization. The Exchange believes it is reasonable to

[41] *Id.*

[42] *Id. See also supra* note 33 (regarding SFTI's announced fee increases).

[43] *See supra* note 40.

[44] *Id.*

allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 70% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange's and MIAX's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be approximately $0.6 million, which is only a portion of the $0.6 million (for MIAX) and $0.5 million (for MIAX Pearl) total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 53% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[46]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange and MIAX have only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $15.9 million per annum or an average of $1,325,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021. For July 2021, prior to the Proposed Access Fees, Exchange Members and non-Members purchased a total of 156 10Gb ULL connections for which the Exchange and MIAX charged approximately $1,547,620. This resulted in a profit of $222,620 (a profit margin of 14.4%) for that month (including pro-rated charges). For the month of October 2021, which includes the tiered 10Gb ULL connectivity fees pursuant to the Proposed Access Fees, the Exchange and MIAX had Members and non-Members purchasing a total of 154 10Gb ULL connections for which the Exchange and MIAX charged a total of approximately $1,684,000 (including pro-rated charges). This resulted in a profit of $359,000 for that month for a profit margin of 21.3% (a modest 6.9% profit margin increase from July 2021 to October 2021 from 14.4% to 21.3%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 6.9% of profit margin per month (reflecting a 21.3% profit margin).[47] The Exchange believes this modest increase in profit margin will allow it to continue to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are free to add and drop connections at any time based on their own business decisions. This profit margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[48] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the

[45] *Id.*

[46] *Id.*

[47] *See supra* note 31.

[48] *See supra* note 32.

expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Proposed Tiered-Pricing Structure Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of connections a Member or non-Member utilizes. Charging a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.

The Exchange believes that the proposal to move to a tiered-pricing structure for its 10Gb ULL connections is reasonable, equitably allocated and not unfairly discriminatory because the majority of Members and non-Members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-pricing structure is implemented. After the effective date of the First Proposed Rule Change on August 1, 2021, approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees while only approximately 20% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. To illustrate, firms that purchase only one 10Gb ULL connection per month used to pay the flat rate of $10,000 per month for that one 10Gb ULL connection. Pursuant to the proposed tiered-pricing structure, these firms now pay $9,000 per month for that same one 10Gb ULL connection, saving $1,000 per month or $12,000 annually. Further, firms that purchase two 10Gb ULL connections per month previously paid a flat rate of $20,000 per month ($10,000 × 2) for those two 10Gb ULL connections. Pursuant to the proposed tiered-pricing structure, these firms now pay $18,000 per month ($9,000 × 2) for those two 10Gb ULL connections, saving $2,000 per month or $24,000 annually.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange connectivity resources, but also those firms that most heavily consume Exchange connectivity resources, network consumers, and purchasers of 10Gb ULL connectivity. 10Gb ULL connectivity is not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional connections. The Exchange also needs to provide personnel to set up new connections, service requests related to adding new and/or deleting existing connections, respond to performance queries from, and to maintain those connections on behalf of Members and non-Members. Also, those firms that utilize 10Gb ULL connectivity typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[49]

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes to decrease the monthly fees for those firms who connect to the Exchange as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections. The Exchange notes that firms that primarily route orders seeking best-execution generally only purchase a limited number of connections. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources. Therefore, the connectivity costs will likely be lower for these firms based on the proposed tiered-pricing structure.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more connections resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase more than two to four 10Gb ULL connections essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one of their 10Gb ULL connections that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book.

[49] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

That Member may choose to send that order over one or more of their other 10Gb ULL connections with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically require multiple connections and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their connections and drop and simultaneously add connections mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those connections in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased connectivity costs based on their disproportionate pull on Exchange resources to provide the additional connectivity.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[50] As stated above, 10Gb ULL connectivity is not an unlimited resource and the Exchange's network is limited in the amount of connections it can provide. However, the Exchange must accommodate requests for additional connectivity and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional connectivity on top of current network capacity constraints, requires that the Exchange purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new connections and to maintain those connections on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical in selecting the amount of connectivity they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional connectivity.

The Proposed Fees Are Reasonable When Compared to the Fees of Other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other equities exchanges' costs to provide connectivity or their fee markup over those costs, and therefore cannot use other exchange's connectivity fees as a benchmark to determine a reasonable markup over the costs of providing connectivity. Nevertheless, the Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity. To that end, the Exchange believes the proposed tiered-pricing structure for 10Gb ULL connections is reasonable because the proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges with comparable market shares. For example, NASDAQ (equity options market share of 8.88% as of November 26, 2021 for the month of November)[51] charges a monthly fee of $10,000 per 10Gb fiber connection and $15,000 per 10Gb Ultra fiber connection.[52] The highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $2,000 per month less than NASDAQ and, unlike NASDAQ, the Exchange does not charge installation fees. The Exchange notes that the same connectivity fees described above for NASDAQ also apply to its affiliates, ISE[53] (equity options market share of 7.96% as of November 26, 2021 for the month of November)[54] and PHLX (equity options market share of 9.31% as of November 26, 2021 for the month of November).[55] Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November)[56] charges $15,000 per connection initially plus $22,000 monthly per 10Gb LX LCN circuit connection.[57] Again, the highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $9,000 per month lower than the Amex connectivity fee after the first month.

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive connectivity alternatives. Each of the connectivity rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

The Exchange further believes that the Proposed Access Fees are reasonable, equitably allocated and not unfairly discriminatory because, for one 10Gb ULL connection, the Exchange provides each Member or non-Member access to all twelve (12) matching engines on MIAX Pearl and a vast majority choose to connect to all twelve (12) matching engines. The Exchange believes that other exchanges require firms to connect to multiple matching engines.[58]

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.

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not

[50] 15 U.S.C. 78f(b)(5).

[51] *See* ''The market at a glance,'' *available at https://www.miaxoptions.com/* (last visited November 26, 2021).

[52] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[53] *See* ISE Rules, General 8: Connectivity.

[54] *See supra* note 51.

[55] *See id.* See also PHLX Rules, General 8: Connectivity.

[56] *See supra* note 51.

[57] *See* Amex Fee Schedule, Section IV.

[58] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing structure for its 10Gb ULL connections is associated with relative usage of the various market participants. Further, the majority of firms that purchase 10Gb ULL connections may either save money or pay the same amount after the tiered-pricing structure is implemented. While total cost may be increased for market participants with larger capacity needs or for business/technical preferences, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed tiered-pricing structure does not favor certain categories of market participants in a manner that would impose an undue burden on competition; rather, the allocation reflects the network resources consumed by the various usage of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and connectivity is constrained by competition among exchanges and third parties. There are other options markets of which market participants may connect to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange or reseller to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As described above, the Exchange received one comment letter on the First Proposed Rule Change and four comment letters on the Second Proposed Rule Change.[59] The Exchange now responds to the comment letters in this filing.

HMA Letter

The HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Instead the HMA Letter is generally critical of the exchange fee filing process contained in Section 19(b)(3)(A)(ii) of the Act,[60] and Rule 19b–4(f)(2) thereunder,[61] and other exchanges' fee filings in recent years. The HMA Letter, however, applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes and was supportive of the efforts made by the Exchange and its affiliates to provide transparency and justify their proposed fees. The HMA Letter specifically notes that:

> MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension. For example, MIAX detailed the associated projected revenues generated from the connectivity fees by user class, again in a clear attempt to comply with the SRO Fee Filing Guidance.[62]

As the HMA Letter notes, the Exchange refiled its same fee proposals to include significantly greater information about who is impacted and how, primarily at the request of the Commission Staff and in response to comments. The Exchange is again refiling its proposal to include more information surrounding the proposed fees and to respond to commenters.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.'' [63] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [64] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2017.[65] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory,

[59] *See supra* note 9.

[60] 15 U.S.C. 78s(b)(3)(A)(ii).

[61] 17 CFR 240.19b–4.

[62] *See* HMA Letter, *supra* note 9.

[63] *See* SIG Letter 2, *supra* note 9.

[64] 17 CFR 201.700(b)(3).

[65] *See supra* note 33.

and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First Proposed Rule Change, Second Proposed Rule Change. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX Emerald and MIAX, and SIG did not submit a comment letter on those filings.[66] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[67]

[66] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[67] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled that proposal as SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [68] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [69]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange.

[68] *See* HMA Letter, *supra* note 9.

[69] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

Nonetheless, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments from SIG Letter 1, which the Exchange will first respond to in turn, below:

(1) the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit, the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event, and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison; (3) the Exchanges provide no support for their claim that their proposed tiered pricing structure is needed to encourage efficiency in connectivity usage; (4) the Exchanges provided no support for their claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event; (5) the Exchanges' claim that firms who purchase more 10Gb ULL lines generate ''higher'' costs is misleading, and they offered no support for this claim in any event; (6) no other exchange has tiered connectivity pricing; (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory; and (8) the recoupment of investment claim belies the Exchanges' claim of encouraging efficiency in connectivity usage.[70]

The Exchange's Examples of Members Terminating Their Exchange Access Shows That Members Have Choice Whether To Connect to an Exchange Based on Fees

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [71] SIG misinterprets the

[70] *See* SIG Letter 3, *supra* note 9.

[71] *Id.*

Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of connectivity are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [72] Nonetheless, the Third Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchange's claims that they will not realize a supracompetitive profit,'' that ''the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.''

The Exchange has provided ample data that the proposed fees would not result in excessive pricing or a supra-competitive profit. In this Third Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Tiered Pricing Structure Is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange[ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Firms That Purchase More 10Gb ULL Generate Higher Exchange Costs

SIG argues that ''the Exchanges' claim that firms who purchase more 10Gb ULL lines generate 'higher' costs is misleading,'' and that the Exchange has ''offered no support for this claim in any event.'' As described above, the Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases and the Exchange believes it provided ample justification for the proposed tiered-pricing structure in the First and Second Proposed Rule Changes. Nonetheless, the Exchange provides additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

The Proposed Tiered-Pricing Structure for 10Gb ULL Connectivity Will Provide Cost Savings for the Majority of Exchange Members

The SIG Letter incorrectly asserts that no other exchange has tiered connectivity pricing. Numerous other exchanges provide tiered fee structures for various other types of access to their platforms, including trading permits and ports.[73] The Exchange provided adequate evidence that most firms would incur cost savings under the Proposed Access Fees in the First and Second Proposed Rule Changes and this filing. Nonetheless, the Exchange believes it provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First Proposed Rule Change did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe is it necessary to respond to SIG's assertion here.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' [74] The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [75] argument to

[72] *See* Guidance, *supra* note 20.

[73] *See* Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees ($750 per port per month for the first 5 BOE/FIX Logical Ports and $800 per port per month for each port over 5; $1,500 per port per month for the first 5 BOE Bulk Logical Ports, $2,500 per port per month for ports 6–30, and $3,000 per port per month for each port over 30); Cboe BXZ Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Ports with Bulk Quoting Capabilities ($1,500 per port per month for the first and second ports, $2,500 per port per month for three or more); Nasdaq Stock Market LLC, Options 7, Pricing Schedule, Section 3 ($1,500 per port per month for the first 5 SQF ports; $1,000 per port per month for SQF ports 15–20; and $500 per port per month for all SQF ports over 21); NYSE American Options Fee Schedule, Section V.A., Port Fees and NYSE Arca Options Fee Schedule, Port Fees (both charging $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater).

[74] *See* SIFMA Letter, *supra* note 9.

[75] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 20.

justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [76] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) The substitutability or optionality of 10Gb ULL connections, (ii) whether the Exchange has shown that the fees are equitable and non-discriminatory; (iii) that a tiered pricing structure will impose higher cost on all market participants; (iv) that a tiered pricing structure will encourage market participants to be more economical with the usage; (v) greater number of connections use greater Exchange resources; and (vi) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[77] and Rule 19b–4(f)(2) [78] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2021–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2021–57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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–PEARL–2021–57 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[79]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27423 Filed 12–17–21; 8:45 am]

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[76] *See* SIFMA Letter, *supra* note 9.

[77] 15 U.S.C. 78s(b)(3)(A)(ii).

[78] 17 CFR 240.19b–4(f)(2).

[79] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93772; File No. SR–EMERALD–2021–43]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt a Tiered-Pricing Structure for Additional Limited Service MIAX Emerald Express Interface Ports

December 14, 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 December 1, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Exchange's Fee Schedule (the ''Fee Schedule'') to amend certain port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt a tiered-pricing structure for additional Limited Service MIAX Emerald Express Interface (''MEI'') Ports [3] available to Market Makers.[4] The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient and economical when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.[5]

The Exchange initially filed the proposed fee changes on August 2, 2021, with the changes being immediately effective.[6] The First Proposed Rule Change was published for comment in the **Federal Register** on August 19, 2021.[7] The Commission received one comment letter on the First Proposed Rule Change.[8] The Exchange withdrew the First Proposed Rule Change on September 27, 2021 and resubmitted its proposal (''Second Proposed Rule Change'').[9] On September 28, 2021, the Exchange withdrew the Second Proposed Rule Change and re-submitted the proposal on September 28, 2021, with the proposed fee changes being immediately effective (''Third Proposed Rule Change'').[10] The Third Proposed Rule Change was published for comment in the **Federal Register** on October 5, 2021.[11] The Third Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Third Proposed Rule Change.[12] The Commission suspended the Third Proposed Rule Change on November 22, 2021.[13] The Exchange withdrew the Third Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness (''Fourth Proposed Rule Change''). This Fourth Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[14] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Third Proposed Rule Change.

Additional Limited Service MEI Port Tiered-Pricing Structure

The Exchange proposes to amend the fees for additional Limited Service MEI Ports. Currently, the Exchange allocates two (2) Full Service MEI Ports [15] and two (2) Limited Service MEI Ports [16] per matching engine [17] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports, Limited Service MEI Ports and the additional Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports for which they are assessed a $100 monthly fee for each additional Limited Service MEI Port for each matching engine.

The Exchange now proposes to move from a flat monthly fee per additional Limited Service MEI Port for each matching engine to a tiered-pricing structure for additional Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of additional Limited Service MEI Ports the Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second additional Limited Service MEI Ports for each matching engine free of charge, as described above, per the initial allocation of Limited Service MEI Ports that Market Makers receive. The Exchange now proposes the following

[3] The MIAX Emerald Express Interface (''MEI'') is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. *See* the Definitions Section of the Fee Schedule.

[4] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[6] *See* Securities Exchange Act Release No. 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR–EMERALD–2021–25).

[7] *Id.*

[8] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[9] *See* SR–EMERALD–2021–30.

[10] *See* Securities Exchange Act Release No. 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR–EMERALD–2021–31).

[11] *Id.*

[12] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''); *and* Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter''). The Exchange notes that the Healthy Markets Association (''HMA'') submitted a comment letter on a related filing to amend fees for 10Gb ULL connections, on which SIG Letters 1, 2, and 3 as well as the SIFMA Letter also commented. *See* letter from Tyler Gellasch, Executive Director, HMA (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe–BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (emphasis added) (''HMA Letter'').

[13] *See* Securities Exchange Act Release No. 93644 (November 22, 2021), 86 FR 67745 (November 29, 2021).

[14] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

[15] ''Full Service MEI Ports'' means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[16] ''Limited Service MEI Ports'' means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[17] ''Matching Engine'' means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. *See* the Definitions Section of the Fee Schedule.

tiered-pricing structure: (i) The third and fourth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $200 per port; (ii) the fifth and sixth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $300 per port; and (iii) the seventh to the twelfth additional Limited Service MEI Ports will increase from the current monthly flat fee of $100 to $400 per port (collectively, the ''Proposed Access Fees'').

The Exchange believes the other exchange's port fees are a useful example of alternative approaches to providing and charging for port access and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar port access. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar port access provided by other options exchanges.

Exchange	Type of port	Monthly fee (per port)
MIAX Emerald (as proposed)	Additional Limited Service MEI Port	1–2 ports. FREE (not changed in this proposal). 3–4 ports. $200. 5–6 ports. $300. 7–12 ports. $400.
NYSE American, LLC (''Amex'') [18]	Order/Quote Entry Port	$450.
NYSE Arca, Inc. (''Arca'') [19]	Order/Quote Entry Port	$450.
The NASDAQ Stock Market LLC (''NASDAQ'') [20].	SQF Port	1–5 ports. $1,500.00. 6–20 ports. $1,000.00. 21 or more ports. $500.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [21] in general, and furthers the objectives of Section 6(b)(4) of the Act [22] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [23] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[24] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [25] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates Miami International Securities Exchange, LLC (''MIAX'') and MIAX PEARL, LLC (''MIAX Pearl''), to amend other non-transaction fees.[26]

The Proposed Access Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems ports to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In its Guidance, the Commission Staff stated that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [27] The Commission Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [28] In its Guidance, the Commission staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, or will not result in excessive pricing or supracompetitive profit, specific

[18] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees.

[19] *See* NYSE Arca Options Fee Schedule, Port Fees.

[20] *See* Nasdaq Stock Market, Nasdaq Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services.

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(4).

[23] 15 U.S.C. 78f(b)(5).

[24] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[25] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[26] *See* Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01) (proposal to increase connectivity fees); 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02) (proposal to increase connectivity fees).

[27] *See* Guidance, *supra* note 25.

[28] *Id.*

information, including quantitative information, should be provided to support that argument.'' [29] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply additional Limited Service MEI Ports and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines ''supra-competitive profit'' as ''profits that exceed the profits that can be obtained in a competitive market.'' [30] The Commission Staff further states in the Guidance that ''the SRO should provide an analysis of the SRO's baseline revenues, costs, and profitability (before the proposed fee change) and the SRO's expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.'' [31] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [32] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the Proposed Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access Fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange's aggregate costs of offering additional Limited Service MEI Port access to the Exchange.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide port access, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports) to estimate such costs,[33] as well as the relative costs of providing and maintaining additional Limited Service MEI Ports, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining additional Limited Service MEI Ports because of the uncertainty of forecasting subscriber decision making with respect to firms' additional Limited Service MEI Port needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access Fees.

The Exchange also provides detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [34] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Market Makers currently utilizing additional Limited Service MEI Ports and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[35] As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the first seven months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are reasonable because they will allow the Exchange to recover its costs

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Guidance, *supra* note 25.

[33] For example, the Exchange only included the costs associated with providing and supporting additional Limited Service MEI Ports and excluded from its cost calculations any cost not directly associated with providing and maintaining such ports. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining additional Limited Service MEI Ports.

[34] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fee is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 12.

[35] *Id.*

associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $880,000 per annum or an average of $73,333.33 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 625 additional Limited Service MEI Ports for which the Exchange charged approximately $62,500. This resulted in a loss of $10,833.33 for that month (a loss margin of approximately 17.3%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 860 additional Limited Service MEI Ports for which the Exchange charged approximately $216,600 for that month. This resulted in a profit of $143,266.67 for that month (a profit margin of approximately 66%, after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate a revenue per-month after experiencing monthly losses prior to the Proposed Access Fees. The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are able to add and drop ports at any time based on their own business decisions, which they frequently do. This profit margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.[36] The Exchange has been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

Further, the Exchange chose to provide additional Limited Service MEI Ports at a discounted price to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues, or in this case, a monthly loss. The Exchange is now trying to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $880,000 per annum or an average of $73,333.33 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.[37] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide access services associated with the Proposed Access Fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.[38] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems.[39] To do so, the Exchange chose to waive the fees for some non-transaction related services or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As

[36] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[37] For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

[38] The Exchange has incurred a cumulative loss of $22 million since its inception in 2019 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://sec.report/Document/9999999997-21-004557/*.

[39] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

mentioned above, for 2021,[40] the total annual expense for providing the access services associated with the Proposed Access Fees is projected to be approximately $880,000.00, or approximately $73,333.33 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[41] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[42] The $880,000 projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

External Expense Allocations

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees, is projected to be $0.05 million. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[43] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.). For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees.

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. Further, the Exchange notes that, with respect to the expenses included herein, those expenses only cover the MIAX Emerald market; expenses associated with MIAX Pearl for its options and equities markets and MIAX, are accounted for separately and are not included within the scope of this filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 2.05% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

[40] The Exchange has not yet finalized its 2021 year end results.

[41] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[42] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR–EMERALD–2019–39). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

[43] In fact, on October 22, 2019, the Exchange was notified by SFTI that it is again raising its fees charged to the Exchange by approximately 11%, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

[44] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to,

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX Pearl and MIAX, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 1.64% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 2.05% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[46]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 1.23% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[47]

Internal Expense Allocations

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be $0.83 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately $0.76 million, which is only a portion of the $9.74 million total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), and Trade Operations. As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 7.81% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[48]

The Exchange's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.06 million, which is only a

among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part of its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

portion of the $3.13 million total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 1.92% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[49]

The Exchange's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.01 million, which is only a portion of the $0.52 million total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, NJ office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 1.93% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[50]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide the access services associated with the Proposed Access Fees to be approximately $880,000 per annum or an average of $73,333.33 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 625 additional Limited Service MEI Ports for which the Exchange charged approximately $62,500. This resulted in a loss of $10,833.33 for that month (a loss margin of approximately 17.3%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 860 additional Limited Service MEI Ports for which the Exchange charged approximately $216,600 for that month. This resulted in a profit of $143,266.67 for that month (a profit margin of approximately 66%), after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate a revenue per-month after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes this profit margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are free to add and drop ports at any time based on their own business decisions. This profit margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[51] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line

[49] *Id.*

[50] *Id.*

[51] *See supra* note 36.

item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Proposed Tiered-Pricing Structure Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of Limited Service MEI Ports they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of ports a Market Maker utilizes. Charging a higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the Exchange incurs in providing and maintaining those additional ports. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System while still providing the first and second additional Limited Service MEI Ports for each matching engine free of charge.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange access resources, but also those firms that most heavily consume Exchange access resources, network consumers, and purchasers of Limited Service MEI Ports. Limited Service MEI Ports is not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional ports. The Exchange also needs to provide personnel to set up new ports, service requests related to adding new and/or deleting existing ports, respond to performance queries, and to maintain those ports on behalf of Members and non-Members. Also, those firms that utilize additional Limited Service MEI Ports typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network access expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[52]

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fee to relate to the number of ports a firm purchases. The Exchange notes that Limited Service MEI Ports are primarily utilized by firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two per matching engine that are currently provided free of charge. Accordingly, the firms engaged in advanced trading strategies generate higher costs by utilizing more of the Exchange's resources. Those firms purchase higher amounts of Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in order routing as part of their best-execution obligations.

The use of such additional Limited Service MEI Ports is a voluntary business decision of each Market Maker. Additional Limited Service MEI Ports are primarily used by Market Makers seeking to remove liquidity and, for competitive reasons, a Market Maker may choose to utilize numerous ports in an attempt to access the market quicker by using one port that may have less latency. The more ports purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange will continue to provide the first and second additional Limited Service MEI Ports free of charge. The Exchange notes that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more ports resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase numerous additional Limited Service MEI Ports essentially do so for competitive reasons amongst themselves and choose to utilize numerous ports based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more ports so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one or more of their additional Limited Service MEI Ports that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other additional Limited Service MEI Ports with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically

[52] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

require multiple ports and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their ports and drop and simultaneously add ports mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those ports in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[53] As stated above, Additional Limited Service MEI Ports are not an unlimited resource and the Exchange's network is limited in the amount of ports it can provide. However, the Exchange must accommodate requests for additional Limited Service MEI Ports and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional Limited Service MEI Ports on top of current network capacity constraints, requires that the Exchange to purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new ports and to maintain those ports on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Market Makers to be more efficient and economical in selecting the amount of additional Limited Service MEI Ports they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional Limited Service MEI Ports.

The Proposed Fees Are Reasonable When Compared to the Fees of Other Options Exchanges With Similar Market Share

For example, Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November) [54] and Arca (equity options market share of 14.88% as of November 26, 2021 for the month of November) [55] both charge $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater,[56] all on a per matching engine basis, with Amex and Arca having 17 match engines and 19 match engines, respectively.[57] Similarly, NASDAQ (equity options market share of 8.88% as of November 23, 2021 for the month of November) [58] charges $1,500 per port for SQF ports 1–5, $1,000 per SQF port for ports 6–20, and $500 per SQF port for ports 21 and greater,[59] all on a per matching engine basis, with NASDAQ having multiple matching engines.[60] The NASDAQ SQF Interface Specification provides that PHLX/NOM/BX Options trading infrastructures may consist of multiple matching engines with each matching engine trading only a range of option underlyings. Further, the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.[61]

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is similar to or significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive port alternatives. Each of the port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

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.

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that the proposed pricing structure is associated with relative usage of the various market participants. Firms that are primarily order routers seeking best-execution do not utilize Limited Service MEI Ports on MIAX Emerald and therefore will not pay the fees associated with the tiered-pricing structure. Rather, the fees described in the proposed tiered-pricing structure will only be allocated to Market Making firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two that are free. Accordingly, the firms engaged in a Market Making business generate higher costs by utilizing more of the Exchange's resources. Those Market Making firms that purchase higher amounts of additional Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in best-execution order routing business. Additionally, the use of such additional Limited Service MEI Ports is entirely voluntary.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to access all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and ports is constrained by competition among exchanges and third parties. There are other options markets of which market participants may access in order to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market

[53] 15 U.S.C. 78f(b)(5).

[54] *See* ''The market at a glance,'' *available at https://www.miaxoptions.com/* (last visited November 26, 2021).

[55] *See id.*

[56] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees; NYSE Arca Options Fee Schedule, Port Fees.

[57] *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange).

[58] *See supra* note 54.

[59] *See* NASDAQ Stock Market, NASDAQ Options 7 Pricing Schedule, Section 3, NASDAQ Options Market—Ports and Other Services.

[60] *See* NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.4 (October 2017), Section 2, Architecture (the ''NASDAQ SQF Interface Specification'').

[61] *See id.*

center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As described above, the Exchange received one comment letter on the First Proposed Rule Change [62] and three comment letters on the Second Proposed Rule Change.[63] The Exchange now responds to the comment letters in this filing.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.'' [64] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [65] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2019.[66] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First and Second Proposed Rule Changes. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX and MIAX Pearl, and SIG did not submit a comment letter on those filings.[67] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[68] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect

[62] *See supra* note 8.

[63] *See supra* note 12.

[64] *See* SIG Letter 2, *supra* note 12, at page 1.

[65] 17 CFR 201.700(b)(3).

[66] *See supra* note 38.

[67] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[68] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

without suspension.'' [69] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [70]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. With regards to the First and Second Proposed Rule Changes, the SIG Letter does not directly address the proposed fees or lay out specific arguments as to why the proposal is not consistent with Section 6(b)(4) of the Act. Rather, it simply describes the proposed fee change and flippantly states that its claims concerning the 10Gb ULL fee change proposals by the Exchange, and its affiliates, apply to these changes. Nonetheless, the Exchange submits the below response to the SIG Letter concerning the First Proposed Rule Change.

Furthermore, the Exchange has enhanced its cost and revenue analysis and data in this Fourth Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG's remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments regarding additional Limited Service MEI Port fees from SIG Letter 1 (while excluding arguments that pertain solely to connectivity), which the Exchange will first respond to in turn, below:

> ''(1) The prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit . . . and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison . . . (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory . . . .'' [71]

General

First, the SIG Letter 1 states that additional Limited Service MEI Ports ''are critical to Exchange members to be competitive *and to provide essential protection from adverse market events*'' (emphasis added).[72] The Exchange notes that this statement is generally not true for additional Limited Service MEI Ports as those ports are completely voluntary and used primarily for entering liquidity removing orders and not risk protection activities like purging quotes resting on the MIAX Emerald Book. Additional Limited Service MEI Ports are essentially used for competitive reasons and Market Makers may choose to utilize one or two Limited Service MEI Ports that are provided for free, or purchase additional Limited Service MEI Ports based on their business needs and desire to attempt to access the market quicker by using one port that may have less latency. For instance, a Market Maker may have just sent numerous messages and/or orders over one of their additional Limited Service MEI Ports that are in queue to be processed. That same Market Maker then seeks to enter an order to remove liquidity from the Exchange's Book. That Market Maker may choose to send that order simultaneously over all of their Limited Service MEI Ports that they elected to purchase to ensure that their liquidity taking order accesses the Exchange as quickly as possible.

If the Exchanges Were To Attempt To Establish Unreasonable Pricing, Then No Market Participant Would Join or Connect to the Exchange, and Existing Market Participants Would Disconnect

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [73] SIG misinterprets the Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of access are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [74] Nonetheless, the Fourth Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Access Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.'' [75]

The Exchange has provided ample data that the Proposed Access Fees would not result in excessive pricing or a supra-competitive profit. In this

[69] *See* HMA Letter, *supra* note 12.

[70] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

[71] *See* SIG Letter 3, *supra* note 10.

[72] *See* SIG Letter 1 at page 2, *supra* note 12.

[73] *Id.*

[74] *See Guidance, supra note 27.*

[75] *See supra* note 12. The Exchange does not have visibility into other equities exchanges' costs to provide port access or their fee markup over those costs, and therefore cannot use other exchange's port fees as a benchmark to determine a reasonable markup over the costs of providing port access. Nevertheless, the Exchange believes the other exchange's port fees are a useful example of alternative approaches to providing and charging for port access. To that end, the Exchange believes the proposed tiered-pricing structure for Limited Service MEI Ports is reasonable because the proposed highest tier is still less than fees charged for similar port access provided by other options exchanges with comparable market shares.

Fourth Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Fourth Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First, Second, or Third Proposed Rule Changes did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe is it necessary to respond to SIG's assertion here.

The Proposed Tiered Pricing Structure is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange[ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[ ] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [76] argument to justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [77] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) Whether the Exchange has shown that the fees are equitable and non-discriminatory; (ii) that a tiered pricing structure will encourage market participants to be more economical with the usage; (iii) greater number of ports use greater Exchange resources; and (iv) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

[76] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 25.

[77] *See* SIFMA Letter, *supra* note 12.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[78] and Rule 19b–4(f)(2) [79] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2021–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2021–43. 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

[78] 15 U.S.C. 78s(b)(3)(A)(ii).

[79] 17 CFR 240.19b–4(f)(2).

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–EMERALD–2021–43 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[80]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27421 Filed 12–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93779; File No. SR–MRX–2021–12]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX's Pricing Schedule at Options 7, Section 1, General Provisions

December 14, 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 December 1, 2021, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, Section 1, General Provisions.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on December 1, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

MRX proposes to amend its Pricing Schedule at Options 7, Section 1, General Provisions. Specifically, MRX proposes to amend the way an Exchange Member indicates its participation in the Affiliated Entity Program. Specifically, the Exchange proposes to amend the description of ''Affiliated Entity'' within Options 7, Section 1, General Provisions. Currently, the term ''Affiliated Entity'' is described as,

> a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually by each party sending an email to the Exchange. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

Today, Members are required to annually renew their Affiliate Entity relationship at the end of one year if they desire to continue the relationship. The parties must both send an email to the Exchange to avoid termination of the relationship, provided the relationship was not terminated earlier in the year. The Exchange believes that this process is burdensome for Members that desire to remain in the program. The consequence of not renewing is termination. The Exchange desires to remove the administrative burden associated with the requirement to annually renew and instead provide that the Affiliated Entity relationship will automatically renew each month, unless otherwise terminated. The proposed new rule text would provide,

> An ''Affiliated Entity'' is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

As is the case today, parties to the Affiliated Entity relationship may decide to terminate the relationship during any month by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Cboe Exchange, Inc. (''Cboe'') has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program.[3] The Exchange believes

[80] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe's Fees Schedule at footnote 23 ''A Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of

that this amendment will streamline the workflow for Members by not requiring Members to renew each year to continue the affiliated relationship.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposal to amend the way Exchange Members indicate their participation in the Affiliated Entity Program is reasonable. Today, Members are required to annually renew their Affiliated Entity relationship at the end of one year if they desire to continue the relationship. The parties must both send an email to the Exchange to avoid termination of the relationship, provided the relationship was not terminated earlier in the year. The Exchange believes that this process is burdensome for Members that desire to remain in the program. The consequence of not renewing is termination of their participation in the program. The Exchange desires to remove the administrative burden associated with the requirement to annually renew and instead provide that the Affiliated Entity relationship will automatically renew each month, unless otherwise terminated. As is the case today, parties to the Affiliated Entity relationship may decide to terminate the relationship during any month by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Also, Cboe has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program.[6] The Exchange believes that this amendment will streamline the workflow for Members by not requiring Members to renew each year to continue the affiliated relationship.

The Exchange's proposal to amend the way Exchange Member indicate their participation in the Affiliated Entity Program is equitable and not unfairly discriminatory. Today, any Member may participate in the Affiliated Entity Program. The proposed changes would impact all Members that voluntarily elect to participate in the Affiliated Entity Program in a uniform manner.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. Cboe has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program [7] as proposed herein for the Affiliated Entity Program.

Intra-Market Competition

The Exchange's proposal to amend the way Exchange Members indicate their participation in the Affiliated Entity Program does not impose an undue burden on competition. Today, any Member may participate in an Affiliated Entity relationship. The proposed changes would impact all Members that voluntarily elect to participate in the Affiliated Entity Program in a uniform manner.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[8] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MRX–2021–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MRX–2021–12. 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

qualifying for credits under AVP. In order to effectuate the appointment, the parties would need to submit the Appointed Affiliate Form to the Exchange by 3:00 p.m. CST on the first business day of the month in order to be eligible to qualify for credits under AVP for that month. The Exchange will recognize only one such designation for each party once every calendar month, which designation will automatically renew each month until or unless the Exchange receives an email from either party indicating that the appointment has been terminated. A Market-Maker that has both an Affiliate OFP and Appointed OFP will only qualify based upon the volume of its Appointed OFP. The volume of an OFP that has both an Affiliate Market-Maker and Appointed Market-Maker will only count towards qualifying the Appointed Market-Maker. Volume executed in open outcry is not eligible to receive a credit under AVP.''

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] *See* Cboe's Fees Schedule at footnote 23 ''A Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP. In order to effectuate the appointment, the parties would need to submit the Appointed Affiliate Form to the Exchange by 3:00 p.m. CST on the first business day of the month in order to be eligible to qualify for credits under AVP for that month. The Exchange will recognize only one such designation for each party once every calendar month, which designation will automatically renew each month until or unless the Exchange receives an email from either party indicating that the appointment has been terminated. A Market-Maker that has both an Affiliate OFP and Appointed OFP will only qualify based upon the volume of its Appointed OFP. The volume of an OFP that has both an Affiliate Market-Maker and Appointed Market-Maker will only count towards qualifying the Appointed Market-Maker. Volume executed in open outcry is not eligible to receive a credit under AVP.''

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

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–MRX–2021–12 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27428 Filed 12–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93773; File No. SR–MEMX–2021–18]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

December 14, 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 December 1, 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.

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 Members[3] (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 December 1, 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 provide free executions for Retail Orders[4] with a time-in-force (''TIF'') instruction of Day,[5] GTT[6] or RHO[7] that remove liquidity from the Exchange upon entry into the System.

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.[8] 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 4% of the overall market share.[9] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

As noted above, the Exchange is proposing to provide free executions (*i.e.,* the Exchange would charge no fee and provide no rebate) for Retail Orders with a TIF instruction of Day, GTT or RHO that remove liquidity from the Exchange upon entry into the System (such orders, ''Removing Retail Orders''). As proposed, the free executions would apply to Removing Retail Orders in securities priced at,

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1.5(p).

[4] A ''Retail Order'' means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization (''RMO''), provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Exchange Rule 11.21(a).

[5] ''Day'' is an instruction the User may attach to an order stating that an order to buy or sell is designated for execution starting with the Pre-Market Session and, if not executed, expires at the end of Regular Trading Hours. Any Day Order entered into the System before the opening for business on the Exchange as determined pursuant to Exchange Rule 11.1, or after the closing of Regular Trading Hours, will be rejected. *See* Exchange Rule 11.6(o)(2). The term ''System'' refers to the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing. *See* Exchange Rule 1.5(gg).

[6] ''GTT'' or ''Good-'til-Time'' is an instruction the User may attach to an order specifying the time of day at which the order expires, which is designated for execution starting with the Pre-Market Session. Any unexecuted portion of an order with a TIF instruction of GTT will be cancelled at the expiration of the User's specified time, which can be no later than the close of the Post-Market Session. *See* Exchange Rule 11.6(o)(4).

[7] ''RHO'' or ''Regular Hours Only'' is instruction a User may attach to an order stating that an order to buy or sell is designated for execution only during Regular Trading Hours and, if not executed, expires at the end of Regular Trading Hours. Any order with a TIF instruction of RHO entered into the System before the opening or after the closing of Regular Trading Hours will be rejected. *See* Exchange Rule 11.6(o)(5).

[8] Market share percentage calculated as of November 30, 2021. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[9] *Id.*

above or below $1.00 per share.[10] Currently, executions of Removing Retail Orders in securities priced at or above $1.00 per share are assessed the standard fee of $0.0029 per share to remove liquidity from the Exchange (or a lower fee of $0.0027 per share if the entering User qualifies for the Liquidity Removal Tier 1), and executions of Removing Retail Orders in securities priced below $1.00 per share are assessed the standard fee of 0.05% of the total dollar value of the transaction to remove liquidity from the Exchange.

The Exchange notes that multiple other equities exchanges currently provide free executions for retail orders that remove liquidity upon entry in securities priced at, above or below $1.00 per share.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[12] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[13] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among 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, 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.'' [14]

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. The Exchange also notes that the competition for Retail Order flow is particularly intense, especially as it relates to exchange versus off-exchange venues.[15] Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, particularly as they relate to competing for Retail Order flow, 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 additional order flow to the Exchange, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members.

The Exchange believes that the proposal to provide free executions for Removing Retail Orders is reasonable, equitable and not unfairly discriminatory. Specifically, the Exchange believes such proposal is reasonable as it is reasonably designed to incentivize RMOs to submit additional Removing Retail Orders to the Exchange, and such market participants would not be subject to a fee for the execution of such orders. This is consistent with, and competitive with, fees and rebates assessed for retail order flow on other equities exchanges, which provide pricing incentives to retail orders in the form of lower fees (including free executions) and/or higher rebates.[16] In addition, the Exchange notes that it also currently offers a separate pricing incentive for Retail Order flow in the form of a higher rebate of $0.0037 per share for Retail Orders that add displayed liquidity to the Exchange in securities priced at or above $1.00 per share as compared to the standard rebate of $0.0028 for non-retail orders that add displayed liquidity to the Exchange in securities priced at or above $1.00 per share, which is similarly designed to attract Retail Order flow to the Exchange.

As noted above, the Exchange believes that providing free executions for Removing Retail Orders is reasonably designed to incentivize an increase in Removing Retail Order flow. Retail Orders are generally submitted in smaller sizes and tend to attract liquidity-providing market makers, as smaller size orders are easier to hedge, and Retail Order flow that removes liquidity additionally signals to liquidity providers to increase their overall provision of liquidity in the markets. Increased market maker activity facilitates tighter spreads and an increase in overall liquidity provider activity provides for deeper, more robust levels of liquidity, both of which signal additional corresponding increase in order flow from other market participants, contributing towards a robust, well-balanced market ecosystem. Indeed, increased overall order flow benefits all investors by continuing to deepen the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange notes that the proposed free executions for Removing Retail Orders will be automatically and uniformly applied to all RMOs' qualifying orders. The Exchange additionally notes that while the proposed free executions are applicable only to qualifying Retail Orders, which may only be submitted by RMOs, the Exchange believes this application is equitable and not unfairly discriminatory as the Exchange offers other pricing incentives in the form of enhanced rebates and reduced fees to qualifying non-Retail Order flow that may be submitted by all Members.[17] The Exchange understands that Section 6(b)(5) of the Act [18] prohibits an

[10] This proposed pricing is referred to by the Exchange on the Fee Schedule under the new description ''Removed volume from MEMX Book upon entry, Retail Order (Day/GTT/RHO)'' and such orders will receive a Fee Code of ''Rr0'' assigned by the Exchange.

[11] *See, e.g.,* the Cboe EDGX Exchange, Inc. equities trading fee schedule (available at *https://www.cboe.com/us/equities/membership/fee_schedule/edgx/*), which provides for free executions for retail orders with a TIF instruction of Day or RHO that remove liquidity on arrival in securities priced at, above or below $1.00 per share; the Investors Exchange LLC equities trading fee schedule (available at *https://exchange.iex.io/resources/trading/fee-schedule/*), which provides for free executions of retail orders that remove liquidity.

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[15] Securities Exchange Release No. 86375 (July 15, 2019), 84 FR 34960 (SR–CboeEDGX–2019–045).

[16] *See supra* note 11; *see also* the NYSE Arca, Inc. equities trading fee schedule on its public website (available at [sic]), which provides for enhanced rebates ranging from $0.0032 to $0.0038 per share, depending on the applicable tier, for retail orders in securities priced at or above $1.00 per share that add liquidity as compared to the standard rebate of $0.0020 per share for non-retail orders in securities priced at or above $1.00 per share that add liquidity.

[17] *See generally,* the Exchange's Fee Schedule (available at *https://info.memxtrading.com/fee-schedule/*), which provides for various enhanced rebates and reduced fees for non-Retail Order flow.

[18] 15 U.S.C. 78f(b)(5).

exchange from establishing rules that are designed to permit unfair discrimination between market participants. However, Section 6(b)(5) of the Act [19] does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of Retail Order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around Retail Order executions such that retail investors would receive free executions for Removing Retail Orders on the Exchange rather than paying a fee, as they do currently, in order to encourage entry of Removing Retail Orders to the Exchange. Accordingly, the Exchange believes the proposed free executions for Removing Retail Orders is not unfairly discriminatory.

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 [20] 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. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts Retail Orders (including Removing Retail Orders) and other orders seeking to interact with such 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.'' [21]

Intramarket Competition

The Exchange believes that the proposal would incentivize market participants to direct more 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. As noted above, the proposed free executions for Removing Retail Orders will be automatically and uniformly applied to all RMOs' qualifying orders and, while such proposed free executions are applicable only to qualifying Retail Orders, which may only be submitted by RMOs, the Exchange believes this application is equitable and not unfairly discriminatory as the Exchange offers other pricing incentives in the form of enhanced rebates and reduced fees to qualifying non-Retail Order flow that may be submitted by all Members.[22] Further, the differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around Retail Order executions such that retail investors would receive free executions for Removing Retail Orders on the Exchange rather than paying a fee, as they do currently, in order to encourage entry of Removing Retail Orders to the Exchange. As such, the Exchange believes the proposal 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 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, particularly as they relate to competing for Retail Order flow, as described above, 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 change is a competitive proposal through which the Exchange is seeking to encourage additional order flow to the Exchange through a pricing incentive that is comparable to, and competitive with, pricing programs in place at other exchanges.[23] 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 incentives to market participants to encourage the submission of Retail Order flow.

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.'' [24] 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

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78f(b)(4) and (5).

[21] *See supra* note 14.

[22] *See supra* note 17.

[23] *See supra* note 11.

[24] *See supra* note 14.

'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'. . . .''.[25] 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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[26] and Rule 19b–4(f)(2)[27] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission 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–2021–18 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–2021–18. 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–MEMX–2021–18 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

J. Matthew DeLesDernier,

Assistant Secretary.

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[25] *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)).

[26] 15 U.S.C. 78s(b)(3)(A)(ii).

[27] 17 CFR 240.19b–4(f)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93776; File No. SR–EMERALD–2021–42]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Emerald Fee Schedule To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

December 14, 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 December 1, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'') to amend certain connectivity fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt a tiered-pricing structure for the 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection available to Members [3] and non-Members. The Exchange initially filed this proposal on July 30, 2021, with the proposed fee changes effective beginning August 1, 2021 (''First Proposed Rule Change'').[4] The First Proposed Rule Change was published for comment in the **Federal Register** on August 17, 2021.[5] The Commission received one comment letter on the First Proposed Rule Change.[6] The Exchange withdrew the First Proposed Rule Change on September 24, 2021 and re-submitted the proposal on September 24, 2021, with the proposed fee changes being immediately effective (''Second Proposed Rule Change'').[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 4, 2021.[8] The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Second Proposed Rule Change.[9] The Commission suspended the Second Proposed Rule Change on November 22, 2021.[10] The Exchange withdrew the Second Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness (''Third Proposed Rule Change''). This Third Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[11] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Second Proposed Rule Change.

10Gb ULL Tiered-Pricing Structure

The Exchange proposes to amend Sections (5)(a)–(b) of the Fee Schedule to provide for a tiered-pricing structure for 10Gb ULL connections for Members and non-Members. Currently, the Exchange assesses Members and non-Members a flat monthly fee of $10,000 per 10Gb ULL connection for access to the Exchange's primary and secondary facilities.

The Exchange now proposes to move from a flat monthly fee per connection to a tiered-pricing structure under which the monthly fee would vary depending on the number of 10Gb ULL connections each Member or non-Member elects to purchase per exchange. Specifically, the Exchange proposes to decrease the fee for the first and second 10Gb ULL connections for each Member and non-Member from the current flat monthly fee of $10,000 to $9,000 per connection. To encourage more efficient connectivity usage, the Exchange proposes to increase the per connection fee for Members and non-Members that purchase more than two 10Gb ULL connections. In particular, (i) the third and fourth 10Gb ULL connections for each Member or non-Member will increase from the current flat monthly fee of $10,000 to $11,000 per connection; and (ii) for the fifth 10Gb ULL connection, and each 10Gb ULL connection purchased by Members and non-Members thereafter, the fee will increase from the flat monthly fee of $10,000 to $13,000 per connection. The proposed 10Gb ULL tiered-pricing structure and fees are collectively referred to herein as the ''Proposed Access Fees.''

The Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar connectivity. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges.

Exchange	Type of port	Monthly fee
MIAX Emerald (as proposed)	10Gb ULL	1–2 connection. $9,000.00. 3–4 connections. $11,000.00. 5 or more. $13,000.00.
The NASDAQ Stock Market LLC (''NASDAQ'') [12]	10Gb Ultra fiber	$15,000.00.
Nasdaq ISE LLC (''ISE'') [13]	10Gb Ultra fiber	$15,000.00.
Nasdaq PHLX LLC (''PHLX'') [14]	10Gb Ultra Fiber	$15,000.00.
NYSE American LLC (''Amex'') [15]	10Gb LX LCN	$22,000.00.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release No. 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23).

[5] *Id.*

[6] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[7] *See* Securities Exchange Act Release No. 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR–EMERALD–2021–29).

[8] *Id.*

[9] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''). *See also* letter from Tyler Gellasch, Executive Director, Healthy Markets Association (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe–BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (emphasis added) (''HMA Letter''); *and* Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter'').

[10] *See* Securities Exchange Act Release No. 93644 (November 22, 2021), 86 FR 67750 (November 29, 2021).

[11] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange proposes to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate. The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the disaster recovery facility in each month during which the Member or non-Member has established connectivity with the disaster recovery facility.

2. Statutory Basis

The Exchange believes that the Proposed Access Fees are consistent with Section 6(b) of the Act [16] in general, and furthers the objectives of Section 6(b)(4) of the Act [17] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the Proposed Access Fees further the objectives of Section 6(b)(5) of the Act [18] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[19] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [20] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates Miami International Securities Exchange, LLC (''MIAX'') and MIAX PEARL, LLC (''MIAX Pearl''), to amend other non-transaction fees.[21]

The Proposed Access Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems connectivity to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In its Guidance, the Commission Staff stated that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [22] The Commission Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [23] In its Guidance, the Commission staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, or will not result in excessive pricing or supra-competitive profit, specific information, including quantitative information, should be provided to support that argument.'' [24] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply 10Gb ULL connectivity and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines ''supra-competitive profit'' as ''profits that exceed the profits that can be obtained in a competitive market.'' [25] The Commission Staff further states in the Guidance that ''the SRO should provide an analysis of the SRO's baseline revenues, costs, and profitability (before the proposed fee change) and the SRO's expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.'' [26] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [27] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the Proposed Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the

[12] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[13] *See* PHLX Rules, General 8: Connectivity.

[14] *See* ISE Rules, General 8: Connectivity.

[15] *See* NYSE American Options Fee Schedule, Section IV.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[20] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[21] *See* Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01) (proposal to increase connectivity fees); 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02) (proposal to increase connectivity fees).

[22] *See* Guidance, *supra* note 20.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Guidance, *supra* note 20.

Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access Fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange's aggregate costs of offering connectivity to the Exchange.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide connectivity, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity) to estimate such costs,[28] as well as the relative costs of providing and maintaining 10Gb ULL connectivity, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining 10Gb ULL connectivity because of the uncertainty of forecasting subscriber decision making with respect to firms' connectivity needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access Fees.

The Exchange also provides detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [29] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Members and non-Members currently utilizing the 10Gb ULL fiber connection and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[30] As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the first seven months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are reasonable because they will allow the Exchange to recover its costs associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange projects that its annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $7.2 million per annum or an average of $600,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 98 10Gb ULL connections for which the Exchange charged approximately $971,905 (this includes Members and non-Members dropping or adding connections mid-month, resulting a pro-rated charge at times). This resulted in a profit of $371,905 for that month (a profit margin of 38%). For the month of October 2021, which includes the varying rates for 10Gb ULL connectivity for the Proposed Access Fees, Exchange Members and non-Members purchased a total of 100 10Gb ULL connections for which the Exchange charged approximately $1,146,714 for that month (also including pro-rated connection charges). This resulted in a profit of $546,714 for that month (a modest 9% profit margin increase from July 2021 to October 2021 from 38% to 47%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 9% of profit margin per-month (reflecting a 47% profit margin). The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are able to add and drop connections at any time based on their own business decisions, which they frequently do. This profit margin may also decrease due to the significant

[28] For example, the Exchange only included the costs associated with providing and supporting connectivity and excluded from its connectivity cost calculations any cost not directly associated with providing and maintaining such connectivity. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining connectivity.

[29] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fee is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 9.

[30] *Id.*

inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.[31] The Exchange has been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $7.2 million per annum or an average of $600,000 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.[32] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide access services associated with the Proposed Access Fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.[33] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems.[34] To do so, the Exchange chose to waive the fees for some non-transaction related services or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As mentioned above, for 2021,[35] the total annual expense for providing the access services associated with the Proposed Access Fees is projected to be approximately $7.2 million, or approximately $600,000 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[36] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[37] The $7.2 million projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

[31] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[32] For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

[33] The Exchange has incurred a cumulative loss of $22 million since its inception in 2019 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available athttps://sec.report/Document/9999999997-21-004557/*.

[34] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[35] The Exchange has not yet finalized its 2021 year end results.

[36] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[37] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR–EMERALD–2019–39). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

External Expense Allocations

For 2021, expenses relating to fees paid by the Exchange to third-parties for products and services necessary to provide the access services associated with the Proposed Access Fees is projected to be $1.7 million. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix for data center services, including for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's and its affiliates' office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[38] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all fees paid to such third-parties is included in the third-party expenses described herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, the Exchange notes that expenses associated with its affiliates, MIAX and MIAX Pearl (the options and equities markets), are accounted for separately and are not included within the scope of this filing. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing. Therefore, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. The Exchange notes that the expense allocations differ from the Exchange's filing earlier this year, SR–EMERALD–2021–11, because that prior filing pertained to several different access fees, which the Exchange had not been charging for since the Exchange launched operations in March 2019.[39] In SR–EMERALD–2021–11, the Exchange sought to adopt fees for FIX Ports, MEI Ports, Purge Ports, Clearing Trade Drop Ports, and FIX Drop Copy Ports, all of which had been free for market participants for over two years.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 62% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[40]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX Pearl and MIAX, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 62% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[41]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being

[38] *See supra* note 32.

[39] *See* Securities Exchange Act Release No. 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11).

[40] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

[41] *Id.*

specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 89% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[42]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 51% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[43]

Internal Expense Allocations

For 2021, total projected internal expenses relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees is projected to be approximately $5.5 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below.

For clarity, and as stated above, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately $3.2 million, which is only a portion of the approximately $9.7 million total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by employees on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 33% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $2 million, which is only a portion of the $3.1 million total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 63% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange

[42] *Id. See also supra* note 32 (regarding SFTI's announced fee increases).

[43] *See supra* note 40.

[44] *Id.*

believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be approximately $0.3 million, which is only a portion of the $0.5 million total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 53% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[46]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $7.2 million per annum or an average of $600,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021. For July 2021, prior to the Proposed Access Fees, Exchange Members and non-Members purchased a total of 98 10Gb ULL connections for which the Exchange charged approximately $971,905. This resulted in a profit of $371,905 (a profit margin of 38%) for that month (including pro-rated charges). For the month of October 2021, which includes the varying 10Gb ULL connectivity fees pursuant to the Proposed Access Fees, the Exchange had Members and non-Members purchasing a total of 100 10Gb ULL connections for which the Exchange charged approximately $1,146,714 (including pro-rated charges). This resulted in a profit of $546,714 for that month (a modest 9% profit margin increase from July 2021 to October 2021 from 38% to 47%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 9% of profit margin per month (reflecting a 47% profit margin). The Exchange believes this modest increase in profit margin will allow it to continue to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are free to add and drop connections at any time based on their own business decisions. This profit margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[47] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Proposed Tiered-Pricing Structure Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly

[45] *Id.*

[46] *Id.*

[47] *See supra* note 31.

discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of connections a Member or non-Member utilizes. Charging a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.

The Exchange believes that the proposal to move to a tiered-pricing structure for its 10Gb ULL connections is reasonable, equitably allocated and not unfairly discriminatory because the majority of Members and non-Members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-pricing structure is implemented. After the effective date of the First Proposed Rule Change on August 1, 2021, approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees while only approximately 40% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. To illustrate, firms that purchase only one 10Gb ULL connection per month used to pay the flat rate of $10,000 per month for that one 10Gb ULL connection. Pursuant to the proposed tiered-pricing structure, these firms now pay $9,000 per month for that same one 10Gb ULL connection, saving $1,000 per month or $12,000 annually. Further, firms that purchase two 10Gb ULL connections per month previously paid a flat rate of $20,000 per month ($10,000 × 2) for those two 10Gb ULL connections. Pursuant to the proposed tiered-pricing structure, these firms now pay $18,000 per month ($9,000 × 2) for those two 10Gb ULL connections, saving $2,000 per month or $24,000 annually.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange connectivity resources, but also those firms that most heavily consume Exchange connectivity resources, network consumers, and purchasers of 10Gb ULL connectivity. 10Gb ULL connectivity is not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional connections. The Exchange also needs to provide personnel to set up new connections, service requests related to adding new and/or deleting existing connections, respond to performance queries from, and to maintain those connections on behalf of Members and non-Members. Also, those firms that utilize 10Gb ULL connectivity typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[48]

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes to decrease the monthly fees for those firms who connect to the Exchange as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections. The Exchange notes that firms that primarily route orders seeking best-execution generally only purchase a limited number of connections. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources. Therefore, the connectivity costs will likely be lower for these firms based on the proposed tiered-pricing structure.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more connections resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase more than two to four 10Gb ULL connections essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one of their 10Gb ULL connections that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other 10Gb ULL connections with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically require multiple connections and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their connections and drop and simultaneously add connections mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those connections in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased connectivity costs based on their disproportionate pull on

[48] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

Exchange resources to provide the additional connectivity.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[49] As stated above, 10Gb ULL connectivity is not an unlimited resource and the Exchange's network is limited in the amount of connections it can provide. However, the Exchange must accommodate requests for additional connectivity and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional connectivity on top of current network capacity constraints, requires that the Exchange purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new connections and to maintain those connections on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical in selecting the amount of connectivity they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional connectivity.

The Proposed Fees Are Reasonable When Compared to the Fees of Other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other equities exchanges' costs to provide connectivity or their fee markup over those costs, and therefore cannot use other exchange's connectivity fees as a benchmark to determine a reasonable markup over the costs of providing connectivity. Nevertheless, the Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity. To that end, the Exchange believes the proposed tiered-pricing structure for 10Gb ULL connections is reasonable because the proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges with comparable market shares. For example, NASDAQ (equity options market share of 8.88% as of November 26, 2021 for the month of November)[50] charges a monthly fee of $10,000 per 10Gb fiber connection and $15,000 per 10Gb Ultra fiber connection.[51] The highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $2,000 per month less than NASDAQ and, unlike NASDAQ, the Exchange does not charge installation fees. The Exchange notes that the same connectivity fees described above for NASDAQ also apply to its affiliates, ISE[52] (equity options market share of 7.96% as of November 26, 2021 for the month of November)[53] and PHLX (equity options market share of 9.31% as of November 26, 2021 for the month of November).[54] Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November)[55] charges $15,000 per connection initially plus $22,000 monthly per 10Gb LX LCN circuit connection.[56] Again, the highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $9,000 per month lower than the Amex connectivity fee after the first month.

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive connectivity alternatives. Each of the connectivity rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

The Exchange further believes that the Proposed Access Fees are reasonable, equitably allocated and not unfairly discriminatory because, for one 10Gb ULL connection, the Exchange provides each Member or non-Member access to all twelve (12) matching engines on MIAX Emerald and a vast majority choose to connect to all twelve (12) matching engines. The Exchange believes that other exchanges require firms to connect to multiple matching engines.[57]

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.

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing structure for its 10Gb ULL connections is associated with relative usage of the various market participants. Further, the majority of firms that purchase 10Gb ULL connections may either save money or pay the same amount after the tiered-pricing structure is implemented. While total cost may be increased for market participants with larger capacity needs or for business/technical preferences, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed tiered-pricing structure does not favor certain categories of market participants in a manner that would impose an undue burden on competition; rather, the allocation reflects the network resources consumed by the various usage of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market

[49] 15 U.S.C. 78f(b)(5).

[50] See ''The market at a glance,'' *available at https://www.miaxoptions.com/* (last visited November 26, 2021).

[51] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[52] *See* ISE Rules, General 8: Connectivity.

[53] *See supra note 50.*

[54] *See id. See also* PHLX Rules, General 8: Connectivity.

[55] *See supra* note 50.

[56] *See* Amex Fee Schedule, Section IV.

[57] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and connectivity is constrained by competition among exchanges and third parties. There are other options markets of which market participants may connect to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange or reseller to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As described above, the Exchange received one comment letter on the First Proposed Rule Change and four comment letters on the Second Proposed Rule Change.[58] The Exchange now responds to the comment letters in this filing.

HMA Letter

The HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Instead the HMA Letter is generally critical of the exchange fee filing process contained in Section 19(b)(3)(A)(ii) of the Act,[59] and Rule 19b–4(f)(2) thereunder,[60] and other exchanges' fee filings in recent years. The HMA Letter, however, applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes and was supportive of the efforts made by the Exchange and its affiliates to provide transparency and justify their proposed fees. The HMA Letter specifically notes that:

> MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension. For example, MIAX detailed the associated projected revenues generated from the connectivity fees by user class, again in a clear attempt to comply with the SRO Fee Filing Guidance.[61]

As the HMA Letter notes, the Exchange refiled its same fee proposals to include significantly greater information about who is impacted and how, primarily at the request of the Commission Staff and in response to comments. The Exchange is again refiling its proposal to include more information surrounding the proposed fees and to respond to commenters.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.'' [62] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [63] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2019.[64] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First Proposed Rule Change, Second Proposed Rule Change. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX and MIAX Pearl, and SIG did not submit a comment letter on those filings.[65] Those filings were not

[58] *See supra* note 9.

[59] 15 U.S.C. 78s(b)(3)(A)(ii).

[60] 17 CFR 240.19b–4.

[61] *See* HMA Letter, *supra* note 9.

[62] *See* SIG Letter 2, *supra* note 9.

[63] 17 CFR 201.700(b)(3).

[64] *See supra* note 33.

[65] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to

Continued

suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[66] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [67] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [68]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange.

Nonetheless, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments from SIG Letter 1, which the Exchange will first respond to in turn, below:

(1) The prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit, the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event, and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison; (3) the Exchanges provide no support for their claim that their proposed tiered pricing structure is needed to encourage efficiency in connectivity usage; (4) the Exchanges provided no support for their claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event; (5) the Exchanges' claim that firms who purchase more 10Gb ULL lines generate ''higher'' costs is misleading, and they offered no support for this claim in any event; (6) no other exchange has tiered connectivity pricing; (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory; and (8) the recoupment of investment claim belies the Exchanges' claim of encouraging efficiency in connectivity usage.'' [69]

The Exchange's Examples of Members Terminating Their Exchange Access Shows That Members Have Choice Whether To Connect to an Exchange Based on Fees

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [70] SIG misinterprets the Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of connectivity are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [71] Nonetheless, the Third Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[66] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

[67] *See* HMA Letter, *supra* note 9.

[68] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

[69] *See* SIG Letter 3, *supra* note 9.

[70] *Id.*

[71] *See* Guidance, *supra* note 20.

The Proposed Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchange's claims that they will not realize a supracompetitive profit,'' that ''the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.''

The Exchange has provided ample data that the proposed fees would not result in excessive pricing or a supra-competitive profit. In this Third Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Tiered Pricing Structure Is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange[ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[ ] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Firms That Purchase More 10Gb ULL Generate Higher Exchange Costs

SIG argues that ''the Exchanges' claim that firms who purchase more 10Gb ULL lines generate 'higher' costs is misleading,'' and that the Exchange has ''offered no support for this claim in any event.'' As described above, the Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases and the Exchange believes it provided ample justification for the proposed tiered-pricing structure in the First and Second Proposed Rule Changes. Nonetheless, the Exchange provides additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

The Proposed Tiered-Pricing Structure for 10Gb ULL Connectivity Will Provide Cost Savings for the Majority of Exchange Members

The SIG Letter incorrectly asserts that no other exchange has tiered connectivity pricing. Numerous other exchanges provide tiered fee structures for various other types of access to their platforms, including trading permits and ports.[72] The Exchange provided adequate evidence that most firms would incur cost savings under the Proposed Access Fees in the First and Second Proposed Rule Changes and this filing. Nonetheless, the Exchange believes it provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First Proposed Fee change did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe is it necessary to respond to SIG's assertion here.

[72] *See* Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees ($750 per port per month for the first 5 BOE/FIX Logical Ports and $800 per port per month for each port over 5; $1,500 per port per month for the first 5 BOE Bulk Logical Ports, $2,500 per port per month for ports 6–30, and $3,000 per port per month for each port over 30); Cboe BXZ Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Ports with Bulk Quoting Capabilities ($1,500 per port per month for the first and second ports, $2,500 per port per month for three or more); Nasdaq Stock Market LLC, Options 7, Pricing Schedule, Section 3 ($1,500 per port per month for the first 5 SQF ports; $1,000 per port per month for SQF ports 15–20; and $500 per port per month for all SQF ports over 21); NYSE American Options Fee Schedule, Section V.A., Port Fees and NYSE Arca Options Fee Schedule, Port Fees (both charging $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater).

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . .order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' [73] The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [74] argument to justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [75] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

[73] *See* SIFMA Letter, *supra* note 9.

[74] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 20.

[75] *See* SIFMA Letter, *supra* note 9.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) The substitutability or optionality of 10Gb ULL connections, (ii) whether the Exchange has shown that the fees are equitable and non-discriminatory; (iii) that a tiered pricing structure will impose higher cost on all market participants; (iv) that a tiered pricing structure will encourage market participants to be more economical with the usage; (v) greater number of connections use greater Exchange resources; and (vi) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[76] and Rule 19b–4(f)(2)[77] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2021–42 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2021–42. 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–EMERALD–2021–42 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[78]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27425 Filed 12–17–21; 8:45 am]

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[76] 15 U.S.C. 78s(b)(3)(A)(ii).

[77] 17 CFR 240.19b–4(f)(2).

[78] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93775; File No. SR–MIAX–2021–59]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Fee Schedule To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

December 14, 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 December 1, 2021, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to amend certain connectivity fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adopt a tiered-pricing structure for the 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection available to Members [3] and non-Members. The Exchange initially filed this proposal on July 30, 2021, with the proposed fee changes effective beginning August 1, 2021 (''First Proposed Rule Change'').[4] The First Proposed Rule Change was published for comment in the **Federal Register** on August 17, 2021.[5] The Commission received one comment letter on the First Proposed Rule Change.[6] The Exchange withdrew the First Proposed Rule Change on September 24, 2021 and re-submitted the proposal on September 24, 2021, with the proposed fee changes being immediately effective (''Second Proposed Rule Change'').[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 4, 2021.[8] The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Second Proposed Rule Change.[9] The Commission suspended the Second Proposed Rule Change on November 22, 2021.[10] The Exchange withdrew the Second Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness (''Third Proposed Rule Change''). This Third Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[11] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Second Proposed Rule Change.

10Gb ULL Tiered-Pricing Structure

The Exchange proposes to amend Sections (5)(a)–(b) of the Fee Schedule to provide for a tiered-pricing structure for 10Gb ULL connections for Members and non-Members. Currently, the Exchange assesses Members and non-Members a flat monthly fee of $10,000 per 10Gb ULL connection for access to the Exchange's primary and secondary facilities.

The Exchange now proposes to move from a flat monthly fee per connection to a tiered-pricing structure under which the monthly fee would vary depending on the number of 10Gb ULL connections each Member or non-Member elects to purchase per exchange. Specifically, the Exchange proposes to decrease the fee for the first and second 10Gb ULL connections for each Member and non-Member from the current flat monthly fee of $10,000 to $9,000 per connection. To encourage more efficient connectivity usage, the Exchange proposes to increase the per connection fee for Members and non-Members that purchase more than two 10Gb ULL connections. In particular, (i) the third and fourth 10Gb ULL connections for each Member or non-Member will increase from the current flat monthly fee of $10,000 to $11,000 per connection; and (ii) for the fifth 10Gb ULL connection, and each 10Gb ULL connection purchased by Members and non-Members thereafter, the fee will increase from the flat monthly fee of $10,000 to $13,000 per connection. The proposed 10Gb ULL tiered-pricing structure and fees are collectively referred to herein as the ''Proposed Access Fees.''

The Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar connectivity. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges.

Exchange	Type of port	Monthly fee
MIAX (as proposed)	10Gb ULL	1–2 connection. $9,000.00. 3–4 connections. $11,000.00. 5 or more. $13,000.00.
The NASDAQ Stock Market LLC (''NASDAQ'') [12]	10Gb Ultra fiber	$15,000.00.
Nasdaq ISE LLC (''ISE'') [13]	10Gb Ultra fiber	$15,000.00
Nasdaq PHLX LLC (''PHLX'') [14]	10Gb Ultra Fiber	$15,000.00.
NYSE American LLC (''Amex'') [15]	10Gb LX LCN	$22,000.00.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release No. 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR–MIAX–2021–35).

[5] *Id.*

[6] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[7] *See* Securities Exchange Act Release No. 93165 (September 28, 2021), 86 FR 54750 (October 4, 2021) (SR–MIAX–2021–41).

[8] *Id.*

[9] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''). *See also* letter from Tyler Gellasch, Executive Director, Healthy Markets Association (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe–BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (emphasis added) (''HMA Letter''); *and* Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter'').

[10] *See* Securities Exchange Act Release No. 93639 (November 22, 2021), 86 FR 67758 (November 29, 2021).

[11] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange proposes to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate. The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the disaster recovery facility in each month during which the Member or non-Member has established connectivity with the disaster recovery facility.

The Exchange's MIAX Express Network Interconnect (''MENI'') can be configured to provide Members and non-Members of the Exchange network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of both the Exchange and its affiliate, MIAX PEARL, LLC (''MIAX Pearl''), via a single, shared connection. Members and non-Members utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX Pearl via a single, shared connection will continue to only be assessed one monthly connectivity fee per connection, regardless of the trading platforms, market data systems, test systems, and disaster recovery facilities accessed via such connection.

2. Statutory Basis

The Exchange believes that the Proposed Access Fees are consistent with Section 6(b) of the Act [16] in general, and furthers the objectives of Section 6(b)(4) of the Act [17] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the Proposed Access Fees further the objectives of Section 6(b)(5) of the Act [18] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[19] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [20] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX Emerald, LLC (''MIAX Emerald'') and MIAX Pearl, to amend other non-transaction fees.[21]

The Proposed Access Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems connectivity to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In its Guidance, the Commission Staff stated that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [22] The Commission Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [23] In its Guidance, the Commission staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, or will not result in excessive pricing or supra-competitive profit, specific information, including quantitative information, should be provided to support that argument.'' [24] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply 10Gb ULL connectivity and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines ''supra-competitive profit'' as ''profits that exceed the profits that can be obtained in a competitive market.'' [25] The Commission Staff further states in the Guidance that ''the SRO should provide an analysis of the SRO's baseline revenues, costs, and profitability (before the proposed fee change) and the SRO's expected revenues, costs, and profitability (following the proposed fee

[12] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[13] *See* PHLX Rules, General 8: Connectivity.

[14] *See* ISE Rules, General 8: Connectivity.

[15] *See* NYSE American Options Fee Schedule, Section IV.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[20] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[21] *See* Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01) (proposal to increase connectivity fees); 91460 (April 2, 2021), 86 FR 18349 (SR–EMERALD–2021–11) (proposal to adopt port fees, increase connectivity fees, and increase additional limited service ports); 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (proposal to adopt trading permit fees).

[22] *See* Guidance, *supra* note 20.

[23] *Id.*

[24] *Id.*

[25] *Id.*

change) for the product or service in question.'' [26] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [27] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the Proposed Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access Fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange's aggregate costs of offering connectivity to the Exchange and MIAX Pearl.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs and MIAX Pearl's costs to provide connectivity, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity) to estimate such costs,[28] as well as the relative costs of providing and maintaining 10Gb ULL connectivity, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining 10Gb ULL connectivity because of the uncertainty of forecasting subscriber decision making with respect to firms' connectivity needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access Fees.

The Exchange also provides detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [29] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Members and non-Members currently utilizing the 10Gb ULL fiber connection and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[30] As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the first seven months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are reasonable because they will allow the Exchange to recover its costs associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange and MIAX Pearl project that the annualized expense for 2021 to provide all network connectivity services (that is, the shared network connectivity of all connectivity alternatives of the Exchange and MIAX Pearl, but excluding MIAX Emerald) to be approximately $15.9 million per annum or an average of $1,325,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange and MIAX Pearl Members and non-Members purchased a total of 156 10Gb ULL connections for which the Exchange and MIAX Pearl charged a total of approximately $1,547,620 (this includes MIAX and MIAX Pearl Members and non-Members dropping or adding connections mid-month, resulting a pro-rated charge at

[26] *Id.*

[27] *See* Guidance, *supra* note 20.

[28] For example, the Exchange only included the costs associated with providing and supporting connectivity and excluded from its connectivity cost calculations any cost not directly associated with providing and maintaining such connectivity. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining connectivity.

[29] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fees is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 9.

[30] *Id.*

times). This resulted in a profit of $222,620 for that month (a profit margin of 14.4%). For the month of October 2021, which includes the tiered rates for 10Gb ULL connectivity for the Proposed Access Fees, MIAX and MIAX Pearl Exchange Members and non-Members purchased a total of 154 10Gb ULL connections for which the Exchange and MIAX Pearl charged a total of approximately $1,684,000 for that month (also including pro-rated connection charges). This resulted in a profit of $359,000 for that month for a profit margin of 21.3% (a modest 6.9% profit margin increase from July 2021 to October 2021 from 14.4% to 21.3%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 6.9% of profit margin per-month (reflecting a 21.3% profit margin).[31] The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are able to add and drop connections at any time based on their own business decisions, which they frequently do. This profit margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.[32] The Exchange and MIAX Pearl have been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

As mentioned above, the Exchange and MIAX Pearl project that the annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $15.9 million per annum or an average of $1,325,000 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.[33] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide access services associated with the Proposed Access Fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2008.[34] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems.[35] To do so, the Exchange chose to waive the fees for some non-transaction related services or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As mentioned above, for 2021,[36] the total annual expense for MIAX and MIAX Pearl for providing the access services associated with the Proposed Access Fees is projected to be approximately $15.9 million, or approximately $1,325,000 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[37] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited

[31] The Exchange notes that this profit margin differs from the First and Second Proposed Rule Change because the Exchange now has the benefit of using a more recent billing cycle under the Proposed Access Fees (October 2021) and comparing it to a baseline month (July 2021) from before the Proposed Access Fees were in effect.

[32] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[33] For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

[34] The Exchange has incurred a cumulative loss of $175 million since its inception in 2008 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000460.pdf.*

[35] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[36] The Exchange has not yet finalized its 2021 year end results.

[37] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

Unconsolidated Financial Statements.[38] The $15.9 million projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange or MIAX Pearl. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice. Further, the Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with MIAX Pearl Equities are accounted for separately and are not included within the scope of this filing.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

External Expense Allocations

For 2021, expenses relating to fees paid by the Exchange and MIAX Pearl to third-parties for products and services necessary to provide the access services associated with the Proposed Access Fees is projected to be $3.9 million. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix for data center services, including for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's and its affiliates' office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[39] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all fees paid to such third-parties is included in the third-party expenses described herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, the Exchange notes that expenses associated with its affiliates, MIAX Emerald, are accounted for separately and are not included within the scope of this filing. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing. Therefore, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange and MIAX Pearl to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 62% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[40]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX Pearl and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 62% of the total

[38] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87875 (December 31, 2019), 85 FR 770 (January 7, 2020) (SR–MIAX–2019–51). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

[39] *See supra* note 33.

[40] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[41]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 75% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[42]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 51% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[43]

Internal Expense Allocations

For 2021, total projected internal expenses relating to the internal costs of the Exchange and MIAX Pearl to provide the access services associated with the Proposed Access Fees is projected to be approximately $12 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below.

For clarity, and as stated above, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to the providing access services in connection with the Proposed Access Fees. Only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange and MIAX Pearl to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's and MIAX Pearl's combined employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be $6.1 million, which is only a portion of the approximately $12.6 million (for MIAX) and $9.2 million (for MIAX Pearl) total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by employees on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 28% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange's and MIAX Pearl's depreciation and amortization expense relating to providing the services associated with the Proposed Access

[41] *Id.*

[42] *Id. See also supra* note 33 (regarding SFTI's announced fee increases).

[43] *See supra* note 40.

[44] *Id.*

Fees is projected to be $5.3 million, which is only a portion of the $4.8 million (for MIAX) and $2.9 million (for MIAX Pearl) total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 70% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange's and MIAX Pearl's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be approximately $0.6 million, which is only a portion of the $0.6 million (for MIAX) and $0.5 million (for MIAX Pearl) total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 53% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[46]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange and MIAX Pearl have only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide network connectivity services (all connectivity alternatives) to be approximately $15.9 million per annum or an average of $1,325,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021. For July 2021, prior to the Proposed Access Fees, Exchange Members and non-Members purchased a total of 156 10Gb ULL connections for which the Exchange and MIAX Pearl charged approximately $1,547,620. This resulted in a profit of $222,620 (a profit margin of 14.4%) for that month (including pro-rated charges). For the month of October 2021, which includes the tiered 10Gb ULL connectivity fees pursuant to the Proposed Access Fees, the Exchange and MIAX Pearl had Members and non-Members purchasing a total of 154 10Gb ULL connections for which the Exchange and MIAX Pearl charged a total of approximately $1,684,000 (including pro-rated charges). This resulted in a profit of $359,000 for that month for a profit margin of 21.3% (a modest 6.9% profit margin increase from July 2021 to October 2021 from 14.4% to 21.3%). The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate an additional 6.9% of profit margin per month (reflecting a 21.3% profit margin).[47] The Exchange believes this modest increase in profit margin will allow it to continue to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many connections may be purchased from month to month as Members and non-Members are free to add and drop connections at any time based on their own business decisions. This profit margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[48] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to

[45] *Id.*

[46] *Id.*

[47] *See supra* note 31.

[48] *See supra* note 32.

the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Proposed Tiered-Pricing Structure Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of connections a Member or non-Member utilizes. Charging a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.

The Exchange believes that the proposal to move to a tiered-pricing structure for its 10Gb ULL connections is reasonable, equitably allocated and not unfairly discriminatory because the majority of Members and non-Members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-pricing structure is implemented. After the effective date of the First Proposed Rule Change on August 1, 2021, approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees while only approximately 20% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. To illustrate, firms that purchase only one 10Gb ULL connection per month used to pay the flat rate of $10,000 per month for that one 10Gb ULL connection. Pursuant to the proposed tiered-pricing structure, these firms now pay $9,000 per month for that same one 10Gb ULL connection, saving $1,000 per month or $12,000 annually. Further, firms that purchase two 10Gb ULL connections per month previously paid a flat rate of $20,000 per month ($10,000 x 2) for those two 10Gb ULL connections. Pursuant to the proposed tiered-pricing structure, these firms now pay $18,000 per month ($9,000 x 2) for those two 10Gb ULL connections, saving $2,000 per month or $24,000 annually.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange connectivity resources, but also those firms that most heavily consume Exchange connectivity resources, network consumers, and purchasers of 10Gb ULL connectivity. 10Gb ULL connectivity is not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional connections. The Exchange also needs to provide personnel to set up new connections, service requests related to adding new and/or deleting existing connections, respond to performance queries from, and to maintain those connections on behalf of Members and non-Members. Also, those firms that utilize 10Gb ULL connectivity typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[49]

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes to decrease the monthly fees for those firms who connect to the Exchange as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections. The Exchange notes that firms that primarily route orders seeking best-execution generally only purchase a limited number of connections. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources. Therefore, the connectivity costs will likely be lower for these firms based on the proposed tiered-pricing structure.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more connections resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase more than two to four 10Gb ULL connections essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of

[49] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

their competitors. For instance, a Member may have just sent numerous messages and/or orders over one of their 10Gb ULL connections that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other 10Gb ULL connections with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically require multiple connections and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their connections and drop and simultaneously add connections mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those connections in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased connectivity costs based on their disproportionate pull on Exchange resources to provide the additional connectivity.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[50] As stated above, 10Gb ULL connectivity is not an unlimited resource and the Exchange's network is limited in the amount of connections it can provide. However, the Exchange must accommodate requests for additional connectivity and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional connectivity on top of current network capacity constraints, requires that the Exchange purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new connections and to maintain those connections on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical in selecting the amount of connectivity they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional connectivity.

The Proposed Fees Are Reasonable when Compared to The Fees of other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other equities exchanges' costs to provide connectivity or their fee markup over those costs, and therefore cannot use other exchange's connectivity fees as a benchmark to determine a reasonable markup over the costs of providing connectivity. Nevertheless, the Exchange believes the other exchange's connectivity fees are a useful example of alternative approaches to providing and charging for connectivity. To that end, the Exchange believes the proposed tiered-pricing structure for 10Gb ULL connections is reasonable because the proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges with comparable market shares. For example, NASDAQ (equity options market share of 8.88% as of November 26, 2021 for the month of November)[51] charges a monthly fee of $10,000 per 10Gb fiber connection and $15,000 per 10Gb Ultra fiber connection.[52] The highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $2,000 per month less than NASDAQ and, unlike NASDAQ, the Exchange does not charge installation fees. The Exchange notes that the same connectivity fees described above for NASDAQ also apply to its affiliates, ISE[53] (equity options market share of 7.96% as of November 26, 2021 for the month of November)[54] and PHLX (equity options market share of 9.31% as of November 26, 2021 for the month of November).[55] Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November)[56] charges $15,000 per connection initially plus $22,000 monthly per 10Gb LX LCN circuit connection.[57] Again, the highest tier of the Exchange's proposed fee structure for a 10Gb ULL connection is $9,000 per month lower than the Amex connectivity fee after the first month.

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive connectivity alternatives. Each of the connectivity rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

The Exchange further believes that the Proposed Access Fees are reasonable, equitably allocated and not unfairly discriminatory because, for one 10Gb ULL connection, the Exchange provides each Member or non-Member access to all twenty-four (24) matching engines on MIAX and a vast majority choose to connect to all twenty-four (24) matching engines. The Exchange believes that other exchanges require firms to connect to multiple matching engines.[58]

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.

With respect to intra-market competition, the Exchange does not

[50] 15 U.S.C. 78f(b)(5).

[51] See ''The market at a glance,'' available at *https://www.miaxoptions.com/*(last visited November 26, 2021).

[52] *See* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[53] *See* ISE Rules, General 8: Connectivity.

[54] *See supra note 51.*

[55] See *id. See also* PHLX Rules, General 8: Connectivity.

[56] *See supra note 51.*

[57] *See* Amex Fee Schedule, Section IV.

[58] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing structure for its 10Gb ULL connections is associated with relative usage of the various market participants. Further, the majority of firms that purchase 10Gb ULL connections may either save money or pay the same amount after the tiered-pricing structure is implemented. While total cost may be increased for market participants with larger capacity needs or for business/technical preferences, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed tiered-pricing structure does not favor certain categories of market participants in a manner that would impose an undue burden on competition; rather, the allocation reflects the network resources consumed by the various usage of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and connectivity is constrained by competition among exchanges and third parties. There are other options markets of which market participants may connect to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange or reseller to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

As described above, the Exchange received one comment letter on the First Proposed Rule Change and four comment letters on the Second Proposed Rule Change.[59] The Exchange now responds to the comment letters in this filing.

HMA Letter

The HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Instead the HMA Letter is generally critical of the exchange fee filing process contained in Section 19(b)(3)(A)(ii) of the Act,[60] and Rule 19b–4(f)(2) thereunder,[61] and other exchanges' fee filings in recent years. The HMA Letter, however, applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes and was supportive of the efforts made by the Exchange and its affiliates to provide transparency and justify their proposed fees. The HMA Letter specifically notes that:

''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension. For example, MIAX detailed the associated projected revenues generated from the connectivity fees by user class, again in a clear attempt to comply with the SRO Fee Filing Guidance.'' [62]

As the HMA Letter notes, the Exchange refiled its same fee proposals to include significantly greater information about who is impacted and how, primarily at the request of the Commission Staff and in response to comments. The Exchange is again refiling its proposal to include more information surrounding the proposed fees and to respond to commenters.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.'' [63] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [64] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

[59] *See supra* note 9.

[60] 15 U.S.C. 78s(b)(3)(A)(ii).

[61] 17 CFR 240.19b–4.

[62] *See* HMA Letter, *supra* note 9.

[63] *See* SIG Letter 2, *supra* note 9.

[64] 17 CFR 201.700(b)(3).

Until recently, the Exchange operated at a net annual loss since it launched operations in 2008.[65] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First Proposed Rule Change, Second Proposed Rule Change. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX Emerald and MIAX Pearl, and SIG did not submit a comment letter on those filings.[66] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[67] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [68] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [69]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange.

Nonetheless, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments from SIG Letter 1, which the Exchange will first respond to in turn, below:

''(1) the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit, the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event, and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison; (3) the Exchanges provide no support for their claim that their proposed tiered pricing structure is needed to encourage efficiency in connectivity usage; (4) the Exchanges provided no support for their claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event; (5) the Exchanges' claim that firms who purchase more 10Gb ULL lines generate ''higher'' costs is misleading, and they offered no support for this claim in any event; (6) no other exchange has tiered connectivity pricing; (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory; and (8) the recoupment of investment claim belies the Exchanges' claim of encouraging efficiency in connectivity usage.'' [70]

[65] *See supra* note 34.

[66] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[67] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled that proposal as SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

[68] *See* HMA Letter, *supra* note 9.

[69] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

[70] *See* SIG Letter 3, *supra* note 9.

The Exchange's Examples of Members Terminating Their Exchange Access Shows That Members Have Choice Whether To Connect to an Exchange Based on Fees

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [71] SIG misinterprets the Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of connectivity are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [72] Nonetheless, the Third Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchange's claims that they will not realize a supracompetitive profit,'' that ''the Exchanges' respective profit margins of 30% (for MIAX and Pearl) and 51% (for Emerald) in relation to connectivity fees are high in any event,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.''

The Exchange has provided ample data that the proposed fees would not result in excessive pricing or a supra-competitive profit. In this Third Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Third Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Tiered Pricing Structure is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange[ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[ ] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Firms That Purchase More 10Gb ULL Generate Higher Exchange Costs

SIG argues that ''the Exchanges' claim that firms who purchase more 10Gb ULL lines generate 'higher' costs is misleading,'' and that the Exchange has ''offered no support for this claim in any event.'' As described above, the Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases and the Exchange believes it provided ample justification for the proposed tiered-pricing structure in the First and Second Proposed Rule Changes. Nonetheless, the Exchange provides additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

The Proposed Tiered-Pricing Structure for 10Gb ULL Connectivity Will Provide Cost Savings for the Majority of Exchange Members

The SIG Letter incorrectly asserts that no other exchange has tiered connectivity pricing. Numerous other exchanges provide tiered fee structures for various other types of access to their platforms, including trading permits and ports.[73] The Exchange provided adequate evidence that most firms would incur cost savings under the Proposed Access Fees in the First and Second Proposed Rule Changes and this filing. Nonetheless, the Exchange believes it provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First Proposed Rule Change did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe is it necessary to respond to SIG's assertion here.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data

[71] *Id.*

[72] *See* Guidance, *supra* note 20.

[73] *See* Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees ($750 per port per month for the first 5 BOE/FIX Logical Ports and $800 per port per month for each port over 5; $1,500 per port per month for the first 5 BOE Bulk Logical Ports, $2,500 per port per month for ports 6–30, and $3,000 per port per month for each port over 30); Cboe BXZ Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Ports with Bulk Quoting Capabilities ($1,500 per port per month for the first and second ports, $2,500 per port per month for three or more); Nasdaq Stock Market LLC, Options 7, Pricing Schedule, Section 3 ($1,500 per port per month for the first 5 SQF ports; $1,000 per port per month for SQF ports 15–20; and $500 per port per month for all SQF ports over 21); NYSE American Options Fee Schedule, Section V.A., Port Fees and NYSE Arca Options Fee Schedule, Port Fees (both charging $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater).

or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' [74] The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [75] argument to justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [76] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) The substitutability or optionality of 10Gb ULL connections, (ii) whether the Exchange has shown that the fees are equitable and non-discriminatory; (iii) that a tiered pricing structure will impose higher cost on all market participants; (iv) that a tiered pricing structure will encourage market participants to be more economical with the usage; (v) greater number of connections use greater Exchange resources; and (vi) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[77] and Rule 19b–4(f)(2) [78] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2021–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2021–59. 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–MIAX–2021–59 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[79]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27424 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

[74] *See* SIFMA Letter, *supra* note 9.

[75] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 20.

[76] *See* SIFMA Letter, *supra* note 9.

[77] 15 U.S.C. 78s(b)(3)(A)(ii).

[78] 17 CFR 240.19b–4(f)(2).

[79] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93780; File No. SR–NYSE–2021–71]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend the Temporary Period for Specified Commentaries to Rules 7.35A and 7.35C and Temporary Rule Relief in Rule 36.30

December 14, 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 December 8, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary period for specified Commentaries to Rules 7.35A and 7.35C and temporary rule relief in Rule 36.30, to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on March 31, 2022. The proposed rule change is

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 extend the temporary period for specified Commentaries to Rules 7.35A and 7.35C and temporary rule relief to Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on March 31, 2022. The current temporary period that these Rules are in effect ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2021.

Background

To slow the spread of COVID–19 through social-distancing measures, on March 18, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that, beginning March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City would close and the Exchange would move, on a temporary basis, to fully electronic trading.[4] On May 14, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to reopen the Trading Floor on a limited basis on May 26, 2020 to a subset of Floor brokers, subject to safety measures designed to prevent the spread of COVID–19.[5] On June 15, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to begin the second phase of the Trading Floor reopening by allowing DMMs to return on June 17, 2020, subject to safety measures designed to prevent the spread of COVID–19.[6] Consistent with these safety measures, both DMMs and Floor broker firms continue to operate with reduced staff on the Trading Floor.

Proposed Rule Change

Beginning in March 2020, the Exchange modified its rules to add Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and rule relief in Rule 36.30,[7] and has extended the expiration date of such Commentaries several times.[8] In July 2021, the Commission approved the Exchange's proposals to make permanent several of the rule changes that were the subject of those Commentaries.[9] The remaining Commentaries, specified below, are in effect until the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2021:

- Commentaries .01, .02, .03, .04, .05, and .07 to Rule 7.35A;
- Commentaries .01, .02, and .04 to Rule 7.35C; and
- Amendments to Rule 36.30.

The first and second phases of the reopening of the Trading Floor are subject to safety measures designed to prevent the spread of COVID–19. To meet these safety measures, Floor brokers and DMM units that have chosen to return to the Trading Floor are operating with reduced staff. The Exchange is therefore proposing to extend Commentaries .01, .02, .03, .04, 05, and .07 to Rule 7.35A, Commentaries .01 and .02 to Rule 7.35C,[10] and the amendments to Rule

[4] Pursuant to Rule 7.1(e), the CEO notified the Board of Directors of the Exchange of this determination. The Exchange's current rules establish how the Exchange will function fully-electronically. The CEO also closed the NYSE American Options Trading Floor, which is located at the same 11 Wall Street facilities, and the NYSE Arca Options Trading Floor, which is located in San Francisco, CA. *See* Press Release, dated March 18, 2020, available here: *https://ir.theice.com/press/press-releases/all-categories/2020/03-18-2020-204202110.*

[5] *See* Securities Exchange Act Release No. 88933 (May 22, 2020), 85 FR 32059 (May 28, 2020) (SR–NYSE–2020–47) (Notice of filing and immediate effectiveness of proposed rule change).

[6] *See* Securities Exchange Act Release No. 89086 (June 17, 2020) (SR–NYSE–2020–52) (Notice of filing and immediate effectiveness of proposed rule change).

[7] *See* Securities Exchange Act Release Nos. 88413 (March 18, 2020), 85 FR 16713 (March 24, 2020) (SR–NYSE–2020–19) (amending Rule 7.35C to add Commentary .01); 88444 (March 20, 2020), 85 FR 17141 (March 26, 2020) (SR–NYSE–2020–22) (amending Rules 7.35A to add Commentary .01, 7.35B to add Commentary .01, and 7.35C to add Commentary .02); 88488 (March 26, 2020), 85 FR 18286 (April 1, 2020) (SR–NYSE–2020–23) (amending Rule 7.35A to add Commentary .02); 88546 (April 2, 2020), 85 FR 19782 (April 8, 2020) (SR–NYSE–2020–28) (amending Rule 7.35A to add Commentary .03); 88562 (April 3, 2020), 85 FR 20002 (April 9, 2020) (SR–NYSE–2020–29) (amending Rule 7.35C to add Commentary .03); 88705 (April 21, 2020), 85 FR 23413 (April 27, 2020) (SR–NYSE–2020–35) (amending Rule 7.35A to add Commentary .04); 88725 (April 22, 2020), 85 FR 23583 (April 28, 2020) (SR–NYSE–2020–37) (amending Rule 7.35 to add Commentary .01); 88950 (May 26, 2020), 85 FR 33252 (June 1, 2020) (SR–NYSE–2020–48) (amending Rule 7.35A to add Commentary .05); 89059 (June 12, 2020), 85 FR 36911 (June 18, 2020) (SR–NYSE–2020–50) (amending Rule 7.35C to add Commentary .04); 89086 (June 17, 2020), 85 FR 37712 (SR–NYSE–2020–52) (amending Rules 7.35A to add Commentary .06, 7.35B to add Commentary .03, 76 to add Supplementary Material 20, and Supplementary Material .30 to Rule 36); 89925 (September 18, 2020) (SR–NYSE–2020–75) (amending Rule 7.35 to add Commentary .02); and 90810 (December 29, 2020), 86 FR 335 (January 5, 2021) (SR–NYSE–2020–109) (amending Rule 7.35A to add Commentary .07).

[8] *See* Securities Exchange Act Release No. 92802 (August 30, 2021), 86 FR 49587 (September 3, 2021) (SR–NYSE–2021–46) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for specified Commentaries to Rules 7.35A and 7.35C and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2021). *See also* Securities Exchange Act Release Nos. 89199 (June 30, 2020), 85 FR 40718 (July 7, 2020) (SR–NYSE–2020–56) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C; Supplementary Material .20 to Rule 76; and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on July 31, 2020); 89368 (July 21, 2020), 85 FR 45272 (July 27, 2020) (SR–NYSE–2020–61) (Notice of filing and immediate effectiveness of proposed rule change to lift the temporary suspension to Rule 76 and delete Supplementary Material .20 to Rule 76); 89425 (July 30, 2020), 85 FR 47446 (August 5, 2020) (SR–NYSE–2020–63) (extending the temporary period specified in Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and Temporary Rule Relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on September 30, 2020); 90005 (September 25, 2020), 85 FR 61999 (October 2020) (SR–NYSE–2020–78) (extending same to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020); 90795 (December 23, 2020), 85 FR 86608 (December 30, 2020) (SR–NYSE–2020–106) (extending same to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021); and 91778 (May 5, 2021) 86 FR 25902 (May 11, 2021) (SR–NYSE–2021–29) (extending same to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on August 31, 2021).

[9] *See* Securities Exchange Act Release Nos. 92374 (July 9, 2021), 86 FR 37367 (July 15, 2021) (SR–NYSE–2020–89) (making permanent the rule changes specified in Commentary .03 to Rule 7.35C); 92373 (July 12, 2021), 86 FR 37779 (July 16, 2021) (SR–NYSE–2020–93) (making permanent the rule changes specified in Commentaries .01 and .02 to Rule 7.35); and 92480 (July 23, 2021), 86 FR 40885 (July 29, 2021) (SR–NYSE–2020–95) (making permanent certain rule changes specified in Commentaries .01 and .06 to Rule 7.35A and Commentaries .01 and .03 to Rule 7.35B).

[10] The Exchange does not propose to extend Commentary .04 to Rule 7.35C because the Exchange implemented its technology change to use the midpoint of the Auction NBBO as the Auction Reference price for an Exchange-facilitated Core Open Auction and therefore this Commentary is no longer operative. *See* Securities Exchange Act Release No. 91143 (February 17, 2021), 86 FR 11024 (February 23, 2021) (SR–NYSE–2021–13) (Notice of

36.30 until the earlier of March 31, 2022 or such time that there is a full reopening of the Trading Floor facilities to DMMs.

The Exchange is not proposing any substantive changes to these Rules.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

To reduce the spread of COVID–19, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that beginning March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City would close and the Exchange would move, on a temporary basis, to fully electronic trading. On May 14, 2020, the CEO made a determination under Rule 7.1(c)(3) that, beginning May 26, 2020, the Trading Floor would be partially reopened to allow a subset of Floor brokers to return to the Trading Floor. On June 15, 2020, the CEO made a determination under Rule 7.1(c)(3) that, beginning June 17, 2020, DMM units may choose to return a subset of staff to the Trading Floor.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Trading Floor has not yet reopened in full to DMMs or Floor brokers. Accordingly, the Exchange believes that the temporary rule changes in effect pursuant to the Commentaries to Rules 7.35A and 7.35C and amendments to Rule 36.30, which are intended to be in effect during the temporary period while the Trading Floor has not yet opened in full to DMMs, should be extended until such time that there is a full reopening of the Trading Floor facilities to DMMs. The Exchange is not proposing any substantive changes to these Rules.

The Exchange believes that, by clearly stating that this relief will be in effect through the earlier of a full reopening of the Trading Floor facilities to DMMs or the close of the Exchange on March 31, 2022, market participants will have advance notice of the temporary period during which the Commentaries to Rules 7.35A and 7.35C and amendments to Rule 36.30 will be in effect.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather would extend the period during which Commentaries .01, .02, .03, .04, 05, and .07 to Rule 7.35A; Commentaries .01 and .02 to Rule 7.35C; and amendments to Rule 36.30 will be in effect. These Commentaries are intended to be in effect during the temporary period while the Trading Floor has not yet been opened in full to DMMs and Floor brokers and are currently due to expire on December 31, 2021. Because the Trading Floor has not been opened in full to DMMs, the Exchange proposes to extend the temporary period for these temporary rules to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on March 31, 2022.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the rules discussed above to remain in effect during the temporary period during which the Trading Floor has not yet been reopened in full to DMMs because of health precautions related to the Covid-19 pandemic. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[17]

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)[18] 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 Number SR–NYSE–2021–71 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange

filing and immediate effectiveness of proposed rule change).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78s(b)(2)(B).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2021–71. 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–NYSE–2021–71 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27429 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34–93770; File No. SR–NYSEArca–2021–103]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Equities Fees and Charges

December 14, 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 December 1, 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 amend the NYSE Arca Equities Fees and Charges (''Fee Schedule'') to amend the criteria to qualify for the MPID Adding Tier pricing tier and adopt a per share credit for orders that provide liquidity in Tape B securities under the MPID Adding Tier. The Exchange proposes to implement the fee changes effective December 1, 2021.The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend the criteria to qualify for the MPID Adding Tier pricing tier and adopt a per share credit for orders that provide liquidity in Tape B securities under the MPID Adding Tier.

The Exchange proposes to implement the fee changes effective December 1, 2021.

Background

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [4]

While Regulation NMS has enhanced competition, it has also fostered a ''fragmented'' market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that ''such competition can lead to the fragmentation of order flow in that stock.'' [5] Indeed, equity trading is currently dispersed across 16 exchanges,[6] numerous alternative trading systems,[7] and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single exchange currently has more than 18%

[4] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7–10–04) (Final Rule) (''Regulation NMS'').

[5] *See* Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7–02–10) (Concept Release on Equity Market Structure).

[6] *See* Cboe U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.*

[7] *See* FINRA ATS Transparency Data, *available at https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

market share.[8] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 12% market share of executed volume of equities trading.[9]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide liquidity on an Exchange against which market makers can quote, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

Proposed Rule Change

Pursuant to the MPID Adding Tier pricing tier, the Exchange currently provides a per share credit for orders that provide liquidity in Tape A and Tape C securities. Specifically, to qualify for the pricing tier, an MPID is required to execute providing ADV in all securities that is at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV. A qualifying MPID receives a credit for providing liquidity in Tape A and Tape C securities of $0.0028 per share if the MPID has at least 4 million shares of providing ADV during the billing month, or $0.0029 per share if the MPID has at least 9 million shares of providing ADV during the billing month. The Exchange currently does not provide any credit under the MPID Adding Tier for orders that provide liquidity in Tape B securities.

With this proposed rule change, the Exchange proposes to adopt a per share credit for orders that provide liquidity in Tape B securities when an MPID executes providing ADV in all securities that is at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV. As proposed, a qualifying MPID would receive a credit for providing liquidity in Tape B securities of $0.0022 per share if the MPID has at least 4 million shares of providing ADV during the billing month. An MPID that has at least 9 million shares of providing ADV during the billing month would also receive a similar credit of $0.0022 per share for providing liquidity in Tape B securities.

Additionally, the Exchange proposes to rename the current MPID Adding Tier that offers a credit of $0.0028 per share in Tape A and Tape C securities and $0.0022 per share in Tape B securities as MPID Adding Tier 2, and proposes to rename the current MPID Adding Tier that offers a credit of $0.0029 per share in Tape A and Tape C securities and $0.0022 per share in Tape B securities as MPID Adding Tier 1.

Finally, the Exchange proposes to adopt an alternative method to qualify for the renamed MPID Adding Tier 2. As proposed, to qualify for the renamed MPID Adding Tier 2 credit of $0.0028 per share for providing liquidity in Tape A and Tape C securities and $0.0022 per share for providing liquidity in Tape B securities, an MPID would be required to execute providing ADV in all securities that is at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV, and have at least 4 million shares of providing ADV during the billing month, or 2 million shares of providing ADV during the billing month in Tape B securities.

The proposed rule change to adopt a new credit and an alternative method to qualify for the existing credits is designed to incentivize ETP Holders to increase liquidity-providing orders in Tape B securities they send to the Exchange, which would support the quality of price discovery on the Exchange and provide additional liquidity for incoming orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market. 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.'' [12]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes the proposed rule change is reasonable because it provides an additional opportunity and amends an existing opportunity for ETP Holders to receive an enhanced rebate on qualifying orders in a manner that incentivizes increased order flow on the Exchange's equities platform. The Exchange believes the proposed new credit of $0.0022 per share for orders that provide liquidity in Tape B securities under the MPID Adding Tier pricing tier is a reasonable means to encourage ETP Holders to increase their liquidity providing orders in Tape B securities each month over a predetermined baseline by offering liquidity providers an opportunity to receive an enhanced rebate. The Exchange believes the proposed change to adopt an alternative method to qualify for the renamed MPID Adding Tier 2 is reasonable because it provides ETP Holders with an additional way to qualify for the pricing tier's credits by providing liquidity in Tape B securities. The Exchange believes that the proposed alternative to qualify for the pricing tier utilizing a lower volume requirement of liquidity providing orders in Tape B securities is reasonable because the proposal provides firms with greater flexibility to reach the proposed volume tier across all Tape A, Tape B and Tape C securities, thereby creating an added incentive for

[8] *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/*.

[9] *See id.*

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

additional ETP Holders to bring increased order flow to a public exchange.

The Exchange believes it is reasonable to provide the proposed credit to a qualifying MPID if it meets the tier's criteria because this would encourage individual MPIDs to send orders that provide liquidity to the Exchange, thereby contributing to robust levels of liquidity, which would benefit all market participants, and would promote price discovery and transparency. The Exchange believes the proposed change to adopt a new credit and an alternative method to qualify for existing credits is reasonable as these changes would provide an incentive for an ETP Holder's MPID to direct its order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the new and existing credits, thereby contributing to depth and market quality on the Exchange.

As noted above, the Exchange operates in a highly competitive environment, particularly for attracting order flow that provides displayed liquidity on an exchange. More specifically, the Exchange notes that greater add volume order flow may provide for deeper, more liquid markets and execution opportunities at improved prices, which the Exchange believes would incentivize liquidity providers to submit additional liquidity and enhance execution opportunities. The Exchange notes that other markets with which the Exchange competes currently offer its members an opportunity to earn rebates based on the activity of the member's MPID.[13] The Exchange believes the proposed changes to the MPID Adding Tier continues to be a reasonable means to encourage ETP Holders to increase their liquidity on the Exchange.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are available to all ETP Holders on an equal basis. They also provide additional benefits or discounts that are reasonably related to the value of the Exchange's market quality and associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, the Exchange is one of many venues and off-exchange venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based on members achieving certain volume thresholds.

The Exchange believes its proposal equitably allocates its fees among its market participants.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it would apply uniformly to all ETP Holders, in that all ETP Holders will be eligible for the proposed new credit and have the opportunity to meet the tier's criteria and receive the applicable rebate if such criteria is met. The enhanced rebate (proposed and existing) would apply automatically and uniformly to all ETP Holders that achieve the corresponding criteria. The proposed change is designed as an incentive to any and all liquidity providers interested in meeting the tier criteria to submit additional order flow to the Exchange and each will receive the associated rebate if the tier criteria is met. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular ETP Holder qualifying for the proposed new credit, the Exchange anticipates a number of ETP Holders would be able to meet, or will reasonably be able to meet, the proposed criteria. However, without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder meeting the alternative method and/or qualifying for the proposed rebate. As stated, the proposed new credit and the proposed alternative method to qualify for existing credits are designed to provide an incentive for ETP Holders to submit additional liquidity across all Tapes to qualify for the corresponding rebates.

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes it is not unfairly discriminatory to provide the proposed credit as the credit would be provided on an equal basis to all ETP Holders that add liquidity in Tape B securities and meet the MPID Adding Tier's requirements. The Exchange also believes that the proposed rule change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume. The proposed changes to the MPID Adding Tier are designed as an incentive to any and all ETP Holders interested in meeting the tier criteria to submit additional order flow to the Exchange and each will receive the corresponding new and existing rebate if the tier criteria are met. The Exchange also notes that the proposed rule change will not adversely impact any ETP Holder's pricing or their ability to qualify for other tiers. Rather, should an ETP Holder not meet the criteria of the MPID Adding Tier pricing tier, the ETP Holder will merely not receive the corresponding rebate.

The Exchange believes it is not unfairly discriminatory to provide an alternative way to qualify for the per share credit under the MPID Adding Tier pricing tier, as the credit would be provided on an equal basis to all ETP Holders that meet the proposed alternative requirement under the renamed MPID Adding Tier 2. Further, the Exchange believes the proposed alternative requirement would incentivize ETP Holders to send their liquidity providing orders in Tape B securities to the Exchange to qualify for the enhanced rebate.

In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Moreover, this proposed rule change neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that this proposal does not permit unfair discrimination because the changes described in this proposal would be applied to all similarly situated ETP Holders and all ETP Holders would be subject to the same requirements. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by the proposed allocation of fees. The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the MPID Adding Tier credits would be available equally to all ETP Holders.

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

[13] *See* BZX Fee Schedule, Footnote 2, Step Up Tiers, and Footnote 4, Single Investor MPID Tiers, at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[14] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [15]

Intramarket Competition. The Exchange believes the proposed amendments to its Fee Schedule would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or its competitors. The proposed changes are designed to attract additional order flow to the Exchange, in particular with respect to Tape B securities. The Exchange believes that the proposed adoption of a new credit and the amendment to the volume requirement to qualify for an established tier under the MPID Adding Tier pricing tier would incentivize market participants to direct liquidity adding order flow to the Exchange, bringing with it additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage ETP Holders to send orders to the Exchange, thereby contributing towards a robust and well-balanced market ecosystem.

Intermarket Competition. The Exchange operates in a highly competitive market in which 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 noted above, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) is currently less than 12%. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] 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) [18] 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 Number SR–NYSEArca–2021–103 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–2021–103. 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; the Commission does not edit personal identifying information from submissions. 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–2021–103 and should be submitted on or before January 10, 2022.

[14] 15 U.S.C. 78f(b)(8).

[15] *See* Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27419 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–621, OMB Control No. 3235–0672, (Electronic Data Collection System); SEC File No. 270–625, OMB Control No. 3235–0686, (Form TCR)]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extensions:

Electronic Data Collection System, Form TCR

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit an extension for these two current collections of information to the Office of Management and Budget for approval, and to consolidate both collections of information within OMB Control No. 3235–0672.

The Commission invites comment on updates to its Electronic Data Collection System database (the Database), which will support information provided by members of the public who would like to file an online tip, complaint or referral (TCR) to the Commission. The Database will be a web based e-filed dynamic report based on technology that pre-populates and establishes a series of questions based on the data that the individual enters. The individual will then complete specific information on the subject(s) and nature of the suspicious activity, using the data elements appropriate to the type of complaint or subject. The information collection is voluntary. The public interface to the Database will be available using the agency's website, *www.sec.gov.* The Commission estimates that it takes a complainant, on average, 30 minutes to submit a TCR through the Database. Based on the receipt of an average of approximately 28,000 annual TCRs for the past three fiscal years, the Commission estimates that the annual reporting burden is 14,000 hours.

The Commission further invites comment on updates to Form TCR, which is a hard copy form adopted by the Commission in 2011.[1] Form TCR may be submitted by whistleblowers who wish to provide information to the Commission and its staff regarding potential violations of the federal securities laws. The Commission estimates that it takes a whistleblower, on average, one and one half hours to complete Form TCR. Based on the receipt of an average of approximately 560 annual Form TCR submissions for the past three fiscal years, the Commission estimates that the annual reporting burden of Form TCR is 840 hours.

Written comments are invited on: (a) Whether this 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 imposed by the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology.

Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication. Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John R. Pezzullo, 100 F St. NE, Washington DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27499 Filed 12–17–21; 8:45 am]

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[19] 17 CFR 200.30–3(a)(12).

[1] Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34–64545; File No. S7–33–10 (adopted May 25, 2011).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–NYSE–2021–52; File No. SR–NYSE–2021–52]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Section 902.03 of the NYSE Listed Company Manual To Modify Listing and Annual Fees Applicable to Certain Warrants Listed by Foreign Companies

December 14, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 1, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit 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 Section 902.03 of the NYSE Listed Company Manual (the ''Manual'') to modify the listing fees applicable to warrants listed by foreign companies whose listed ADRs represent multiple shares or a fraction of a share. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 902.03 of the Manual sets forth initial listing fees and annual fees applicable to listed warrants. Initial listing fees for warrants are charged on a per warrant basis.

In many cases, foreign issuers list their equity securities on the Exchange in the form of American Depositary Receipts (''ADRs''). In some instances, a listed ADR will represent a single underlying common share, but in other cases the listed ADR will represent multiple underlying common shares or a fraction of an underlying common share.

To the extent a company with listed ADRs representing multiple underlying common shares or a fraction of an underlying common share seeks to list warrants to purchase common shares, this transaction could result in a numerical discrepancy between the number of warrants issued and the number of ADRs that could be created if those warrants were fully exercised. For example: A company's listed ADRs each represent five underlying common shares. The company issues and lists five million warrants, each exercisable for a single share. If the warrants are fully exercised, this will result in the issuance of five million shares. If those shares are all converted into the listed ADRs, the five million shares issued would result in the creation of one million ADRs.

A discrepancy between the number of warrants issued and the number of ADRs post-conversion results in a very different billing outcome than would be the case for a company that lists its common shares directly or lists ADRs each of which represents a single underlying common share. In those cases, a listed company seeking to issue warrants exercisable into one million units of its listed equity security would issue one million warrants, rather than the five million warrants issued in the example set forth above, and would therefore pay only one-fifth of the initial listing and annual fees for the warrant listing as compared to the company whose ADRs represent five underlying common shares.

The Exchange proposes to amend Section 902.03 to charge annual and listing fees for warrants listed on ADRs on an ADR-equivalent basis. Specifically:

• *Listing Fees for Warrants Relating to Listed ADRs.* If a listed company's primary listed security is an ADR and it lists warrants that are exercisable into the equity security underlying such ADRs, it will be charged initial listing fees for the warrants adjusted to reflect the maximum number of ADRs that could be created upon exercise of such warrants.

Example A: An issuer whose primary listed security is an ADR representing five shares of its common stock lists five million warrants, each exercisable into a single share of the common stock. The issuer will be billed for listing fees for one million warrants (*i.e.,* adjusted to reflect the number of ADRs that could be created with five million shares).

Example B: An issuer whose primary listed security is an ADR representing one-fifth of a share of its common stock lists one million warrants, each exercisable into one share of the common stock. The issuer will be billed for initial listing and annual fees for five million warrants (*i.e.,* adjusted to reflect the number of ADRs that could be created with one million shares).[4]

• *Annual Fees for Warrants Relating to Listed ADRs.* If a listed company's primary listed security is an ADR and it lists warrants that are exercisable into the equity security underlying such ADRs, it will be charged annual fees for the outstanding warrants adjusted to reflect the maximum number of ADRs that could be created upon exercise of such warrants. Example: An issuer whose primary listed security is an ADR representing five shares of its common stock, has a listed class of warrants each exercisable into a single share of the common stock, with five million warrants outstanding. The issuer will be billed for annual fees for one million warrants (*i.e.,* adjusted to reflect the number of ADRs that could be created with five million shares).

The proposed amendments to the initial and annual fee provisions for listed warrants would apply to all warrants exercisable into common shares that are issued by a listed company whose primary listed security is an ADR. In the case of a listed company whose ADRs represent a multiple (a fraction) of a common share, the fees for any warrants issued by the company that are exercisable into equity securities underlying the ADR would be based on an adjustment downward (upward) of the number of warrants.[5]

[4] Approximately 0.5% of the ADRs currently listed on the Exchange represent fractional share interests.

[5] The Exchange notes that there is currently just one warrant listed on the NYSE that is exercisable into common stock underlying an ADR that is listed on the NYSE. This listed ADR represents 10 shares of the common stock.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(4)[7] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[8] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a preliminary matter, the Exchange competes for listings with other national securities exchanges, and companies can easily choose to list on, or transfer to, those alternative venues. As a result, the fees the Exchange can charge listed companies are constrained by the fees charged by its competitors and the Exchange cannot charge prices in a manner that would be unreasonable, inequitable, or unfairly discriminatory.

The Exchange believes that the proposal to charge listing fees for warrants on an ADR-equivalent basis is equitable and not unfairly discriminatory because it would remove the anomalous outcome that a company whose listed ADRs represent multiple underlying common shares must pay higher fees for the listing of warrants exercisable into its listed equity securities than are paid by a company whose common stock is listed directly or whose listed ADRs represent a single common share.

The Exchange recognizes that the proposal would result in a differential treatment of warrants issued by companies with ADRs listed on the Exchange from that of other issuers of warrants, leading to lower bills in many cases for the companies with listed ADRs. However, the Exchange notes that companies with listed ADRs that represent multiple underlying shares (or fractional shares) face unique circumstances when deciding how to structure their warrants. If those companies want to market their warrants in both their home market and

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

the United States, there are clear advantages to the company and its investors if the same security is issued in both markets. In particular, selling the same security avoids pricing confusion and, by ensuring complete fungibility, facilitates the movement of warrants between the two markets in aftermarket trading. As the ADRs would not be traded in the home market and might not be properly understood by investors there, it is clear why a company would make the decision to issue warrants to purchase a single common share in both markets rather than selling warrants to purchase ADRs in the US market and warrants to purchase a single share in the home market. While other categories of listed companies may also sometimes choose to issue warrants that are exercisable for multiple listed common shares or a fraction of a common share, their reasons for doing so are not the same unique market structural reasons that cause foreign companies to do so when their listed equity security is an ADR. Consequently, while the proposal does result in a different treatment of foreign companies with listed ADRs in a very limited circumstance, the Exchange believes that this proposed difference in treatment is not unfairly discriminatory.

The Exchange also notes that foreign companies with listed ADRs would not always pay lower fees on warrants if this proposal was adopted. Rather, the issuer would always pay fees on an ADR-equivalent basis, which would result in lower fees if the listed ADR represents multiple common shares and higher fees if it represents a fractional common share.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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 proposed modified warrant listing and annual fee for issuers whose listed ADRs represent multiple underlying common shares will be applicable to all similarly situated issuers on the same basis.

The Exchange does not believe that the proposed amended fees will have any meaningful effect on the competition among issuers listed on the Exchange. The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable.

Because competitors are free to modify their own fees in response, and because issuers may change their listing venue, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [9] of the Act and subparagraph (f)(2) of Rule 19b–4 [10] 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) [11] 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 Number SR–NYSE–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 Number SR–NYSE–2021–52. 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–NYSE–2021–52 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27417 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(2)(B).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93777; File No. SR–ISE–2021–26]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Pricing Schedule at Options 7, Section 1, General Provisions

December 14, 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 December 1, 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, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 1, General Provisions.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on December 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

ISE proposes to amend its Pricing Schedule at Options 7, Section 1, General Provisions. Specifically, ISE proposes to amend the way an Exchange Member indicates its participation in the Affiliated Entity Program. Specifically, the Exchange proposes to amend the description of ''Affiliated Entity'' within Options 7, Section 1, General Provisions. Currently, the term ''Affiliated Entity'' is described as,

a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Schedule of Fees. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Schedule of Fees. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually by each party sending an email to the Exchange. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

Today, Members are required to annually renew their Affiliate Entity relationship at the end of one year if they desire to continue the relationship. The parties must both send an email to the Exchange to avoid termination of the relationship, provided the relationship was not terminated earlier in the year. The Exchange believes that this process is burdensome for Members that desire to remain in the program. The consequence of not renewing is termination. The Exchange desires to remove the administrative burden associated with the requirement to annually renew and instead provide that the Affiliated Entity relationship will automatically renew each month, unless otherwise terminated. The proposed new rule text would provide,

An ''Affiliated Entity'' is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Schedule of Fees. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

As is the case today, parties to the Affiliated Entity relationship may decide to terminate the relationship during any month by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Cboe Exchange, Inc. (''Cboe'') has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program.[3] The Exchange believes that this amendment will streamline the workflow for Members by not requiring Members to renew each year to continue the affiliated relationship.

The Exchange is also proposing to amend a reference to ''Schedule of Fees'' within the Affiliated Entity description to ''Pricing Schedule'' to update the reference to Options 7 rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposal to amend the way Exchange Members indicate their participation in the Affiliated Entity Program is reasonable. Today, Members are required to annually renew their Affiliated Entity relationship at the end of one year if they desire to continue the relationship. The parties must both send an email to the Exchange to avoid termination of the relationship, provided the relationship was not terminated earlier in the year. The Exchange believes that this process

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe's Fees Schedule at footnote 23 ''A Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP. In order to effectuate the appointment, the parties would need to submit the Appointed Affiliate Form to the Exchange by 3:00 p.m. CST on the first business day of the month in order to be eligible to qualify for credits under AVP for that month. The Exchange will recognize only one such designation for each party once every calendar month, which designation will automatically renew each month until or unless the Exchange receives an email from either party indicating that the appointment has been terminated. A Market-Maker that has both an Affiliate OFP and Appointed OFP will only qualify based upon the volume of its Appointed OFP. The volume of an OFP that has both an Affiliate Market-Maker and Appointed Market-Maker will only count towards qualifying the Appointed Market-Maker. Volume executed in open outcry is not eligible to receive a credit under AVP.''

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

is burdensome for Members that desire to remain in the program. The consequence of not renewing is termination of their participation in the program. The Exchange desires to remove the administrative burden associated with the requirement to annually renew and instead provide that the Affiliated Entity relationship will automatically renew each month, unless otherwise terminated. As is the case today, parties to the Affiliated Entity relationship may decide to terminate the relationship during any month by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Also, Cboe has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program.[6] The Exchange believes that this amendment will streamline the workflow for Members by not requiring Members to renew each year to continue the affiliated relationship.

The Exchange's proposal to amend the way Exchange Member indicate their participation in the Affiliated Entity Program is equitable and not unfairly discriminatory. Today, any Member may participate in the Affiliated Entity Program. The proposed changes would impact all Members that voluntarily elect to participate in the Affiliated Entity Program in a uniform manner.

The proposal to amend a reference to ''Schedule of Fees'' within the Affiliated Entity description to ''Pricing Schedule'' to update the reference to Options 7 rules is non-substantive.

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.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. Cboe has a similar automatic renewal process for its Appointed OFP and Appointed Market-Maker Program [7] as proposed herein for the Affiliated Entity Program.

Intra-Market Competition

The Exchange's proposal to amend the way Exchange Members indicate their participation in the Affiliated Entity Program does not impose an undue burden on competition. Today, any Member may participate in an Affiliated Entity relationship. The proposed changes would impact all Members that voluntarily elect to participate in the Affiliated Entity Program in a uniform manner.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[8] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2021–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2021–26. 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–ISE–2021–26 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27426 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

[6] *See* Cboe's Fees Schedule at footnote 23 ''A Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP. In order to effectuate the appointment, the parties would need to submit the Appointed Affiliate Form to the Exchange by 3:00 p.m. CST on the first business day of the month in order to be eligible to qualify for credits under AVP for that month. The Exchange will recognize only one such designation for each party once every calendar month, which designation will automatically renew each month until or unless the Exchange receives an email from either party indicating that the appointment has been terminated. A Market-Maker that has both an Affiliate OFP and Appointed OFP will only qualify based upon the volume of its Appointed OFP. The volume of an OFP that has both an Affiliate Market-Maker and Appointed Market-Maker will only count towards qualifying the Appointed Market-Maker. Volume executed in open outcry is not eligible to receive a credit under AVP.''

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93778; File No. SR–BOX–2021–19]

Self-Regulatory Organizations; BOX Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Related to BOX Exchange LLC and BOX Holdings Group LLC Ownership Transfer Transactions

December 14, 2021.

I. Introduction

On August 27, 2021, BOX Exchange LLC (''BOX Exchange'' or ''Exchange'') filed with the 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 related to the Exchange and BOX Holdings Group LLC (''BOX Holdings'') ownership transfer transactions. The proposed rule change was published for comment in the **Federal Register** on September 15, 2021.[3] The Commission received one comment on the proposed rule change.[4] On September 28, 2021, pursuant to Section 19(b)(2) of the Act,[5] 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 disapprove the proposed rule change.[6] On December 13, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the Notice in its entirety.[7] The Commission is approving the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change [8]

The Exchange is a limited liability company, organized under the laws of the State of Delaware on August 26, 2010. The Exchange's charter is a Second Amended and Restated Limited Liability Company Agreement, dated as of May 29, 2020, as amended November 30, 2020 (''BOX Exchange LLC Agreement''). Citigroup Financial Products Inc. (''Citi''), CSFB Next Fund Inc. (''CSFB''), and MX US 2, Inc., (''MXUS2'') each became a Member [9] of the Exchange on May 10, 2012. Wolverine Holdings, L.P. (''Wolverine'') is not currently a Member of the Exchange.

BOX Holdings is a limited liability company, organized under the laws of the State of Delaware on August 26, 2010. BOX Holdings is the sole owner of BOX Options Market LLC, a facility of the Exchange (''BOX Options''). The BOX Holdings charter is a Second Amended and Restated Limited Liability Company Agreement, dated as of September 13, 2018 (''BOX Holdings LLC Agreement''). Citi and CSFB each became a Member [10] of BOX Holdings on May 10, 2012.

The Exchange proposes several transactions related to the ownership of the Exchange and BOX Holdings. First, the Exchange would repurchase the ownership interests in the Exchange held by Citi and CSFB.[11] Second, BOX Holdings would repurchase the ownership interests in BOX Holdings held by Citi and CSFB.[12] Finally, Wolverine would purchase an ownership interest in the Exchange from MXUS2.[13] The charts below summarize the ownership and voting percentage changes in the Exchange and BOX Holdings that would result from the proposed transactions:

BOX Exchange

Exchange unit holder	Current economic percentage interest [14]	Proposed economic percentage interest
MXUS2	40.00	40.00
IB	20.00	20.00
Citadel	7.68	12.28
Citi	7.68	.....
UBS	7.45	11.92
CSFB	7.30	.....
LabMorgan Corp./JPMC	7.30	11.67
Aragon	2.58	4.13

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92926 (September 9, 2021), 86 FR 51410 (''Notice'').

[4] *See* letter from Seymour Johnson, dated September 10, 2021, available at *https://www.sec.gov/comments/sr-box-2021-19/srbox202119-9221992-250319.htm*. The commenter is critical of the voting and economic interests of Citadel Securities Principal Investments LLC (''Citadel'') in BOX Holdings Group and believes that such interests should be reduced.

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 93156, 86 FR 54780 (October 4, 2021). The Commission designated December 14, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] In Amendment No. 1, the Exchange revised the proposal to: (1) Provide updated and additional ownership and voting percentage interests information; (2) correct a reference from BOX Holdings to BOX Options Market LLC; (3) specify that all foreign upstream owners have signed onto the BOX Exchange LLC Agreement and the BOX Holdings LLC Agreement. Because Amendment No. 1 is a technical amendment that does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 to the proposed rule change is available at *https://www.sec.gov/rules/sro/box.htm*.

[8] For a more complete description of all the changes as proposed, *see* Amendment No. 1, *supra* note 7.

[9] A ''Member'' of the Exchange means the current owners of Economic Units and Voting Units of the Exchange and includes any person subsequently admitted to the Exchange as an additional or substitute Member of the Exchange. *See* Article 1. 1 of the BOX Exchange LLC Agreement. ''Economic Units'' refer to equal units of limited liability company interest in the Exchange collectively comprising all interests in the profits and losses of the Exchange and all rights to receive distributions from the Exchange as set forth in the BOX Exchange LLC Agreement. *See* Article 2.5(a) of the BOX Exchange LLC Agreement. ''Voting Units'' refer to equal units of limited liability company interest in the Exchange collectively comprising all voting interests of Members with respect to Exchange matters. *See* Article 2.5(b) of the BOX Exchange LLC Agreement.

[10] A ''Member'' of BOX Holdings means the current owners of BOX Holdings Units and includes any Person subsequently admitted to BOX Holdings as an additional or substitute Member of BOX Holdings. *See* BOX Holdings LLC Agreement § 1.1. BOX Holdings ''Units'' means Class A Membership Units, Class B Membership Units, and Class C Membership Units of BOX Holdings. *See* Article 1.1 of the BOX Holdings LLC Agreement. The current Members of BOX Holdings are: MXUS2, IB Exchange Corp. (''IB''), Citadel, Citi, UBS Americas Inc. (''UBS''), CSFB, JPMC Strategic Investments I Corporation (''JPMC''), Wolverine, and Aragon Solutions Ltd (''Aragon'').

[11] *See* Notice, *supra* note 3, 86 FR at 51411 and Amendment No. 1, *supra* note 7.

[12] *See id*.

[13] *See* Notice, *supra* note 3, 86 FR at 51411–12 and Amendment No. 1, *supra* note 7.

[14] ''Economic Percentage Interest'' with respect to a Member of the Exchange means the ratio of the number of Economic Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Economic Units held by Members, expressed as a percentage. *See* Article 1.1 of the BOX Exchange LLC Agreement.

Exchange unit holder	Current economic percentage interest [14]	Proposed economic percentage interest
Wolverine		<0.01

Exchange unit holder	Current voting percentage interest [15]	Proposed voting percentage interest
MXUS2	20.00	20.00
IB	20.00	20.00
Citadel	18.73	20.00
Citi	10.00	
UBS	4.99	4.99
CSFB	10.00	
LabMorgan Corp./JPMC	9.99	9.99
Aragon	6.30	20.00
Wolverine		5.03

BOX Holdings

BOX holdings unit holder	Current percentage interest [16]	Proposed percentage interest
MXUS2	42.62	47.89
IB	22.69	25.50
Citadel	13.80	15.50
Citi	7.85	
UBS	3.23	3.63
CSFB	3.16	
LabMorgan Corp./JPMC	3.16	3.55
Aragon	1.12	1.26
Wolverine	2.38	2.67

BOX holdings unit holder	Current voting power	Proposed voting power
MXUS2	44.10% (Member votes) 45.50% (total Board voting power)	51.43
IB	20.00%	20.00
Citadel	14.28% (Member votes) 14.73% (total Board voting power)	16.65
Citi	8.13% (Member votes) 8.38% (total Board voting power)	
UBS	3.34% (Member votes) 3.45% (total Board voting power)	3.90
CSFB	3.27% (Member votes) 3.37% (total Board voting power)	
LabMorgan Corp./JPMC	3.27% (Member votes) 3.37% (total Board voting power)	3.82
Aragon	1.16% (Member votes) 1.19% (total Board voting power)	1.35
Wolverine	2.46% (Member votes) 0.00% (total Board voting power because Wolverine does not have a Board seat)	2.87

[15] ''Voting Percentage Interest'' with respect to a Member of the Exchange means the ratio of the number of Voting Units held by the Member, directly or indirectly, of record or beneficially, to the total of all of the issued and outstanding Voting Units held by Members, expressed as a percentage. Voting Units held by a Member of the Exchange that are ineligible to vote shall not be counted in the numerator or the denominator when determining such ratio. *See id.*

[16] ''Percentage Interest'' with respect to a Member of BOX Holdings means the ratio of the number of Units held by the Member to the total of all of the issued Units, expressed as a percentage and determined with respect to each class of Units, whenever applicable. *See id.*

In addition to the transactions, the Exchange proposes to update the name of one of its Members in the BOX Exchange LLC Agreement. LabMorgan Corp., a Member of the Exchange, has changed its legal name to ''JPMC Strategic Investments I Corporation.'' [17]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[18] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[19] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that these proposed rule changes, as modified by Amendment No. 1, are consistent with Section 6(b)(1) of the Act, which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

Both the BOX Exchange LLC Agreement and the BOX Holdings LLC Agreement contain provisions relating to limitations on ownership and voting power. In particular, the BOX Exchange LLC Agreement provides that no Person,[20] either alone or together with any Related Persons [21] may own, directly or indirectly, of record or beneficially, an aggregate Economic Percentage Interest greater than 40%.[22] Exchange Facility Participants,[23] alone or together with any Related Persons may not own, directly or indirectly, of record or beneficially, an Economic Percentage Interest greater than 20%.[24] In addition, no Person, either alone or together with any Related Persons, may own, directly or indirectly, of record or beneficially, an aggregate Voting Percentage Interest greater than 20%.[25] Moreover, any Member [26] of the Exchange involved in a transaction that would result in a Member having a Voting Percentage Interest or Economic Percentage Interest, alone or together with any Related Person, of record or beneficially, of 5% or more will be required to provide written notice to BOX Exchange 14 days before the transaction that would exceed the 5% limit.[27] BOX Exchange will then be required to provide written notice to the Commission 10 days before the transaction.[28]

In addition, the BOX Holdings LLC Agreement provides that if a Member [29] of BOX Holdings or any of its Related Persons [30] is approved by the Exchange as a BOX Options Participant,[31] and if such Member, alone or together with the Related Persons, own more than 20% of BOX Holdings Units,[32] then such Member and any director of BOX Holdings designated by such Member will not have any voting rights with respect to any Units owned in excess of 20%.[33] The BOX Holdings LLC Agreement further provides that any Member of BOX Holdings involved in a transaction in which the Member's Percentage Interest [34] in BOX Holdings, either alone or together with any Related Person, will meet or cross the threshold level of 5% or the successive 5% percentage levels of 10% and 15% will be required to provide written notice to BOX Holdings 14 days before the transaction.[35] BOX Holdings will then be required to provide written notice to BOX Exchange and the Commission 10 days before the transaction.[36] In addition to these notices, any transaction of Units that results in the acquisition and holding by any Person,[37] alone or with its Related Persons, of a Percentage Interest that meets or crosses the threshold level of 20% or any successive 5% percentage interest will be subject to the rule filing process of Section 19 of the Act.[38] Further, any transaction that is in contravention of the notification and filing provisions shall be void.[39]

The ownership and voting limitations are designed to help ensure that BOX Exchange is able to effectively carry out its regulatory obligations under the Act. In addition, the limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. The Commission believes that the Exchange has followed the required notice procedures set forth in the BOX Exchange LLC Agreement and BOX Holdings LLC Agreement and that the proposed transactions are in compliance with the ownership and voting limitations in the governance documents.[40] The Commission also notes that the BOX Exchange LLC Agreement [41] and BOX Holdings LLC

[17] *See* Notice, *supra* note 3, 86 FR at 51413, and Amendment No. 1, *supra* note 7.

[18] In approving this 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).

[19] 15 U.S.C. 78f(b)(5).

[20] ''Person'' means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. *See* Article 1.1 of the BOX Exchange LLC Agreement.

[21] The term ''Related Person'' is defined in Article 1.1 of the BOX Exchange LLC Agreement.

[22] *See* Article 7.3(f) of the BOX Exchange LLC Agreement.

[23] ''Exchange Facility Participant'' means a firm or organization that is registered with the Exchange pursuant to the Exchange Rules for purposes of participant in trading on any Exchange Facility. *See* Article 1.1 of the BOX Exchange LLC Agreement. ''Exchange Facility'' means any facility of the Exchange as the term ''facility'' is defined in Section 3 of the Act. *See id.*

[24] *Id.*

[25] *See* Article 7.3(g)(i) of the BOX Exchange LLC Agreement.

[26] *See supra* note 9.

[27] *See* Article 7.3(e) of the BOX Exchange LLC Agreement.

[28] *Id.*

[29] *See supra* note 10.

[30] The term ''Related Person'' is defined in Article 1.1 of the BOX Holdings LLC Agreement.

[31] ''Options Participant'' means a firm, or organization that is registered with the Exchange pursuant to the Rule 2000 Series for purposes of participating in trading on a facility of the Exchange. *See* BOX Rule 100(a)(41).

[32] *See supra* note 10.

[33] *See* Article 7.4(h) of the BOX Holdings LLC Agreement.

[34] *See supra* note 16.

[35] *See* Article 7.4(e) of the BOX Holdings LLC Agreement.

[36] *Id.*

[37] ''Person'' means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. *See* Article 1.1 of the BOX Holdings LLC Agreement.

[38] *See* Article 7.4(f) of the BOX Holdings LLC Agreement.

[39] *See* Article 7.4(d) of the BOX Holdings LLC Agreement.

[40] Although a commenter objects to Citadel's ownership and voting percentages in BOX Holdings increasing because of the contemplated transaction, the increase is consistent with the ownership and voting limitations set forth in BOX Holdings governing documents as previously approved by the Commission. *See* Securities Exchange Act Release No. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012).

[41] *See, e.g.,* Article 4.6(b) of the BOX Exchange LLC Agreement (requiring the Exchange and its Members to cooperate with BOX Exchange and the Commission and to comply with federal securities laws); and Article 18.6(b) of the BOX Holdings LLC Agreement (deeming the Exchange, its Members and officers, directors, employees and agents of

Continued

Agreement [42] contain certain provisions designed to help maintain the independence of the regulatory functions of BOX Exchange. The Commission believes that the potential for conflicts of interest or unfair competition is mitigated by these provisions.

With respect to the ownership of BOX Exchange, the Commission notes that no BOX Exchange Member will own in excess of 40% of the Exchange's Economic Units (20% if an Exchange Facility Participant) and 20% of the Exchange's Voting Units. The board composition of the Exchange will not change. And although BOX Holdings is not independently responsible for regulation of BOX Options, its activities with respect to the operation of BOX Options must be consistent with, and not interfere with, the self-regulatory obligations of BOX Exchange. Pursuant to the transaction, with respect to the ownership of BOX Holdings, the voting power of IB, a BOX Options Participant, would remain at 20.00%. Further, while MXUS2's voting power in BOX Holdings would increase, MXUS2's power to appoint directors would remain unchanged.[43] The Commission accordingly believes that the proposed transfers are in compliance with requirements in the BOX Exchange LLC Agreement and the BOX Holdings LLC Agreement and provisions designed to help maintain BOX Exchange's regulatory function.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[44] that the proposed rule change (SR–BOX–2021–19), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[45]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27427 Filed 12–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–232, OMB Control No. 3235–0225]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Extension:
Rule 17f–4

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l-3520) (the ''Paperwork Reduction Act''), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Section 17(f) (15 U.S.C. 80a–17(f)) under the Investment Company Act of 1940 (the ''Act'') [1] permits registered management investment companies and their custodians to deposit the securities they own in a system for the central handling of securities (''securities depositories''), subject to rules adopted by the Commission.

Rule 17f–4 (17 CFR 270.17f–4) under the Act specifies the conditions for the use of securities depositories by funds [2] and their custodians.

The Commission staff estimates that 794 respondents (including an estimated 768 funds that may deal directly with a securities depository, an estimated 13 custodians, including 7 sub-custodians and 13 possible securities depositories) [3] are subject to the requirements in rule 17f–4. To the extent that Rule 17f–4(c)(4) provides that a sub-custodian can be qualified as a custodian for purposes of Rule 17f–4, sub-custodians are included as ''custodians'' in the estimates of burden hours and costs. While the rule is elective, most, if not all, funds use depository custody arrangements.[4]

Rule 17f–4 contains two general conditions. First, a fund's custodian must be obligated, at a minimum, to exercise due care in accordance with reasonable commercial standards in discharging its duty as a securities intermediary to obtain and thereafter maintain financial assets. If the fund deals directly with a depository, the depository's contract or written rules for its participants must provide that the depository will meet similar obligations. All funds that deal directly with securities depositories in reliance on rule 17f–4 should have either modified their contracts with the relevant securities depository, or negotiated a modification in the securities depository's written rules when the rule was amended. Therefore, we estimate there is no ongoing burden associated with this collection of information.[5]

Second, the custodian must provide, promptly upon request by the fund, such reports as are available about the internal accounting controls and financial strength of the custodian. If a fund deals directly with a depository, the depository's contract with or written rules for its participants must provide that the depository will provide similar financial reports. Custodians and depositories usually transmit financial reports to funds twice each year.[6] The

each to submit to the jurisdiction of the US federal courts and the Commission).

[42] *See, e.g.,* Article 4.12(b) of the BOX Holdings LLC Agreement (requiring BOX Holdings and its Members to cooperate with BOX Exchange and the Commission and to comply with federal securities laws); Article 11.1 of the BOX Holdings LLC Agreement (requiring the books and records of BOX Holdings and its Members to be subject to inspection and copying by the Exchange and the Commission at all times); and Article 18.6(b) of the BOX Holdings LLC Agreement (deeming BOX Holdings, its Members and officers, directors, employees and agents of each to submit to the jurisdiction of the US federal courts, the Commission, and BOX Exchange).

[43] MXUS2 (through MXUS1) is a wholly-owned subsidiary of the Bourse de Montreal (''Bourse'') and the Bourse is a wholly-owned subsidiary of TMX Group Limited. Each of MXUS1, Bourse, and TMX Group Limited is a party to the BOX Exchange LLC Agreement and BOX Holdings LLC Agreement and has all the rights and responsibilities of the Members of BOX Exchange and BOX Holdings. *See* Amendment No 1, *supra* note 7.

[44] *Id.*

[45] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 80a.

[2] As amended in 2003, rule 17f–4 permits any registered investment company, including a unit investment trust or a face-amount certificate company, to use a security depository. *See* Custody of Investment Company Assets With a Securities Depository, Investment Company Act Release No. 25934 (Feb. 13, 2003) (68 FR 8438 (Feb. 20, 2003)). The terms ''fund'' or ''fund series'' are used in this Notice to mean a registered investment company.

[3] The Commission estimates that, as permitted by the rule, an estimated 4% of all funds may deal directly with a securities depository. The Commission estimates that, as permitted by the rule, an estimated 4% of all funds may deal directly with a securities depository. The number of custodians, including the number of sub-custodians is estimated from information collected from Form N–CENs filed with the Commission as of October 15, 2021. In addition, the Commission staff estimates the number of possible securities depositories by adding the 12 Federal Reserve Banks and one active registered clearing agency. The Commission staff recognizes that not all of these entities may currently be acting as a securities depository for fund securities.

[4] Based on responses to Item C.12 of Form N–CEN (17 CFR 274.101), approximately 96 percent of funds' custodians maintain some or all fund securities in a securities depository pursuant to rule 17f–4.

[5] The Commission staff assumes that new funds relying on 17f–4 would choose to use a custodian instead of directly dealing with a securities depository because of the high costs associated with maintaining an account with a securities depository. Thus, new funds would not be subject to this condition.

[6] The estimated 13 custodians would handle requests for reports from 9,984 fund clients (approximately 768 fund clients per custodian) and the depositories from the remaining 768 funds that choose to deal directly with a depository. It is our understanding based on staff conversations with

Commission staff estimates that 13 custodians, including 7 sub-custodians, spend approximately 2,330 hours (by support staff) annually in transmitting such reports to funds.[7] In addition, approximately 768 funds (*i.e.,* four percent of all funds) deal directly with a securities depository and may request periodic reports from their depository. Commission staff estimates that depositories spend approximately 179 hours (by support staff) annually transmitting reports to the 768 funds.[8] The total annual burden estimate for compliance with rule 17f–4's reporting requirement is therefore 2,509 hours.[9]

If a fund deals directly with a securities depository, rule 17f–4 requires that the fund implement internal control systems reasonably designed to prevent an unauthorized officer's instructions (by providing at least for the form, content, and means of giving, recording, and reviewing all officers' instructions). All funds that seek to rely on rule 17f–4 should have already implemented these internal control systems when the rule was amended. Therefore, there is no ongoing burden associated with this collection of information requirement.[10]

Based on the foregoing, the Commission staff estimates that the total annual hour burden of the rule's collection of information requirements is 2,509 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. This estimate is not derived from a comprehensive or even representative survey or study of the costs of Commission rules.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) 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; (b) the accuracy of the Commission's estimate of the burden of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens 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 in writing within 60 days of this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O John R. Pezzullo, 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–27500 Filed 12–17–21; 8:45 am]

BILLING CODE 8011–01–P

industry representatives that custodians and depositories transmit these reports to clients in the normal course of their activities as a good business practice regardless of whether they are requested. Therefore, for purposes of this PRA estimate, the Commission staff assumes that custodians transmit the reports to all fund clients.

[7] (9.984 fund clients × 2 reports) = 19,968 transmissions. The staff estimates that each transmission would take approximately 7 minutes for a total of approximately 2,330 hours (7 minutes × 19,968 transmissions).

[8] (768 fund clients who may deal directly with a securities depository × 2 reports) = 1,536 transmissions. The staff estimates that each transmission would take approximately 7 minutes for a total of approximately 179 hours (7 minutes × 1,536 transmissions).

[9] 2,330 hours for custodians and 179 hours for securities depositories.

[10] The Commission staff assumes that new funds relying on 17f–4 would choose to use a custodian instead of directly dealing with a securities depository because of the high costs associated with maintaining an account with a securities depository. Thus new funds would not be subject to this condition.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2021–0048]

Rate for Assessment on Direct Payment of Fees to Representatives in 2022

AGENCY: Social Security Administration (SSA).

ACTION: Notice.

SUMMARY: We are announcing the assessment percentage rate under the Social Security Act (Act) is 6.3 percent for 2022.

FOR FURTHER INFORMATION CONTACT: Jeffrey C. Blair, Associate General Counsel for Program Law, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Phone: (410) 965–3157, email *Jeff.Blair@ssa.gov.*

SUPPLEMENTARY INFORMATION: A claimant may appoint a qualified individual as a representative to act on his or her behalf in matters before the Social Security Administration (SSA). If the claimant is entitled to past-due benefits and was represented either by an attorney or by a non-attorney representative who has met certain prerequisites, the Act provides that we withhold up to 25 percent of the past-due benefits and use that money to pay the representative's approved fee directly to the representative.

When we pay the representative's approved fee directly to the representative, we must collect from that fee payment an assessment to recover the costs we incur in determining and paying representatives' fees. The Act provides that the assessment we collect will be the lesser of two amounts: A specified dollar limit; or the amount determined by multiplying the fee we are paying by the assessment percentage rate.[1]

The Act initially set the dollar limit at $75 in 2004 and provides that the limit will be adjusted annually based on changes in the cost-of-living.[2] Currently, the maximum dollar limit for the assessment is $104, as we announced in the **Federal Register** on October 22, 2021 (86 FR 58715, 58716).

The Act requires us each year to set the assessment percentage rate at the lesser of 6.3 percent or the percentage rate necessary to achieve full recovery of the costs we incur to determine and pay representatives' fees.[3]

Based on the best available data, we have determined that the current rate of 6.3 percent will continue for 2022. We will continue to review our costs for these services on a yearly basis.

Michelle King,

Deputy Commissioner for Budget, Finance, and Management.

[FR Doc. 2021–27474 Filed 12–17–21; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1073 (Sub-No. 1X)]

Alabama & Florida Railway Co., Inc.—Abandonment Exemption—in Geneva, Coffee, and Covington Counties, Ala.

Alabama & Florida Railway Co., Inc. (A&F), has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exemption Abandonments* to abandon approximately 42.9 miles of rail line between milepost 581.3 at Andalusia, Ala., and milepost 624.2 at Geneva, Ala. (the Line). The Line traverses U.S. Postal Service Zip Codes 36340, 36420, 36421, 36453, 36467, and 36477.

A&F certified that: (1) No local traffic has moved over the Line for at least two

[1] 42 U.S.C. 406(d), 406(e), and 1383(d)(2).

[2] 42 U.S.C. 406(d)(2)(A) and 1383(d)(2)(C)(ii)(I).

[3] 42 U.S.C. 406(d)(2)(B)(ii) and 1383(d)(2)(C)(ii)(II).

years; (2) there is no overhead traffic that has been, or would need to be, rerouted as a result of the proposed abandonment; (3) no formal complaint filed by a user of rail service on the Line (or by state or local government on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(b) and 1105.8(c) (notice of environmental and historic reports), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to government agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received,[1] this exemption will be effective on January 19, 2022, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and interim trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 30, 2021.[3] Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 10, 2022.

All pleadings, referring to Docket No. AB 1073 (Sub-No. 1X), should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on A&F's representative, Crystal M. Zorbaugh, Baker & Miller PLLC, 2401 Pennsylvania Avenue NW, Suite 300, Washington, DC 20037.

If the verified notice contains false or misleading information, the exemption is void ab initio.

A&F has filed a combined environmental and historic report that addresses the potential effects, if any, of the abandonment on the environment and historic resources. OEA will issue a Draft Environmental Assessment (Draft EA) by December 23, 2021. The Draft EA will be available to interested persons on the Board's website, by writing to OEA, or by calling OEA at (202) 245–0294. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339. Comments on environmental or historic preservation matters must be filed within 15 days after the Draft EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), A&F shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by A&F's filing of a notice of consummation by December 20, 2022, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available at *www.stb.gov.*

Decided: December 14, 2021.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2021–27470 Filed 12–17–21; 8:45 am]

BILLING CODE 4915–01–P

[1] Persons interested in submitting an OFA must first file a formal expression of intent to file an offer, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Filing fees for OFAs and trail use requests can be found at 49 CFR 1002.2(f)(25) and (27), respectively.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2021–1161]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Flight and Duty Limitations and Rest Requirements—Flightcrew Members

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves reporting exceeded flight duty periods and flight times, including scheduled maximum and actual flight duty periods and flight times, basic flight information (*e.g.,* city pairs, departure times, flight number), and reason for exceedance. Reporting and recordkeeping are required any time a certificated air carrier has exceeded a maximum daily flight time limit or a maximum daily Flight Duty Period (FDP) limit. It is also required for the voluntary development of a Fatigue Risk Management System (FRMS), and for fatigue training. The information is necessary to monitor trends in exceedance and possible underlying systemic causes requiring operator action, and to determine whether operator is scheduling realistically.

DATES: Written comments should be submitted by February 18, 2022.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Sandra Ray, Federal Aviation Administration, Voluntary Programs and Rulemaking Section AFS–260, 1187 Thorn Run Road, Suite 200, Coraopolis, PA 15108.

By fax: 412–239–3063.

FOR FURTHER INFORMATION CONTACT: Chester Piolunek, Jr. by email at: *Chester.Piolunek@faa.gov;* phone: 202–267–3711.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0751.

Title: Flight and Duty Limitations and Rest Requirements—Flightcrew Members.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The FAA collects reports from air carriers conducting passenger operations certificated under 14 CFR part 121 as prescribed in 14 CFR part

117 Flightcrew Member Duty and Rest Requirements, §§§ 117.11, 117.19, and 117.29. Air carriers are required to submit a report of exceeded flight duty periods and flight times, including scheduled maximum and actual flight duty periods and flight times, basic flight information (*e.g.,* city pairs, departure times, flight number), and reason for exceedance. The purpose for the reports is to notify the FAA that the certificate holder has extended a flight time and/or FDP limitation. This information enables FAA to monitor trends in exceedance and possible underlying systemic causes requiring operator action as well as determine whether operators are scheduling realistically. Additionally, if air carriers choose to develop a Fatigue Risk Management System (FRMS) under § 117.7 they are required to collect data specific to the need of the operation for which they will seek an FRMS authorization. It results in an annual recordkeeping and reporting burden when carriers adopt the system because they need to report the related activities to the FAA. Each air carrier is also required to develop specific elements and incorporate these elements into their training program (§ 117.9). Once the elements have been incorporated, the air carrier must submit the revised training program for approval.

Respondents: 47 Air Carriers.

Frequency: On occasion.

Estimated Average Burden per Response: Varies per requirement.

Estimated Total Annual Burden: 857 Hours.

Issued in Washington, DC, on December 15, 2021.

Sandra L. Ray,

Aviation Safety Inspector, AFS–260.

[FR Doc. 2021–27456 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2021–0019]

Petition for Exemption; Summary of Petition Received; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 10, 2022.

ADDRESSES: Send comments identified by docket number FAA–2017–0683 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael H. Harrison, AIR–612, Federal Aviation Administration, 2200 South 216th Street, Des Moines, WA 98198, phone and fax 206–231–3368, email *Michael.Harrison@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 15, 2021.

Daniel J. Commins,

Manager, Technical Writing Section, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service.

Petition for Exemption

Docket No.: FAA–2017–0683.

Petitioner: The Boeing Company.

Section(s) of 14 CFR Affected: § 25.813(e).

Description of Relief Sought: The Boeing Company (Boeing) is seeking relief from 14 CFR 25.813(e), which requires no door may be installed between any passenger seat that is occupiable for takeoff and landing and any passenger emergency exit, such that the door crosses any egress path (including aisles, crossaisles and passageways). Specifically, Boeing is proposing the FAA amend the conditions and limitations of Exemption No. 17635A, to allow for a movable divider between two adjacent single passenger suites. Thus, combining two single-passenger suites into a two-passenger suite when the center divider is in the stowed (open) position on its Boeing Model 777–8 and 777–9 Series airplanes.

[FR Doc. 2021–27488 Filed 12–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0797]

Agency Information Collection Activity: Principles of Excellence Complaint Feedback Tool

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 18, 2022.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0797'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0797'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Executive Order 13607.

Title: Principles of Excellence Complaint Feedback Tool.

OMB Control Number: 2900–0797.

Type of Review: Revision of a currently approved collection.

Abstract: The respondent submits a complaint about an educational institution online through either the GI Bill website or the eBenefit portal. The information gathered can only be obtained from the individual respondents. Valid complaints will be accepted from third parties.

The Feedback Tool process for both DoD's and VA's complaint system shares common data elements, but have some modifications specific to each agencies' complaint handling process:

VA:

- *Institution/Employer:* There are over 36,000 educational institutions that are approved for VA education benefits, while DoD has less than 7000.
- *Anonymous Complaints:* PoE Complaint System allows for a user to file anonymous complaints. Based on working group discussions with CFPB and FTC, VA believes that allowing anonymous complaints will garner more ground truth on what is happening with Veterans using their education benefits at different schools.
- *Required fields*: As a result of allowing anonymous complaints, many of the fields that DoD requires a user to fill will not be required by VA.

DoD:

- *Education Centers:* DoD requires education center information that does not fall within the purview of VA.
- *Military Branch/Rank:* DoD requires a user to select a service affiliation and pay grade.

Affected Public: Individuals and Households.

Estimated Annual Burden: 228 hours.

Estimated Average Burden per Respondent: 30 and 60 minutes respectively based on level of complexity.

Frequency of Response: Occasionally.

Estimated Number of Respondents: 912.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–27490 Filed 12–17–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Justice

Drug Enforcement Administration

Medical Pharmacy Decision and Order; Notice

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–04]

Medical Pharmacy Decision and Order

On November 18, 2019, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause and Immediate Suspension of Registration (hereinafter, OSC/ISO) to Medical Pharmacy (hereinafter, Respondent). Administrative Law Judge Exhibit (hereinafter, ALJ Ex.) 1, (OSC) at 1. The OSC informed Respondent of the immediate suspension of its DEA Certificate of Registration Number AL3398117 (hereinafter, registration or COR) and proposed its revocation, the denial of any pending applications for renewal or modification of such registration, and the denial of any pending applications for additional DEA registrations pursuant to 21 U.S.C. 824(a)(4) and 823(f), because Respondent's ''continued registration is inconsistent with the public interest.'' *Id.* (citing 21 U.S.C. 824(a)(4) and 823(f)).

In response to the OSC, Respondent timely requested a hearing before an Administrative Law Judge. ALJ Ex. 2. The hearing in this matter was conducted from May 4–7, 2020, at the DEA Hearing Facility in Arlington, Virginia, with the parties and their witnesses participating through video teleconference (VTC). On July 2, 2020, Chief Administrative Law Judge John J. Mulrooney, II, (hereinafter, Chief ALJ) issued his Recommended Rulings, Findings of Fact, Conclusions of Law and Decision (hereinafter, Recommended Decision or RD). On July 22, 2020, the Respondent filed Exceptions to the Recommended Decision (hereinafter, Resp Exceptions), to which the Government responded on August 7, 2020. Having reviewed the entire record, I find Respondent's Exceptions without merit and I adopt the Chief ALJ's Recommended Decision with minor modifications, as noted herein.*[A] I have addressed the majority of Respondent's Exceptions in footnotes added to the corresponding parts of the RD, and the remaining exceptions are addressed in ''The Respondent's Exceptions'' section following the RD. While I have made some modifications to the RD based on the exceptions, none of those changes and none of Respondent's arguments persuaded me to reach a different conclusion than the Chief ALJ in this matter. Therefore, I issue my final Order in this case following the Recommended Decision.

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge *[B]

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's COR should be revoked on the grounds alleged by the Government.[1] After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

The Government alleges that the Respondent's COR should be revoked because on numerous occasions between October 2016 and September 2019, it repeatedly filled prescriptions without addressing or resolving factual indicia (*i.e.,* ''red flags'') of potential drug diversion. ALJ Ex. 1 at 2. According to the Government, this constituted unlawfully reckless and negligent dispensing. ALJ Ex. 1 at 2.

The Evidence

Stipulations

The parties entered into factual stipulations prior to and during the litigation of this matter which were accepted by the tribunal. The following factual matters are deemed conclusively established in this case.

1. The Respondent pharmacy is registered with the DEA to handle controlled substances in Schedules II through V under DEA COR number AL3398117. The Respondent pharmacy's registered address is 6400 Main St., P.O. Box 475, Zachary, LA 70791.

2. The Respondent pharmacy's DEA COR expires by its own terms on January 31, 2021.

3. The Respondent pharmacy filled the following prescriptions for Patient C.H.:

a. 9/12/17: Carisoprodol 350 mg, 120 tablets
b. 9/12/17: Alprazolam 1 mg, 90 tablets
c. 9/12/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
d. 9/12/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets

4. The Respondent pharmacy filled the following prescriptions for Patient J.M.B.:

a. 6/05/17: Hydromorphone 8 mg, 120 tablets
b. 6/05/17: Alprazolam 1 mg, 60 tablets
c. 6/05/17: Carisoprodol 350 mg, 120 tablets
d. 6/05/17: Morphine SO4 ER 30 mg, 90 tablets
e. 7/05/17: Alprazolam 1 mg, 60 tablets
f. 7/05/17: Morphine SO4 ER 30 mg, 90 tablets
g. 7/05/17: Carisoprodol 350 mg, 120 tablets
h. 7/05/17: Hydromorphone 8 mg, 120 tablets
i. 9/14/17: Alprazolam 1 mg, 60 tablets
j. 9/27/17: Morphine SO4 ER 15 mg, 30 tablets
k. 9/27/17: Morphine SO4 ER 30 mg, 60 tablets
l. 9/27/17: Carisoprodol 350 mg, 120 tablets
m. 9/27/17: Hydromorphone 8 mg, 120 tablets
n. 10/27/17: Carisoprodol 350 mg, 120 tablets
o. 10/27/17: Hydromorphone 8 mg, 120 tablets
p. 12/20/17: Carisoprodol 350 mg, 120 tablets
q. 12/20/17: Alprazolam 1 mg, 50 tablets
r. 12/20/17: Hydromorphone 8 mg, 120 tablets
s. 12/21/17: Morphine SO4 ER 30 mg, 60 tablets
t. 8/16/18: Alprazolam 1 mg, 60 tablets
u. 8/30/18: Hydromorphone 8 mg, 120 tablets
v. 8/30/18: Carisoprodol 350 mg, 120 tablets
w. 9/10/18: Morphine SO4 ER 30 mg, 60 tablets
x. 9/21/18: Alprazolam 1 mg, 60 tablets
y. 9/27/18: Carisoprodol 350 mg, 120 tablets

*[A] I have made minor, nonsubstantive, grammatical changes to the RD and nonsubstantive conforming edits. Where I have made substantive changes, omitted language for brevity or relevance, or where I have added to or modified the Chief ALJ's opinion, I have noted the edits in brackets, and I have included specific descriptions of the modifications in brackets or in footnotes marked with an asterisk and a letter. Within those brackets and footnotes, the use of the personal pronoun ''I'' refers to myself—the Administrator.

*[B] I have omitted the RD's discussion of the procedural history to avoid repetition with my introduction.

[1] The immediate suspension aspect of the Government's case was final as of the date the OSC/ISO was issued by the Administrator, and is not the subject of these proceedings. 21 U.S.C. 824(d)(1) (''A[n immediate] suspension . . . shall continue in effect until the conclusion of [administrative enforcement] proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.''); 21 CFR 1301.36(h) (''Any suspension shall continue in effect until the conclusion of all proceedings upon the revocation or suspension, including any judicial review thereof, unless sooner withdrawn by the Administrator or dissolved by a court of competent jurisdiction.'').

z. 9/27/18: Hydromorphone 8 mg, 120 tablets
aa. 10/15/18: Morphine SO4 ER 30 mg, 60 tablets
bb. 10/24/18: Carisoprodol 350 mg, 120 tablets
cc. 10/24/18: Hydromorphone 8 mg, 120 tablets
dd. 11/13/18: Morphine SO4 ER 30 mg, 60 tablets
ee. 11/27/18: Hydromorphone 8 mg, 120 tablets
ff. 11/27/18: Carisoprodol 350 mg, 120 tablets
gg. 11/29/18: Alprazolam 1 mg, 60 tablets
hh. 12/24/18: Carisoprodol 350 mg, 120 tablets
ii. 12/24/18: Hydromorphone 8 mg, 120 tablets
jj. 12/28/18: Alprazolam 1 mg, 60 tablets
kk. 1/08/19: Morphine SO4 ER 30 mg, 60 tablets
ll. 1/22/19: Hydromorphone 8 mg, 120 tablets
mm. 1/22/19: Carisoprodol 350 mg, 120 tablets
nn. 2/08/19: Alprazolam 1 mg, 60 tablets
oo. 2/08/19: Morphine SO4 ER 30 mg, 60 tablets
pp. 2/19/19: Carisoprodol 350 mg, 120 tablets
qq. 2/19/19: Hydromorphone 8 mg, 120 tablets
rr. 7/01/19: Morphine SO4 ER 30 mg, 60 tablets
ss. 7/08/19: Carisoprodol 350 mg, 120 tablets
tt. 7/08/19: Hydromorphone 8 mg, 120 tablets
uu. 8/05/19: Hydromorphone 8 mg, 120 tablets
vv. 8/05/19: Carisoprodol 350 mg, 120 tablets
ww. 8/20/19: Alprazolam 1 mg, 60 tablets
xx. 8/27/19: Hydromorphone 8 mg, 120 tablets
yy. 8/27/19: Carisoprodol 350 mg, 120 tablets

5. The Respondent pharmacy filled the following prescriptions for Patient T.D.:

a. 7/13/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets
b. 8/08/17: Clonazepam 0.5 mg, 60 tablets
c. 8/08/17: Carisoprodol 350 mg, 60 tablets
d. 8/12/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets
e. 7/11/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets
f. 7/18/18: Clonazepam 0.5 mg, 60 tablets
g. 7/18/18: Carisoprodol 350 mg, 60 tablets

6. The Respondent pharmacy filled the following prescriptions for Patient D.G.:

a. 2/10/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 2/10/17: Carisoprodol 350 mg, 30 tablets
c. 2/21/17: Diazepam 10 mg, 60 tablets
d. 3/09/17: Carisoprodol 350 mg, 30 tablets
e. 3/09/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
f. 3/21/17: Diazepam 10 mg, 60 tablets
g. 4/06/17: Carisoprodol 350 mg, 30 tablets
h. 4/06/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
i. 4/26/17: Diazepam 10 mg, 60 tablets
j. 5/04/17: Carisoprodol 350 mg, 30 tablets
k. 5/04/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
l. 5/30/17: Diazepam 10 mg, 60 tablets
m. 6/01/17: Carisoprodol 350 mg, 30 tablets
n. 6/01/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
o. 6/29/17: Diazepam 10 mg, 60 tablets
p. 6/29/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
q. 6/29/17: Carisoprodol 350 mg, 30 tablets
r. 7/27/17: Carisoprodol 350 mg, 30 tablets
s. 7/27/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
t. 7/28/17: Diazepam 10 mg, 60 tablets
u. 8/23/17: Diazepam 10 mg, 60 tablets
v. 8/24/17: Carisoprodol 350 mg, 30 tablets
w. 8/27/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
x. 9/21/17: Carisoprodol 350 mg, 30 tablets
y. 9/21/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
z. 9/25/17: Diazepam 10 mg, 60 tablets
aa. 11/16/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
bb. 11/16/17: Carisoprodol 350 mg, 30 tablets
cc. 11/20/17: Diazepam 10 mg, 60 tablets
dd. 12/14/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
ee. 12/14/17: Carisoprodol 350 mg, 30 tablets
ff. 12/14/17: Diazepam 10 mg, 60 tablets
gg. 1/12/18: Carisoprodol 350 mg, 30 tablets
hh. 1/12/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
ii. 1/24/18: Diazepam 10 mg, 60 tablets
jj. 2/09/18: Carisoprodol 350 mg, 30 tablets
kk. 2/09/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
ll. 2/21/18: Diazepam 10 mg, 60 tablets
mm. 3/09/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
nn. 3/09/18: Carisoprodol 350 mg, 30 tablets
oo. 3/26/18: Diazepam 10 mg, 60 tablets
pp. 6/06/18: Carisoprodol 350 mg, 30 tablets
qq. 6/06/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
rr. 6/14/18: Diazepam 10 mg, 60 tablets
ss. 7/05/18: Carisoprodol 350 mg, 30 tablets
tt. 7/05/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
uu. 7/16/18: Diazepam 10 mg, 60 tablets
vv. 8/02/18: Carisoprodol 350 mg, 30 tablets
ww. 8/02/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
xx. 8/13/18: Diazepam 10 mg, 60 tablets
yy. 8/30/18: Carisoprodol 350 mg, 30 tablets
zz. 8/30/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
aaa. 9/08/18: Diazepam 10 mg, 60 tablets
bbb. 10/26/18: Carisoprodol 350 mg, 30 tablets
ccc. 10/26/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
ddd. 11/06/18: Diazepam 10 mg, 60 tablets

7. The Respondent pharmacy filled the following prescriptions for Patient J.H.:

a. 2/07/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 45 tablets
b. 2/07/17: Diazepam 10 mg, 18 tablets
c. 2/07/17: Zolpidem Tartrate 10 mg, 30 tablets
d. 2/09/17: Carisoprodol 350 mg, 90 tablets
e. 7/13/17: Diazepam 10 mg, 90 tablets
f. 7/13/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 40 tablets

g. 7/13/17: Carisoprodol 350 mg, 120 tablets
h. 7/31/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 40 tablets
i. 8/11/17: Diazepam 10 mg, 90 tablets
j. 8/11/17: Carisoprodol 350 mg, 120 tablets
k. 9/29/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets
l. 10/10/17: Carisoprodol 350 mg, 120 tablets
m. 10/11/17: Diazepam 10 mg, 90 tablets
n. 10/26/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
o. 4/26/18: Carisoprodol 350 mg, 120 tablets
p. 4/26/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets
q. 4/26/18: Diazepam 10 mg, 35 tablets
r. 5/24/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets
s. 5/24/18: Carisoprodol 350 mg, 120 tablets
t. 5/24/18: Diazepam 10 mg, 35 tablets
u. 9/20/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets
v. 9/20/18: Carisoprodol 350 mg, 120 tablets
w. 9/20/18: Diazepam 10 mg, 35 tablets
x. 10/18/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
y. 10/18/18: Carisoprodol 350 mg, 120 tablets
z. 10/18/18: Diazepam 10 mg, 35 tablets

8. The Respondent pharmacy filled the following prescriptions for Patient R.I.:

a. 8/17/17: Alprazolam 1 mg, 120 tablets
b. 8/25/17: Zolpidem Tartrate 10 mg, 30 tablets
c. 8/25/17: Carisoprodol 350 mg, 30 tablets
d. 8/25/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
e. 9/11/17: Alprazolam 1 mg, 120 tablets
f. 9/25/17: Carisoprodol 350 mg, 30 tablets
g. 9/25/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
h. 10/12/17: Alprazolam 1 mg, 120 tablets
i. 10/25/17: Carisoprodol 350 mg, 30 tablets
j. 10/25/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
k. 11/13/17: Zolpidem Tartrate 10 mg, 30 tablets
l. 11/13/17: Alprazolam 1 mg, 120 tablets
m. 11/24/17: Carisoprodol 350 mg, tablets 30
n. 11/24/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
o. 12/09/17: Zolpidem Tartrate 10 mg, 30 tablets
p. 12/13/17: Alprazolam 1 mg, 120 tablets
q. 12/23/17: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
r. 12/27/17: Carisoprodol 350 mg, 30 tablets
s. 08/15/18: Alprazolam 1 mg, 90 tablets
t. 08/24/18: Carisoprodol 350 mg, 30 tablets
u. 08/24/18: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
v. 11/08/18: Alprazolam 1 mg, 90 tablets
w. 11/23/18: Zolpidem Tartrate 10 mg, 30 tablets
x. 11/24/18: Carisoprodol 350 mg, 30 tablets
y. 11/24/18: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
z. 12/06/18: Alprazolam 1 mg, 90 tablets
aa. 12/24/18: Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets
bb. 12/24/18: Hydrocodone-Acetaminophen 5 mg/325 mg, 10 tablets
cc. 12/24/18: Carisoprodol 350 mg, 30 tablets
dd. 01/04/19: Alprazolam 1 mg, 90 tablets

9. The Respondent pharmacy filled the following prescriptions for Patient J.B.:

a. 7/02/19: Dextroamphetamine-Amphetamine 20 mg, 90 tablets
b. 7/02/19: Alprazolam 0.5 mg, 60 tablets
c. 7/02/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets

10. The Respondent pharmacy filled the following prescriptions for Patient P.W.:

a. 4/04/19: Alprazolam 0.5 mg, 60 tablets
b. 4/04/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 30 tablets
c. 8/01/19: Alprazolam 0.5 mg, 60 tablets
d. 8/01/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 30 tablets
e. 8/29/19: Alprazolam 0.5 mg, 60 tablets
f. 8/29/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 30 tablets

11. The Respondent pharmacy filled the following prescriptions for Patient L.H.:

a. 6/14/17: Alprazolam 1 mg, 360 tablets
b. 6/22/17: Dextroamphetamine-Amphetamine 30 mg, 30 tablets
c. 6/22/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 20 tablets

12. The Respondent pharmacy filled the following prescriptions for Patient A.P.:

a. 8/02/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 25 tablets
b. 8/02/17: Zolpidem Tartrate 10 mg, 30 tablets

13. The Respondent pharmacy filled the following prescriptions for Patient M.A.:

a. 10/12/17: Alprazolam 1 mg, 30 tablets
b. 10/12/17: Dextroamphetamine-Amphetamine 30 mg, 60 tablets
c. 10/12/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets

14. The Respondent pharmacy filled the following prescriptions for Patient B.B.:

a. 10/19/17: Alprazolam 1 mg, 90 tablets
b. 10/19/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets
c. 1/11/17: Alprazolam 0.5 mg, 2 tablets
d. 1/11/17: Diazepam 10 mg, 2 tablets
e. 1/12/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets
f. 2/08/17: Alprazolam 0.5 mg, 2 tablets
g. 2/08/17: Diazepam 10 mg, 2 tablets
h. 2/10/17: Alprazolam 0.5 mg, 60 tablets
i. 2/10/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets
j. 3/09/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets
k. 3/09/17: Alprazolam 0.5 mg, 60 tablets
l. 5/04/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets

15. The Respondent pharmacy filled the following prescriptions for Patient T.D.:

a. 3/07/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets
b. 3/07/18: Clonazepam 0.5 mg, 60 tablets

16. The Respondent pharmacy filled the following prescriptions for Patient L.D.:

a. 8/19/19: Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets
b. 8/19/19: Lorazepam 0.5 mg, 60 tablets
c. 8/19/19: Morphine SO4 ER 30 mg, 60 tablets

17. The Respondent pharmacy filled the following prescriptions for Patient R.W.:

a. 8/12/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 8/12/19: Diazepam 5 mg, 30 tablets
c. 9/09/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
d. 9/09/19: Diazepam 5 mg, 30 tablets

18. The Respondent pharmacy filled the following prescriptions for Patient L.C.:

a. 3/21/19: Oxycodone-Acetaminophen 7.5 mg/325 mg, 14 tablets
b. 3/21/19: Oxycodone-Acetaminophen 7.5 mg/325 mg, 16 tablets

19. The Respondent pharmacy filled the following prescriptions for Patient K.W.:

a. 4/16/19: Alprazolam 0.25 mg, 60 tablets
b. 4/16/19: Dextroamphetamine-Amphetamine 20 mg, 90 tablets

20. The Respondent pharmacy filled the following prescriptions for Patient D.M.:

a. 6/08/17: Alprazolam 1 mg, 60 tablets
b. 6/08/17: Dextroamphetamine-Amphetamine 30 mg, 60 tablets

21. The Respondent pharmacy filled the following prescriptions for Patient K.S.:

a. 6/26/17: Dextroamphetamine-Amphetamine 30 mg, 60 tablets
b. 6/26/17: Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets

22. The Respondent pharmacy filled the following prescription for Patient P.B.:

a. 6/26/19: Methadone 10 mg, 60 tablets
b. 6/29/19: Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets

23. The Respondent pharmacy filled the following prescriptions for Patient C.S.:

a. 6/11/19: Oxycodone 30 mg, 90 tablets
b. 7/09/19: Oxycodone 30 mg, 90 tablets

24. The Respondent pharmacy filled the following prescriptions for Patient S.N.:

a. 6/05/19: Hydrocodone-Acetaminophen 7.5 mg/325 mg, 30 tablets
b. 6/19/19: Hydrocodone-Acetaminophen 7.5 mg/325 mg, 60 tablets

25. The Respondent pharmacy filled the following prescriptions for Patient P.R.:

a. 10/24/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 112 tablets
b. 6/13/19: Hydrocodone-Acetaminophen 10 mg/325 mg, 112 tablets

26. The Respondent pharmacy filled the following prescriptions for Patient D.F.:

a. 6/04/19: Alprazolam 0.5 mg, 120 tablets
b. 6/04/19: Dextroamphetamine-Amphetamine 30 mg, 60 tablets
c. 6/04/19: Butalbital-Acetaminophen-Caffeine 50 mg/325 mg/40 mg, 60 tablets

27. The Respondent pharmacy filled the following prescriptions for Patient D.L.:

a. 8/09/17: Diazepam 10 mg, 90 tablets
b. 8/09/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets

28. The Respondent pharmacy filled the following prescriptions for Patient M.L.:

a. 8/02/17: Diazepam 10 mg, 45 tablets

29. The Respondent pharmacy filled the following prescriptions for Patient K.C.:

a. 10/09/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 75 tablets
b. 10/09/17: Alprazolam 1 mg, 60 tablets

30. The Respondent pharmacy filled the following prescriptions for Patient G.C.:

a. 10/10/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 10/10/17: Alprazolam 1 mg, 90 tablets

31. The Respondent pharmacy filled the following prescriptions for Patient V.M.:

a. 10/20/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 10/20/17: Alprazolam 1 mg, 60 tablets

32. The Respondent pharmacy filled the following prescriptions for Patient A.G.:

a. 9/06/16: Oxycodone 15 mg, 90 tablets
b. 6/27/19: Oxycodone 15 mg, 120 tablets
c. 7/24/19: Oxycodone 15 mg, 120 tablets
d. 8/22/19: Oxycodone 15 mg, 120 tablets

33. The Respondent pharmacy filled the following prescriptions for Patient T.B.:

a. 5/22/17: Oxycodone 15 mg, 90 tablets
b. 6/25/18: Oxycodone 15 mg, 60 tablets
c. 7/09/18: Oxycodone 15 mg, 60 tablets
d. 7/23/18: Oxycodone 15 mg, 60 tablets

34. The Respondent pharmacy filled the following prescriptions for Patient K.R.:

a. 4/09/18: Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets
b. 8/04/18: Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets

35. The Respondent pharmacy filled the following prescriptions for Patient L.W.:

a. 7/27/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 7/27/17: Alprazolam 1 mg, 90 tablets
c. 7/27/17: Dextroamphetamine-Amphetamine 20 mg, 60 tablets
d. 7/27/17: Phentermine 37.5 mg, 30

36. The Respondent pharmacy filled the following prescriptions for Patient K.J.:

a. 5/21/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
b. 7/21/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets
c. 11/19/18: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets

37. The Respondent pharmacy filled the following prescription for Patient V.E.: 5/22/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets.

38. The Respondent pharmacy filled the following prescription for Patient T.P.: 5/22/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets.

39. The Respondent pharmacy filled the following prescription for Patient I.J.: 5/23/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets.

40. The Respondent pharmacy filled the following prescription for Patient R.S.: 5/26/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets.

41. The Respondent pharmacy filled the following prescription for Patient R.W.: 6/01/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets.

42. The Respondent pharmacy filled the following prescription for Patient J.W.: 5/12/17: Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets.

43. The Respondent pharmacy filled the following prescription for Patient M.S.: 5/12/17: Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets.

44. The Respondent pharmacy filled the following prescription for Patient P.F.: 5/22/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets.

45. The Respondent pharmacy filled the following prescription for Patient D.W.: 5/22/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets.

46. The Respondent pharmacy filled the following prescription for Patient K.D.: 5/04/17: Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets.

47. Alprazolam, a type of benzodiazepine, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(C)(2).

48. Carisoprodol, a type of muscle relaxer, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(c)(6).

49. Clonazepam, a type of benzodiazepine, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(c)(11).

50. Diazepam, a type of benzodiazepine, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(c)(16).

51. Lorazepam, a type of benzodiazepine, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(c)(30).

52. Methadone is a Schedule II Controlled Substance. *See* 21 CFR 1308.12(c)(15).

53. Oxycodone is a Schedule II Controlled Substance. *See* 21 CFR 1308.12(b)(1)(xiii).

54. Phentermine is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(f)(9).

55. Zolipidem, a type of sedative, is a Schedule IV Controlled Substance. *See* 21 CFR 1308.14(c)(54).

56. Hydrocodone is a Schedule II Controlled Substance. *See* 21 CFR 1308.12(b)(1)(vi).

57. Dextroamphetamine-Amphetamine, a type of stimulant, is a Schedule II Controlled Substance. *See* 21 CFR 1308.12.(d)(1).

58. Centreville, MS is 33.2 [2] miles from Zachary, LA.

59. Gloster, MS is 41.2 miles from Zachary, LA.

60. Hornbeck, LA is 174.2 miles from Zachary, LA.

61. Independence, LA is 53 miles from Zachary, LA.

62. Liberty, MS is 45.8 miles from Zachary, LA.

63. Vidalia, LA is 80.3 miles from Zachary, LA.

The Government's Case

In addition to the foregoing ponderous number of stipulations, the Government's case consisted of the testimony of a Diversion Investigator and an expert witness.

Diversion Investigator

The first witness to testify was a DEA Diversion Investigator (DI). DI testified that she is currently assigned to the New Orleans Field Division, a position she has held for about two years. Tr. 19. She described her training and responsibilities as a DI, regulating registrants and enforcing Controlled Substances Act (CSA). Tr. 20. In her testimony, DI provided background information about the Louisiana prescription monitoring program (PMP), a database used for the statewide tracking of controlled substance prescriptions. *Id.* DI explained that under Louisiana law, pharmacies doing business in the state are required to enter dispensing data into the PMP for every controlled substance prescription that they dispense. *Id.*

The investigation that culminated in the present administrative charges was initiated by DI2, DI's predecessor. Tr. 21–22. Upon DI2's transfer to DEA Headquarters DI assumed responsibility as the lead DEA investigator on the case and inherited the open and closed evidence requests, as well as the balance of the investigative case file. Tr. 22. According to DI, the Respondent pharmacy became the focus of DEA's attention based on data acquired during a larger investigation concerning Morris & Dickson, Co., L.L.C (M&D), a major pharmaceutical distributor in Louisiana. Tr. 23. As part of the M&D investigation, it came to DEA's attention that the Respondent pharmacy was one of the top purchasers of oxycodone and hydrocodone in the state. *Id.* DI noted that this was significant because the Respondent was purchasing substantially more oxycodone and hydrocodone than other pharmacies in the area. *Id.* She characterized the Respondent's dispensing as ''approximately six or seven times the national average.'' Tr. 25.

DI testified that during the course of her investigation she reviewed reports from DEA's Automation of Reports and Consolidated Ordering System (ARCOS) database. Tr. 25–26. She explained that DEA registrants are required to input transactions involving controlled substances in Schedules I and II, as well as Schedule III narcotics into ARCOS. *Id.* The information entered by registrants is routinely mined an analyzed by the DEA ARCOS Targeting and Analysis Unit (ARCOS Unit) at DEA Headquarters, which can (as was the case here) generate investigative leads. Tr. 26. DI testified that she reviewed the data forwarded to her by the ARCOS Unit. Tr. 27–28. Through DI, the Government introduced ARCOS data which established some discernible trends regarding the Respondent's purchasing and dispensing of controlled substances. Tr. 33; Gov't. Ex. 71. According to the ARCOS data, in 2015 the Respondent was the sixth highest purchaser of hydrocodone in the state of Louisiana at 677,878 dosage units that year. Tr. 33; Gov't. Ex. 71 at 1–2. In 2016, the Respondent was the second highest purchaser,[3] at 677,583 dosage units of hydrocodone. Tr. 33; Gov't. Ex. 71 at 2. This trend of high volume purchasing continued into 2017 where the Respondent was the third highest purchaser at 615,924 dosage units. Tr. 35; Gov't. Ex. 71 at 6.

A similar trend was present with respect to the Respondent's purchasing of oxycodone. Tr. 34. In 2015, the Respondent was the fifth highest purchaser of oxycodone, having purchased 519,219 dosage units. Tr. 44; Gov't. Ex. 71 at 7. The Respondent was the seventh highest purchaser in 2016 at 494,730 dosage units. Tr. 34; Gov't. Ex. 71 at 9. In 2017, the Respondent was again the fifth highest purchaser at 482,770 dosage units of oxycodone. Tr. 34–35; Gov't. Ex. 71 at 11–12. According to the averages for 2015 aggregated in the ARCOS report, the pharmacies in the same zip code as the Respondent purchased an average of 174,695 dosage units of oxycodone. Tr. 35; Gov't. Ex. 71 at 15. The state average in 2015 for Louisiana was 102,698 dosage units while the national average was 87,261 dosage units. Tr. 35; Gov't, Ex. 71 at 15.

Within its (70791) zip code in 2015, the Respondent pharmacy was the highest purchaser of hydrocodone. Tr. 36; Gov't. Ex. 71 at 14. The second highest purchaser, a Walgreens, purchased only 191,668 dosage units compared to the Respondent's 677,872. Tr. 36; Gov't. Ex. 71 at 4. The average for its zip code was 202,161 while the state average for Louisiana was 112,588, and the national average was 95,866. Tr. 37; Gov't. Ex. 71 at 16. In 2017, the average purchasing of hydrocodone for pharmacies in the Respondent's zip code was 214,518. Tr. 38; Gov't. Ex. 71 at 19. The state average was 93,636 while the national average was 60,488. Tr. 38; Gov't. Ex. 71 at 19. In 2017, the Respondent was again the highest purchaser of hydrocodone in its zip code. Tr. 39; Gov't. Ex. 71 at 20–21. Medical Pharmacy West (MP West),[4] a pharmacy owned by the same corporate entity as the Respondent, was the second highest purchaser at 182,058

[2] The original stipulation reflected the distance between the Respondent pharmacy and Centreville, *Louisiana.* At the Respondent's unopposed request (which was supported by good cause), the stipulation was modified during the hearing. Tr. 149.

[3] Throughout her testimony, DI clarified that the data in the ARCOS report refers to the number of dosage units that the Respondent purchased. Tr. 43.

[4] DI testified that MP West and the Respondent pharmacy are ''sister pharmacies,'' sharing common ownership, but she made it clear that only the conduct of the Respondent pharmacy (Medical Pharmacy), was the subject of the present enforcement case. Tr. 40.

dosage units. Tr. 39; Gov't. Ex. 71 at 21, 40.

In 2015, the average oxycodone purchasing within the Respondent's zip code was 120,274, whereas the Respondent purchased 519,219 dosage units. Tr. 39; Gov't. Ex. 71 at 22. The state average was 55,179 while the national average was 72,729. Tr. 39; Gov't Ex. 71 at 22. Similarly, in 2017, the average purchasing within the Respondent's zip code was 116,706 while the Respondent purchased 482,770 dosage units. Tr. 42; Gov't. Ex. 71 at 28. The state average that year was 53,219 and the national average was 49,415. Tr. 42; Gov't. Ex. 71 at 28.

One peculiar aspect of the Government's table comparisons is the inclusion of a United States Post Office zip code (70072) that did not correspond to the Respondent's registered address or any other location in the universe that bore any logical relationship to the present case.[5] DI had no idea why data regarding 70072 was included, and DI2, who apparently requested the data, was not produced by the Government as a witness. Tr. 153, 172–73. This zip code was used for comparisons on pages 13, 16, 19, 22, 25, and 28 of the ARCOS data report. Tr. 154; Gov't. Ex. 71. In an even stranger development, DI attempted to explain the inclusion of the errant zip code data by inexplicably describing it as an ''exemplar'' zip code for the state of Louisiana. Tr. 169–70. No one at the hearing seemed to have the foggiest notion as to why information relative to this zip code bore any relation to any relevant fact. In any event, the data pertaining to zip code 70072 was not relevant and was not considered in this recommended decision.

DI stated that purchasing data of this sort indicated that from an investigative standpoint, high purchasing numbers raise the specter that ''maybe there's something awry'' because a pharmacy purchasing that many dosage units is likely dispensing at a high volume which is an indicator of possible diversion. Tr. 44. She clarified her understanding that it is not against the law to be a high volume purchaser or dispenser, but offered that the data informed their investigation and led the investigators to probe further.*[C] Tr. 44–45. The Louisiana PMP data confirmed that the high volume purchasing was indeed consistent with a concomitantly high volume dispensing by the Respondent pharmacy.[6] Tr. 45. After reviewing the PMP data and seeing that it corroborated the ARCOS data, DEA acquired the services of an expert, Dr. Diane Ginsburg, to review the data. Tr. 46–47, 72. Prior to requesting the expert report, an administrative subpoena was issued to the Respondent on May 28, 2019. Tr. 47–48; Gov't Ex. 64. This subpoena requested the prescriptions and dispensing data for 30 patients. Tr. 49; Gov't. Ex. 64. Initially not all of the data was provided, but was later supplied in response to an additional subpoena. Tr. 53–54; Gov't. Ex. 66. Another subpoena was issued on September 18, 2019, requesting copies of the prescription fill screens following the dispensing of controlled substances, including pharmacist notations and comments, from January 1, 2017, to March 28, 2019. Tr. 57–58; Gov't. Ex. 66.

Upon review of the responsive material to the first subpoena, the investigators observed that there were no patient profiles or pharmacist comments that corresponded to some of the patients described in the DEA's subpoena. Tr. 53–54. The Respondent was informed that this data was missing and a second administrative subpoena issued. Tr. 53. Additional material was provided in response to the second subpoena.[7] Tr. 53–54. On the issue of compliance with the subpoena, Respondent pharmacy technician TM advised the investigators that where patient profiles and pharmacists' comments were not provided it was because those items do not exist. Tr. 54–56.

According to DI, upon review of the documents received from the Respondent the investigators concluded that what they saw demonstrated potential evidence of combination prescribing, to include many prescriptions for the ''trinity'' (an opioid, a benzodiazepine, and carisoprodol) drug cocktail as well as other opioid and benzodiazepine combinations. Tr. 71. Additionally, the materials she reviewed reflected patients who traveled long distances from their home addresses to the Respondent pharmacy, and that many patients received the highest available quantity and strength of various opioids. *Id.*

Based on its evaluation of the data it retrieved from ARCOS, PMP, and the Respondent pharmacy, DEA issued an OSC/ISO. ALJ Ex. 1. DI acknowledged that although under the CSA, an OSC/ISO authorizes the seizure and storage under seal of controlled substances in the possession of the registrant upon whom it is executed,[8] the cognizant DEA officials on the scene declined to seize the drugs and authorized the transfer of the controlled medications to MP West, the Respondent's sister pharmacy. Tr. 162–64. DI allowed that, at least in her view, the decision to allow the transfer of the medications to MP West should not be read as an indication that DEA did not consider the potential charges to be serious. Tr. 164.

DI also conceded that in May of 2016, a period for which ARCOS and PMP data was used to support the issuance of the OSC/ISO, a cyclical investigation [9] of the Respondent was conducted by DEA investigators, and yielded no violations or charges, but she allowed that it was possible that the regulators conducting the cyclical may not have consulted the ARCOS database. Tr. 94, 97–98.

DI presented as an objective regulator/investigator with no discernible motive to fabricate or exaggerate. Indeed, as a successor investigator, she demonstrated commendable candor in teasing out which aspects of her

[5] Official notice (upon the concurrence of the parties) was taken that zip code 70072 corresponds to Marrero, Louisiana. Tr. 153–56.

*[C] The information in the DI's testimony related to the volume of controlled substances purchased by Respondent is relevant only to the rationale and foundation for the beginning of DEA's investigation and is considered herein for that purpose alone.

[6] DI stated that she was given access to the Louisiana PMP, in the form of a username and password, as part of her onboarding process as a diversion investigator. Tr. 178. The witness credibly testified that the application was made through, and granted by, Louisiana state officials, and that Louisiana furnished password-protected access to the data to DI as a DEA investigator. Tr. 177–80. The Respondent initially declined to object to the Government's PMP evidence, but subsequently attempted to interpose an objection after the evidence was accepted in the record. Tr. 130–34. The evidence had been timely supplied by the Government far in advance of the hearing, the Respondent's objection to it was clearly waived, and the evidence was correctly admitted and considered. Tr. 136. However, even in the absence of waiver, the DI's testimony regarding the level of state-controlled access deliberately granted to the DEA investigators by the State of Louisiana sufficiently distinguishes this case from *Grider Drug #1 and Grider Drug #2,* 77 FR 44069, 44071 n.8 (2012), that the evidence is properly considered in these proceedings. Testimony from DI regarding the manner in which her PMP access was granted by the State of Louisiana, coupled with information supplied via email from JF, R.Ph, Assistant Executive Director of the Louisiana Pharmacy Board (Gov't Ex. 76) (no relation to the Respondent pharmacy PIC, Tr. 1064), provides more than a sufficient foundation to admit the PMP evidence as legally procured pursuant to an authorized administrative request under Louisiana law. La. R.S. 40:1007(F)(3).

[7] All of the requested data was received in response to a total for four subpoenas. Tr. 63–64. DI also clarified that the Government's Exhibits 3–63 did not contain all of the copious volume of documents that the Respondent supplied to the DEA in response to the subpoenas, merely a subset of them. Tr. 66–67.

[8] 21 U.S.C. 824(f).

[9] The witness testified that cyclical investigations are conducted without advance notice to the registrant. Tr. 94–95.

investigation were initiated/controlled by her, and which aspects were inherited. Where she was unsure of an answer (such as the odd inclusion of the ARCOS data relative to the irrelevant zip code), she presented a good-faith effort to analyze the possible basis for generating the information, but made no attempt to supply a convenient contrivance.[10] Viewed in *toto,* the testimony of this witness is sufficiently detailed, plausible, and internally consistent to be afforded full credibility in this case.

Dr. Diane B. Ginsburg

The Government presented the testimony of Dr. Diane Ginsburg, a clinical professor in the Pharmacy Practice Division of the College of Pharmacy at the University of Texas at Austin.[11] Gov't Ex. 2. Her curriculum vitae (CV) reflects myriad teaching and administrative appointments in academia,[12] extensive authorship and publication in pharmacy and educational administration, as well as approximately six years of clinical experience practicing pharmacy in Texas.[13] *Id.* The witness testified that she maintains some level of active involvement with the campus pharmacy at the University of Texas in addition to her prior experience as a retail pharmacist.[14] Tr. 212–14. The witness's CV reflects no actual pharmacy practice or teaching appointments in Louisiana,[15] but she testified that in her view there are no significant differences between the pharmacy standards applicable in Texas versus in Louisiana.[16] Tr. 215. Dr. Ginsburg was offered [17] by the Government and accepted as an expert in the field of pharmacy practice, and specifically pharmacy practice in Louisiana.[18] Tr. 271.

Dr. Ginsburg testified that the applicable standard of care requires that before dispensing a controlled substance, a pharmacist must engage in a defined protocol to ascertain whether the medicine was prescribed for a legitimate medical purpose. Tr. 273. Specifically, in Dr. Ginsburg's opinion, the dispensing pharmacist must perform the following steps prior to dispensing: (1) Verify the prescriber's licensure and DEA registration status; [19] (2) verify that the dose is correct; (3) verify that the drug is correct; (4) verify that the patient directions are correct; (5) consult with the state PMP to check for pharmacy and/or doctor shopping. Tr. 273–74. Additionally, Dr. Ginsburg testified that there are multiple ''holistic'' [20] considerations that a pharmacist must factor into the mix, such as the quantity of medication being prescribed, other medications that may have been simultaneously prescribed, and the duration of the therapy. Tr. 275–76. In Dr. Ginsberg's opinion, it is incumbent upon the dispensing pharmacist to contact the prescriber to resolve any issues raised regarding any of the foregoing wickets, or even the state medical board or law enforcement in some cases. Tr. 273–74, 276. According to Dr. Ginsburg, documentation memorializing the resolution of any conflict constitutes a minimum standard of conduct.[21] Tr. 280. Dr. Ginsburg also discussed a pharmacist's corresponding responsibility to ensure that a controlled substance prescription is issued for a legitimate medical purpose. Tr. 274–75.

Although not included in the defined protocol that she outlined early in her testimony, Dr. Ginsburg outlined various features, or ''red flags,'' that must (presumably in the manner of the other listed potential anomalies in her

[10] This in no way relieves this witness or the Government from the responsibility to actually understand the relevance of the evidence put forth. *Gregg & Son Distributors,* 74 FR 17517, 17517 n.1 (2009) (Agency clarified that ''it is the Government's obligation as part of its burden of proof and not the ALJ's responsibility to sift through the records and highlight that information which is probative of the issues in the proceeding.''). Stated differently, the fact that the Government sponsored evidence under circumstances where no one in the courtroom could intelligibly articulate a reasonable basis for its relevance did not enhance the confidence that can be placed in its witness or its case. This feature is made even more inexplicable by the fact that the initial investigator is currently stationed at DEA Headquarters, less than a mile from the DEA Hearing Facility, and that all testimony in this case was taken by VTC. Still, the irrelevant evidence had no impact, and the wound was not mortal to the Government's case or the witness's credibility.

[11] Dr. Ginsburg testified that she is in her thirty-second year on the University of Texas faculty. Tr. 207.

[12] The witness testified that she currently teaches courses in pharmacy law, inter-professional ethics, and foundations of professional development. Tr. 214.

[13] Dr. Ginsburg testified that she has been licensed to practice pharmacy in Texas since 1984. Tr. 209.

[14] Dr. Ginsburg testified that although she has filled in sporadically (but not recently) as a line pharmacist at the campus pharmacy (Tr. 213–14, 246–48), she is not the pharmacist-in-charge (PIC) (Tr. 213), and her name does not appear on the campus pharmacy license. Tr. 243–46.

[15] Gov't Ex. 2. Past Agency precedent has not required that expert witnesses maintain licensure in the state(s) where their professional expertise is elicited. *See, e.g., Wesley Pope, M.D.,* 82 FR 14944, 14976 (2017) (holding that testimony of the Government's expert witness merited controlling weight notwithstanding lack of applicable state licensure or experience. [omitted]. In fact, the Agency has even held that there is no requirement that an expert witness be licensed in any state at all. *Trinity Pharmacy II,* 83 FR 7304, 7324 n.48 (2018). [However, as is the case here, expert witnesses from out of state generally demonstrate an understanding of the applicable standard of care and usual course of professional practice and the foundation for this understanding. In this case, the expert witness's testimony was supported by Louisiana law.]

[16] Dr. Ginsburg testified that during her academic tenure she has had the opportunity to compare Louisiana and Texas pharmacy practice standards. Tr. 216.

[17] Tr. 219.

[18] At the hearing and in its post-hearing brief, the Respondent objected to the classification of Dr. Ginsburg as an expert. Tr. 269–70; ALJ Ex. 20 at 8–10. The Respondent's objection at the hearing was noted on the record and Dr. Ginsburg's expert testimony was admitted over that objection. Tr. 271. [Respondent again objected in his Exceptions and argued, in the alternative, that her ''lack of qualifications should have been taken into account in determining what weight to give her opinions.'' Resp Exceptions, at 1. Repeating the arguments Respondent made before the Chief ALJ, Respondent took exception to Dr. Ginsburg's lack of recent work experience in retail pharmacy, her lack of research work and publications, her lack of prior testimony regarding ''red flags,'' and, amongst other things, her lack of any practice or license in Louisiana. *Id.* at 1–5. Respondent also again pointed out that Dr. Ginsburg rendered her opinion that Medical Pharmacy was improperly filling prescriptions for controlled substances that had one or more red flags without first having the pharmacy records from which she could determine whether or not the red flags had been resolved. *Id.* at 3–4. All of these issues were considered by the Chief ALJ both during the hearing and in the RD and I agree with the ALJ's determination. I find that Dr. Ginsburg was a credible witness. I find that Dr. Ginsburg primarily relied on Louisiana law and regulations to formulate her opinion regarding the usual course of professional practice and a pharmacist's corresponding responsibility and the laws provide extremely strong support for her testimony. *See infra* The Analysis. For example, Dr. Ginsburg testified that Louisiana requires pharmacists to exercise their corresponding responsibility, Tr. 275, and indeed, Louisiana states that ''[t]he responsibility for the proper prescribing of controlled substances rests upon the prescribing practitioner; however, a corresponding responsibility rests with the pharmacist who dispenses the prescription.'' La. Admin Code tit. 46, Part LIII, § 2745(b)(1). Also, Dr. Ginsburg testified that to ensure a prescription is issued for a legitimate medical purpose, ''[y]ou would look at some of the things that would, I guess, raise the red flag, although that is not an official legal term. . . . [Y]ou would look at quantity, . . . other medications being prescribed, . . . duration of therapy . . . [you would] look also holistically in terms of within that patient profile. Those are examples of a few things.'' Tr. 275–76. This is supported by La. Admin Code tit. 46, Part LIII, § 515 which says ''[a] pharmacist shall review the patient record and each prescription presented for dispensing for purposes of enhancing pharmacy care and therapeutic outcomes by recognizing the following potential situations: 1. Drug over-utilization or under-utilization; 2. Therapeutic duplication; . . . 4. Drug-drug interactions; 5. inappropriate drug dosage or treatment duration; 6. drug-allergy interactions; 7. or clinical abuse/misuse.'' Moreover, it appears that the expert opinions generally relied upon in this decision were largely uncontested.]

[19] [Omitted for relevance.]

[20] At another point in her testimony, the witness testified that checking the patient profile maintained by a pharmacy is encompassed within her definition of a ''holistic'' analysis. Tr. 282–83.

[21] The memorialization could be affixed to the back of a prescription by handwritten note or entered electronically into a pharmacy database. Tr. 281.

described protocol) be resolved prior to controlled substance dispensing. Tr. 275–76. Dr. Ginsburg testified that because pharmacists comprise a type of safety net, all encountered red flags of diversion must be identified, resolved, and documented prior to any controlled substance being dispensed. Tr. 711. In Dr. Ginsburg's view, a pharmacy falls short of the applicable standard of care where red flags are not addressed and documented prior to dispensing, irrespective of the legitimacy of the prescription.[22] Tr. 712–14. Specifically, she discussed a phenomenon described as a ''prescription cocktail'' or a ''trinity'' combination. Tr. 284–87. According to Dr. Ginsburg, a trinity or cocktail is defined by the simultaneous prescribing of an opioid in combination with a benzodiazepine and a muscle relaxant. Tr. 287. This combination presents a heightened risk of respiratory and/or central nervous system depression, but is sought after by drug abusers for the gratuitous euphoric effect it produces.[23] Tr. 286, 379–80.

Dr. Ginsburg testified that although dispensing events[24] CH1–CH4,[25] JMB1–JMB4,[26] JMB6–JMB8,[27] JMB9–JMB13,[28] JMB16–JMB19,[29] JMB20–JMB22,[30] JMB24–JMB26,[31] JMB30–36,[32] JMB40–JMB43,[33] JMB49–JMB51,[34] TD1–TD4,[35] DG1–DG6,[36] DG7–DG–9,[37] DG7–DG14,[38] DG18–DG20,[39] DG24–DG30,[40] DG33–DG35,[41] DG45–DG56,[42] JH1–JH26,[43] RI1–RI5,[44] RI19–RI25,[45] JB2–JB3,[46] PW1–PW6,[47] LH1–LH3,[48] AP1–AP2,[49] MA1–MA3,[50] BB1–BB11,[51] TD1–TD2,[52] LD1–LD3,[53] and RW1–RW4[54] demonstrated evidence of prescription trinity cocktails, there was no evidence in the electronic data provided by the Respondent that this red flag was the subject of resolution or inquiry by pharmacists or pharmacy staff with respect to these patients. Tr. 714–15. Dr. Ginsburg rendered her expert opinion (not contradicted on this record) that these prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice in Louisiana. Tr. 308, 312, 314, 316–20, 322, 325, 330, 336–43, 347–51, 358, 359–66, 376–88, 392–93, 395–96, 550–52.

The second red flag described by Dr. Ginsburg is ''pattern prescribing.'' Tr. 290–91. She described pattern prescribing as a combination of certain medications in the same strength, combination, and/or quantity, with sufficient regularity to cause a reasonable pharmacist to ''question whether there is [an] individual patient-physician relationship and [whether] those medications [are] being prescribed for a legitimate purpose.'' Tr. 291–94; *see also, id.* at 434–35, 648–51. Dr. Ginsburg testified that this variety of red flag is potentially resolvable by consulting with the prescriber and documenting that resolution. Tr. 294–95.

Dr. Ginsburg testified that although dispensing events TD1–TD7,[55] DG7–DG9,[56] DG12–DG14,[57] DG15–DG23,[58] DG27–DG30,[59] and DG45–DG56[60] demonstrated clear evidence of pattern prescribing, the records procured from the Respondent pharmacy revealed no identification or resolution of this red flag by pharmacists or pharmacy staff. Tr. 714. Dr. Ginsburg rendered her expert opinion that these prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice in Louisiana. Tr. 327, 329–31, 336–37, 550–52.

According to Dr. Ginsburg, a subset of pattern prescribing arises when presented scrips show repeated prescriptions by the same prescriber for the highest allowable strength and quantity of a controlled substance (quantity and strength pattern prescribing). Tr. 302–03, 434–35, 600–01, 610. This is so, in her view, because medications such as opioids are started at ''as low a dose as possible.'' Tr. 303. In her testimony, Dr. Ginsburg described this variety of pattern prescribing this way:

> Pattern prescribing is prescribing [the] same medications for multiple patients [with n]o deviation in terms of quantity, highest strength, usually the same agents over and over for multiple people.

Tr. 473. Regarding this subset of pattern prescribing, Dr. Ginsburg explained that:

> [W]hen you start seeing prescription after prescription, after prescription, from the same prescriber, and they're all the same for the highest strength, and you know, a very, very large quantity, and the quantity is consistent, that . . . speaks to it not being individualized for a patient . . . [a]nd . . . potentially not being legitimate.

Tr. 303. Dr. Ginsburg testified that this red flag is identifiable by consulting with the state PMP and characterized this red flag as potentially resolvable by contacting the prescriber. Tr. 304.

Dr. Ginsburg testified that although the Respondent had clear evidence of quantity and strength pattern prescribing, the records procured from the Respondent revealed no identification or resolution of the issue. Tr. 714. Specifically, she identified quantity and strength pattern prescribing relative to prescriptions filled that were issued by a local

[22] [Omitted for relevance.]

[23] The dangers of cocktail prescribing are outlined in a guidance document issued by the Food and Drug Administration (FDA Guidance Document), which was received in the record. Gov't Ex. 67; Tr. 289. The FDA Guidance Document included the dangers of cocktail prescribing as a ''black box warning,'' the most serious variety of warning issued by that agency. Gov't Ex. 67 at 1; Tr. 290. Dr. Ginsburg testified that a practicing pharmacist is responsible for familiarity with the existence and content of the FDA Guidance Document, including the details and nature of the black box warning. Tr. 289. However, Dr. Ginsburg acknowledged that FDA did not attempt to announce a prohibition on prescribing this combination of medications under all circumstances or classify the combination as *per se* illegitimate. Tr. 582–83. Dr. Ginsburg agreed that under some circumstances, such as in end-of-life or palliative care scenarios, the combination could be appropriate. Tr. 591.

[24] Dispensing events such as those pertaining to specific patients, are the subject of stipulation by the parties and are set forth in a table in the Appendix to this recommended decision.

[25] Tr. 306–08; Gov't Ex. 3. Dr. Ginsburg testified that an additional opioid was also present. Tr. 307.

[26] Tr. 309–13. Dr. Ginsburg testified that she noted two opioids, a skeletal muscle relaxant, and a benzodiazepine. Tr. 311.

[27] Tr. 313–14. Dr. Ginsburg testified that she also identified an additional opioid. Tr. 314.

[28] Tr. 314–16.

[29] Tr. 316–17.

[30] Tr. 317–18

[31] Tr. 318–19.

[32] Tr. 319–20.

[33] Tr. 320–21.

[34] Tr. 321–22. Dr. Ginsburg testified that JMB49 and JMB50 are examples of drug combinations that are the subject of the FDA black box warning. Tr. 367–72; Gov't Ex. 67. She further explained that an FDA black box warning creates a red flag that requires resolution prior to dispensing. Tr. 371–72.

[35] Tr. 322–27.

[36] Tr. 327–30.

[37] Tr. 330–31.

[38] Tr. 331–32.

[39] Tr. 332–34.

[40] Tr. 335–37.

[41] Tr. 338–39.

[42] Tr. 340–43.

[43] Tr. 343–51; Gov't Ex. 15.

[44] Tr. 352–363; Gov't Ex. 18.

[45] Tr. 363–65.

[46] Tr. 374–75; Gov't Ex. 19.

[47] Tr. 375–78; Gov't Ex. 20.

[48] Tr. 379–81; Gov't Ex. 21.

[49] Tr. 381–83; Gov't Ex. 22.

[50] Tr. 383–84; Gov't Ex. 23.

[51] Tr. 385–88; Gov't Ex. 24. Dr. Ginsburg further testified that the disparity in strength among the prescribed benzodiazepines raised another variety of red flag that required (and did not receive) documented resolution prior to dispensing by the Respondent. Tr. 389–90.

[52] Tr. 390–93; Gov't Ex. 7.

[53] Tr. 393–94; Gov't Ex. 27.

[54] Tr. 394–96; Gov't Ex. 28.

[55] Tr. 322–27; Gov't Ex. 8.

[56] Tr. 330–31.

[57] Tr. 331–32.

[58] Tr. 332–35.

[59] Tr. 335–37.

[60] Tr. 340–43.

prescriber, Dr. GB. Tr. 435; Gov't Ex. 4 at 1. She identified pattern prescribing by Dr. GB relative to dispensing events JMB41,[61] JMB43,[62] JMB44,[63] JMB46,[64] JMB50,[65] PB2,[66] BE1,[67] TP1,[68] IJ1,[69] RS1,[70] RW1,[71] as well as multiple other dispensing events [72] that were not subject to stipulation, and thus, not contained in the Appendix.[73] The Government's expert also identified numerous quantity and strength pattern prescribing events relative to prescriptions that were issued by AH, a local nurse practitioner.[74] Tr. 502. In Dr. Ginsburg's opinion, dispensing events JB3 [75] and DL2 [76] involving AH-issued controlled-substance prescriptions demonstrated quantity and strength pattern prescribing indicia that were not resolved in the documentation supplied by the Respondent. Tr. 714. Likewise, she identified the following dispensing events on prescriptions issued by Dr. AP as reflecting the same red flag: CS1,[77] CS2,[78] PR1,[79] PR2,[80] and other un-stipulated dispensing events.[81] Dispensing events effected in the face of unresolved quantity and strength pattern prescribing red flags related to prescriptions issued by Dr. MM were also identified. Tr. 516. The following dispensing events on Dr. MM prescriptions were highlighted by Dr. Ginsburg: BB2,[82] KC1,[83] GC1,[84] VM1,[85] KD1,[86] as well as other un-stipulated dispensing events related to this doctor.[87] Additional dispensing events effected in the face of unresolved quantity and strength pattern prescribing red flags related to prescriptions issued by Dr. BJ were also identified. Tr. 527. The following dispensing events on Dr. BJ prescriptions were testified to by Dr. Ginsburg: JW1,[88] MS1,[89] PF1,[90] DW1,[91] and other non-stipulated dispensing events as well.[92] Dr. Ginsburg rendered her expert opinion (not contradicted on this record), informed further by her research based on the individual specialties of the respective prescribers,[93] that these prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice in Louisiana, and that none of the documented resolutions required to meet the minimal standard of care in Louisiana were evident in the paperwork supplied by the Respondent. Tr. 502–03, 505–06, 512–16, 526, 535–38, 550–52.

The third red flag presented by Dr. Ginsburg is distance prescribing, or controlled substance prescriptions presented to pharmacists by customers travelling a long distance to obtain prescriptions and get them filled at a specific pharmacy. Tr. 295. She described it as illogical that a customer, for no valid reason, would travel a significant distance to pick up a prescription at a particular pharmacy where others are closer. Tr. 296. According to Dr. Ginsburg, distance prescribing suggests that the customer is traveling to a particular ''pharmacy that would not question large quantities or large doses of certain prescriptions.'' Tr. 538. Like pattern prescribing, distance prescribing is a red flag that is amenable to resolution by contacting the prescriber and documenting the outcome. Tr. 295–97. Dr. Ginsburg testified that the distance information is generally procured upon customer intake and generally available on the pharmacy's patient profile. Tr. 296.

Dr. Ginsburg identified dispensing events PR1–PR2 (41.2 miles),[94] TB1–TB4 (174.2 miles),[95] KR1–KR2 (53 miles),[96] LW1–LW4 (45.8 miles),[97] and KJ1–KJ3 (80.3 miles) [98] as indicating distance prescribing red flags that were not the subject of documented resolutions by the pharmacists or staff at the Respondent pharmacy. Tr. 714. Dr. Ginsburg rendered her expert opinion that based on the unresolved distance red flags present, these prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice in Louisiana, and none of the documented resolutions required to meet the minimal standard of care in Louisiana were evident in the paperwork supplied by the Respondent. Tr. 549–52.

A fourth red flag outlined by Dr. Ginsburg is alternating methods of payment. Tr. 297. This red flag, according to Dr. Ginsburg, is present when a customer utilizes multiple payment methods to procure different medications, including but not limited to cash, private insurance, Medicaid or Medicare. Tr. 297–98, 398–99. Dr. Ginsburg opined that alternating methods of payment can be an indicator that a pharmacy customer is attempting to shield particular medication purchases, such as opioids, from insurance companies who may be on the lookout for diversion red flags, such as duplicative therapies and/or problematic medication combinations. Tr. 298–99. It is Dr. Ginsburg's view that the standard of care requires a dispensing pharmacist to identify, resolve, and document this type of diversion red flag, which can be accomplished by either consulting with the prescriber, a discussion with the customer, and/or analyzing the pharmacy patient profile. Tr. 302–03, 401–02, 415–16. According to Dr. Ginsburg, benign explanations for alternative methods of payment should be explained by pharmacy staff in the comment section of the pharmacy's software and there was no evidence of such documentation in the pharmacy records. Tr. 667–68, 714–15.

Dr. Ginsburg identified alternating methods of payment red flags regarding customers JMB,[99] DM,[100] KS,[101] and TD [102] but no indication that this red flag was identified or resolved by any pharmacist of pharmacy staff in any of the documentation procured from the Respondent. Dr. Ginsburg rendered her

[61] Tr. 475–76; Gov't Ex. 4.
[62] Tr. 476–77.
[63] Tr. 477.
[64] Tr. 477–78
[65] Tr. 478–479; Gov't Ex. 4 at 1.
[66] Tr. 479–80; Gov't Ex. 35 at 1.
[67] Tr. 481–82; Gov't Ex. 50 at 23.
[68] Tr. 493–94; Gov't Ex. 51 at 5.
[69] Tr. 494–95; Gov't Ex. 52 at 7.
[70] Tr. 495–96; Gov't Ex. 55 at 1.
[71] Tr. 498–500; Gov't Ex. 28 at 2.
[72] Tr. 482–84, 493–94, 496–97; Gov't Ex. 50 at 1.
[73] This feature about the Government's case was less than helpful.
[74] Tr. 779.
[75] Tr. 503–04; Gov't Ex. 19 at 14.
[76] Tr. 504–05; Gov't Ex. 40 at 1.
[77] Tr. 506–08; Gov't Ex. 37 at 1.
[78] Tr. 508; Gov't Ex. 37 at 1.
[79] Tr. 508–09; Gov't Ex. 39 at 1.
[80] Tr. 508–09; Gov't Ex. 39 at 1.
[81] Tr. 509–11; Gov't Ex. 39 at 1. *See* footnote 74.
[82] Tr. 516–17; Gov't Ex. 24 at 3.
[83] Tr. 519–20; Gov't Ex. 42 at 20.
[84] Tr. 521–22; Gov't Ex. 43 at 2.
[85] Tr. 522–23; Gov't Ex. 44 at 1.
[86] Tr. 524–26; Gov't Ex. 60 at 1.
[87] Tr. 519–22; Gov't Exs. 42 at 1, 43 at 2. *See* footnote 74.
[88] Tr. 527–28; Gov't Ex. 56 at 3.
[89] Tr. 529–30; Gov't Ex. 57 at 2.
[90] Tr. 531–32; Gov't Ex. 58 at 1.
[91] Tr. 533–34; Gov't Ex. 59 at 1.
[92] Tr. 528–35; Gov't Exs. 56 at 1, 57 at 2, 58 at 1, 59 at 1. *See* footnote 74.
[93] Tr. 594. Curiously, although the witness testified that she researched and factored in the practice areas of the prescribers into her pattern-prescribing conclusions, she conceded that she declined to include this analysis point in any of the prior reports she supplied to DEA during the run up to the hearing. Tr. 638–39. That said, Dr. Ginsburg gave credible and persuasive testimony that the practice areas of the prescribers did properly form part of the basis for the opinions she rendered during her testimony. Tr. 594, 639–41.
[94] Tr. 539–41; Gov't Ex. 39.
[95] Tr. 541–43; Gov't Ex. 46.
[96] Tr. 543–45; Gov't Ex. 47.
[97] Tr. 545–47; Gov't Ex. 48.
[98] Tr. 547–49; Gov't Ex. 49.
[99] Tr. 411–19, 422–24; Gov't Exs. 4, 68A at 3, 70A at 1.
[100] Tr. 424–26; Gov't Exs. 34, 68A at 34. Dr. Ginsburg also testified that in her opinion, there was evidence of duplication of therapy that was not addressed by the Respondent pharmacy prior to dispensing. Tr. 425–26.
[101] Tr. 427–29; Gov't Ex. 68A at 41.
[102] Tr. 429–34; Gov't Exs. 7, 8, 68A at 13.

expert opinion that these prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice in Louisiana. Tr. 423–26, 434, 550–52.

Notwithstanding brief, inconsequential, passing flashes of mild defensiveness exhibited during cross-examination, Dr. Ginsburg presented as an authoritative, careful, persuasive expert witness who provided her opinions dispassionately and without overt evidence of agenda. Additionally, Dr. Ginsburg's expert testimony stands largely uncontroverted, and for the most part unchallenged in any persuasive way on this record, and will be afforded controlling weight.

The Respondent's Case

Daren L. Vicellio

Daren Vicellio is and has been the General Manager of both Medical Pharmacy and Medical Pharmacy West (MP West) since 2011. Tr. 800. He testified that he is not a pharmacist,[103] but he is the son-in-law of Audrey LeTard, the current owner of Medical Pharmacy, Incorporated (MP, Inc.), the corporate entity which owns both pharmacies. Tr. 799, 803. Mr. Vicellio testified that (like his father-in-law [104]) he grew up in Zachary, Louisiana and attended Louisiana State University where he majored in Industrial Technology Safety. Tr. 801–02.

According to Mr. Vicellio, Zachary, Louisiana, where both the Respondent pharmacy and MP West are located, is a town of 17,000 to 18,000 people that lies about twenty miles north of Baton Rouge. Tr. 802. The Respondent pharmacy was established in 1968 by his late [105] father-in-law John LeTard, a pharmacist. Tr. 802, 805. Mr. Vicellio related that Mr. LeTard had a long, distinguished career as a pharmacist, first working for his own step-father (also a pharmacist) before opening his own pharmacy (the Respondent pharmacy) that has been doing business in the same location in Zachary since 1968. Tr. 803, 807–08. The late Mr. LeTard's accomplishments include a gubernatorial appointment to the Louisiana Board of Pharmacy (Louisiana Pharmacy Board or the Board) in 2008, serving as a board member at Lane Memorial Hospital for over two decades (nineteen as the hospital board's chairman), and a prestigious award from the American Pharmacists Association. Tr. 808, 839. Mr. Vicellio's testimony credibly depicts the late Mr. LeTard as a pillar of the local community, and the pride he conveyed at the hearing about his late father-in-law's accomplishments was palpable and genuine.

Mr. Vicellio provided much helpful background regarding the history of the Respondent pharmacy and MP, Inc. The two pharmacies operated by MP, Inc. collectively employ eight pharmacists, eight pharmacy technicians, six clerks, three office personnel, and two drivers. Tr. 842. Both pharmacies offer free delivery of prescriptions,[106] and a loyalty program for regular customers, which, according to the witness, is frequently used when a customer's insurance will not cover certain prescriptions. Tr. 845. Mr. Vicellio stated that there are several other pharmacies in Zachary: Walmart, Walgreens, CVS, and another independent pharmacy, Dry's Pharmacy. Tr. 808–09. He further stated that the Respondent pharmacy has always been the largest pharmacy in Zachary, ''more than double anybody else in town.'' Tr. 810. Within the time period of the ISO, October 2016 through October 2019, the Respondent pharmacy filled 798,255 prescriptions for 22,629 patients. Tr. 810–12. Mr. Vicellio stated that prior to the OSC/ISO, the Respondent pharmacy was ''very successful'' with a ''great reputation, not only in Zachary, but in the whole state of Louisiana.'' Tr. 814. He further stated that DEA has taken no action against the COR maintained by MP West, and that the Respondent pharmacy is still open for business; just not presently filling prescriptions for controlled substances. Tr. 814–15.

Mr. Vicellio recounted that when he first began work for Mr. LeTard at the Respondent pharmacy, he primarily handled scheduling and maintenance. Tr. 806. He took on a more prominent role in 2010 when his father-in-law was diagnosed with cancer. Tr. 806–07. As Mr. Vicellio explained, Mr. LeTard ''didn't know how the cancer was going to go and he wanted somebody that would be in place that he trusted and would take care of everything for him.'' Tr. 807. Mr. Vicellio testified that the Respondent pharmacy has a very large and loyal customer base and that they ''come from miles away because of the relationship we have with these customers.'' Tr. 815. After the OSC/ISO, The Respondent pharmacy has referred customers to MP West to fill controlled substance prescriptions but Mr. Vicellio explained that MP West ''is on the other side of town and a lot of the patients are coming from the other side that we're on and some of them do not want to go down there because there's too much of an inconvenience.'' Tr. 815–16. This has led to the Respondent pharmacy losing some customers. Tr. 816. By Mr. Vicellio's estimation, the level of business at the Respondent pharmacy has gone down from 900 prescriptions per day to about 600 prescriptions per day. *Id.* He further testified that at the time the OSC/ISO was served, controlled substance dispensing constituted about fifteen percent of the prescriptions filled at the Respondent pharmacy. Tr. 817. Mr. Vicellio also represented that the Respondent pharmacy was not making significant profits from improperly filled controlled substances.[107] Tr. 844. As a result of the OSC/ISO, the percentage of controlled substance prescriptions filled at MP West has gone up. Tr. 818. Mr. Vicellio testified that the DEA has been informed of this development to account for the upswing in that pharmacy's controlled substance traffic. *Id.* The Respondent pharmacy has also posted a notification in their store informing customers that it is currently unable to fill controlled substance prescriptions. Tr. 819. He describes the OSC/ISO as a ''black eye in the community'' of pharmacists and pharmacies.[108] *Id.*

Mr. Vicellio testified that as a result of the OSC/ISO, the MP, Inc. pharmacies no longer fill controlled substance prescriptions issued by Dr. GB, a physician whom Dr. Ginsburg identified during her testimony as a pattern prescriber. Tr. 820, 861. The Respondent pharmacy also lost one of its wholesalers following the OSC/ISO. Tr. 821–23. According to Mr. Vicellio, because this wholesaler was no longer able to claim rebates from manufacturers without the Respondent pharmacy maintaining an active COR, it

[103] Mr. Vicellio testified that he held various positions with the United Parcel Service (UPS) and a hunting retreat called Bush Hill Plantation. Tr. 804. Bush Hill Plantation, like the Respondent pharmacy, was owned by the late Mr. LeTard. Tr. 805–06.

[104] Tr. 807.

[105] Mr. Vicellio testified that his father-in-law, Mr. LeTard, passed away from cancer in 2016. Tr. 802–03.

[106] Tr. 842.

[107] According to Mr. Vicellio, the market is locally competitive, with only a modest profit margin on drugs. Tr. 844.

[108] Mr. Vicellio further related how painful it was to inform his mother-in-law, Mrs. LeTard, the owner of MP, Inc., of the OSC/ISO and its consequences. Tr. 834. According to Mr. Vicellio, his father-in-law ''brought [him] into the [Respondent pharmacy] to be the manager when he was gone and to also make sure the [Mrs. LeTard] was taken care of.'' Tr. 833–34. Mr. Vicello explained his relationship with Mrs. LeTard this way: ''[B]asically, she is the owner. I am the general manager and I run both [MP, Inc. pharmacies]. I report to her. But my job is to let her enjoy life and not be worried about these [pharmacies] and that's what my goal is to achieve here, and make sure we get everything up and running correctly and do it the right way.'' Tr. 834. Mr. Vicellio testified that he feels that he ''let [his mother-in-law] down by getting this ISO.'' Tr. 854.

sought to pass the added costs onto the Respondent pharmacy.[109] Tr. 822–23. Mr. Vicellio also related that Morris & Dickson, a drug distributor, also will no longer sell controlled substances to MP West because of the OSC/ISO affecting the Respondent pharmacy. Tr. 823.

Mr. Vicellio testified that when the first two administrative subpoenas from DEA arrived, his sense was that prescribers, not the Respondent pharmacy, were the focus of the investigation. Tr. 825. When asked to supply data from the comment fields in response to one of the administrative subpoenas, Mr. Vicellio testified that not all of the requested information was provided because ''[i]t was probably nothing to supply. There were no comments.'' Tr. 862. It was Mr. Vicellio's position that blank comment sections were not supplied because of the difficulty in retrieving that information from legacy software that had been replaced. Tr. 864–65. He explained that the pharmacy ''[has] all the prescription records like we're supposed to'' but in order to print the comment sections ''we had to go back into the old software, which we don't really have a license for anymore.'' *Id.* DEA personnel who served the OSC/ISO seized paper documents but the pharmacy computers were not imaged.[110] Tr. 865.

During his testimony, Mr. Vicellio (a non-pharmacist) admitted that he did not know what a diversion red flag was until the OSC/ISO was served. Tr. 832–33. He stated that he is now aware that the trinity cocktail prescriptions posed potential harm to the patients taking them. Tr. 825–26. Although the Respondent pharmacy was presumably manned by qualified pharmacists and staff, its manager, Mr. Vicellio, testified that the first inkling that the organization had anything amiss was upon the service of the OSC/ISO that forms the basis of this case. *Id.*

Mr. Vicellio testified that upon studying the OSC/ISO, he understood that the Respondent pharmacy was, as he put it, ''deficient in some areas,'' and he began formulating a strategy to help ensure compliance in the future. Tr. 830. Written policies and procedures for both pharmacies were (for the first time)[111] developed. *Id.* Interestingly, Mr. Vicellio testified that prior to the written policies generated by MP, Inc. after the OSC/ISO, ''[i]t was for the pharmacists—each pharmacist's professional judgment to make the call on prescriptions.''[112] Tr. 833. James Bryce (the Respondent's other witness in this case), the MP West pharmacist in charge (PIC), was designated as the newly-created compliance officer for both MP, Inc. pharmacies. Tr. 830. Mr. Vicellio testified that Mr. Bryce was selected for this role because he is ''the most knowledgeable'' of their pharmacists and ''a stickler for rules.'' Tr. 831. On December 22, 2019, a mandatory training session[113] was conducted for the employees of both MP, Inc. pharmacies (although only MP West is currently authorized to handle controlled substances) about new policies and procedures where the staff was informed that ''if somebody doesn't do it the right way they are not going to be employed with us.'' Tr. 832, 850. Mr. Vicellio testified that the policies and procedures recently adopted at MP West to handle the filling of controlled substance prescriptions are ready to be implemented at the Respondent pharmacy if its COR is reinstated.[114] Tr. 848. All of the pharmacists at both locations have learned these new protocols and worked at MP West during the implementation phase. Tr. 848. Inasmuch as no new staff members have been added since the mandatory training, all MP, Inc. pharmacists and pharmacy technicians have had this training. Resp't Ex. 2; Tr. 850.

Mr. Vicellio acknowledged that he understands that the CSA and its associated regulations did not suddenly materialize in 2019 and that operating a pharmacy is a highly-regulated activity. Tr. 834–35. He is likewise aware that pharmacists, as practitioners in this area, have legal obligations that must be followed for them to engage in this highly regulated activity. Tr. 835. Mr. Vicellio theorized that one problem may have been that the previous practice of the staff at the MP, Inc. pharmacies was to stay current by exclusively reviewing publications from the Louisiana Pharmacy Board, which (apparently to his knowledge) did not contain references to cocktail prescribing or diversion red flags. Tr. 835, 840. Mr. Vicellio, somewhat incongruently, acknowledged that the pharmacists he employs bear a responsibility to follow not only Louisiana state law, but also the CSA, its ensuing regulations, and rulings by the DEA Administrator. Tr. 866. Needless to say, shifting the blame for non-compliant pharmacists and staff to the supposed quality of materials available from the Louisiana Pharmacy Board did not serve to enhance the Respondent's presentation in this regard.[115] From his perspective, as a non-pharmacist, Mr. Vicellio testified that he assumed that the pharmacists he hired were properly trained and would ensure the business's compliance with applicable laws. Tr. 836. However, even in the face of Mr. Vicellio's acknowledgement that the pharmacists and staff he employed at the Respondent pharmacy were clearly delinquent in following unequivocal federal, state, and professional standards, not a single pharmacist or employee from the Respondent pharmacy has been fired or disciplined. Tr. 836–37. The past notwithstanding, Mr. Vicellio testified that he has confidence in his employees and expects that they will (now) comply with the new policies and procedures. Tr. 843.

As the general manager of both MP, Inc. pharmacies, Mr. Vicellio is inherently and inescapably imbued with the greatest motive attached to the outcome of the case. While his position, standing alone, is not fatal to his credibility, it certainly must be factored into the equation. Further, this witness acknowledged that he feels personally responsible for the Respondent pharmacy's transgressions, and that he let down his mother-in-law by running a pharmacy that was closed down by an ISO. Tr. 833–34. Objectively, the motivations to minimize culpability and maximize the scope of remedial steps and acceptance of responsibility (all of which he arguably did) are certainly present. As discussed, *supra,* Mr. Vicellio's subtle attempt to shift the responsibility for substandard dispensing to reliance on his

[109] Mr. Vicellio testified that this added cost applied to controlled and non-controlled drugs. Tr. 820–22.

[110] Interestingly, although the CSA authorizes the seizure of all controlled substances upon the service of an OSC/ISO, 21 U.S.C. 842(f), Mr. Vicellio testified that the DEA personnel on scene did not confiscate the controlled substances on hand at the Respondent pharmacy, but instead permitted the drugs to be transferred to MP West. Tr. 828–29. This was an act of lenity for which Mr. Vicellio acknowledged he was ''very thankful.'' Tr. 829.

[111] Mr. Vicellio stated that prior to the OSC/ISO there were no established procedures for identifying and resolving red flags. Tr. 833. He acknowledged that prior to the OSC/ISO, neither of the MP, Inc. pharmacies had written policies and ''that's on [him].'' Tr. 837. The Respondent pharmacy did not have written policies because Mr. LeTard did not have written policies and Mr. Vicellio did not previously appreciate their necessity. Tr. 838.

[112] A disorganized document, which purports to be filled with controlled substance scrips that had been presented to and rejected by pharmacists and staff at the Respondent pharmacy, and which was titled ''Medical Pharmacy's Due Diligence File—Pre-ISO,'' was received into the record. Resp't Ex. 3; Tr. 857–58.

[113] An attendance roster of MP, Inc. employees who attended the training session was received into the record. Resp't Ex. 2; Tr. 849–51.

[114] A 16-page controlled substance policy document for the MP, Inc. pharmacies was received into the record. Resp't Ex. 1; Tr. 847–49.

[115] At the behest of his counsel, Mr. Vicellio conceded that the absence of these references does not constitute a defense to the charges. Tr. 841.

subordinate pharmacists and staff, as well as perceived deficiencies with materials published by the Louisiana Pharmacy Board undermined the reliability that can be attached to his representations of contrition. Tr. 836–37. Likewise, even accepting the fact that he is not a pharmacist, to have so little professional curiosity in the regulatory requirements of the pharmacies he manages that he plead complete ignorance of the concept of red flags of diversion is hardly an attribute that can inspire confidence in the Agency's decision to re-entrust him with the weighty responsibility of a COR. Tr. 825–26. It is quite telling that his newly-generated compliance program was spearheaded by the MP West PIC, with virtually no input (at least none apparent on this record) from the PIC assigned to run the Respondent pharmacy. Tr. 830–32. More telling still is Mr. Vicellio's recognition that he relied on the knowledge and professionalism of the Respondent pharmacy's pharmacists and staff, but yet took no adverse action against any employee when it became obvious that they fell far short of their obligations. Tr. 836–37.*[D] There were no perceptible consequences to anyone responsible.

That is not to say that Mr. Vicellio presented as a wholly incredible witness; he certainly did not. There were many aspects of his testimony that were helpful and merit belief, such as important history and background information regarding the MP, Inc. pharmacies, the progress of the investigation, the impact on the Respondent pharmacy's operations, and the palpable regret he feels that the Respondent pharmacy (his mother-in-law's pharmacy), received an OSC/ISO from DEA to preserve public safety. Mr. Vicellio supplied testimony that was detailed, internally consistent, and generally plausible, and overall, he presented as a generally credible witness with no pronounced contradictions from other sources in the record.

James W. Bryce, II

The Respondent presented the testimony of James W. Bryce who is and has been the pharmacist in charge (PIC) for MP West, serves as a staff pharmacist at the Respondent pharmacy, and was appointed by Mr. Vicellio to the newly-created position of compliance officer for MP, Inc. Tr. 873–74. Over Government objection,[116] Mr. Bryce was tendered [117] and accepted [118] as an expert witness in the areas of pharmacy and pharmacy practice in Louisiana. Tr. 889, 893.

Mr. Bryce testified that after some service as an Army medic, he enrolled in college, and in 1999 was awarded a degree in Pharmacy from what is now the University of Louisiana Monroe. Tr. 874–76. Mr. Bryce was first licensed to practice pharmacy in 1999, and has been continuously employed as a pharmacist from that time forward. Tr. 878.

Soon after securing his first pharmacist position as a line pharmacist as Walgreens, Mr. Bryce, by his recollection, was promoted within the company to a pharmacy manager and various positions of increased responsibility. Tr. 878–79. Mr. Bryce testified that after his time at Walgreens, he spent two years working at an independent mail-order pharmacy, and secured his current position from the late John LeTard at the Respondent pharmacy in 2012. Tr. 880–82.

Mr. Bryce described the high level of business routinely encountered at the Respondent pharmacy. He recalled specifically that his first day on the job was ''quite eye-opening'' and that in his twenty-one years of being a pharmacist he ''had never seen a single pharmacy fill that many prescriptions.'' Tr. 885. He described the situation as ''very intimidating at first'' and characterized what he saw as ''controlled chaos.'' *Id.* On an average day at the Respondent pharmacy, there would be four or five pharmacists working with six to eight pharmacy technicians. Tr. 886. In describing the staffing at the Respondent pharmacy, Mr. Bryce stated that, besides him, there are six pharmacists on duty at that store and another two on the job at MP West. Tr. 883. Shifts last the entire day for all pharmacists beginning at 8:30 a.m. and finishing at 6:00 p.m. *Id.* The pharmacy is closed on Sundays and has a shorter shift on Saturday from 8:30 a.m. to 4:00 p.m. Tr. 884. While every pharmacist does not work every day, on busier days all six are present. Tr. 883. Mr. Bryce described certain holiday weekends, especially the Monday after Labor Day Weekend, as ''Black Friday'' in which 1,700–1,800 or more prescriptions are filled in a single day. *Id.* In Mr. Bryce's estimation, on a typical day before the ISO, the Respondent pharmacy would fill approximately 1,000 prescriptions. Tr. 884.

Mr. Bryce testified that the position of compliance officer was created by the MP, Inc. in response to the ISO, and that he is the first person to hold the job. Tr. 887–888. Before the ISO, the Respondent pharmacy had no procedures, written or otherwise, for responding to diversion red flags. Tr. 895–96. Mr. Bryce acknowledged that he is not, and has never been the PIC at the Respondent pharmacy, a position that is, and at all times relevant to these proceedings has been, held by Charles Blaine Fontenot, who was not called as a witness by the Respondent.[119] Tr. 896. Mr. Bryce did not know why Mr. Fontenot was not present for the hearing or why he was not called as a witness. Tr. 897–98. Even though Mr. Fontenot is still the PIC for the Respondent pharmacy, there is no indication in the record that the Respondent pharmacy PIC was involved in the post-ISO procedures, and none that Mr. Bryce has been involved with the pre-ISO procedures at the Respondent pharmacy. Tr. 899. In the absence of an established policy (that is, prior to the ISO), it was for ''[e]ach pharmacist, up to their discretion'' how to handle a red flag. *Id.* Pharmacists also did not document resolution of any red flags. *Id.* [Omitted for brevity.]

Mr. Bryce admits that the pharmacy's documentation was ''one hundred percent lacking in certain areas'' and that where there was documentation, it was more akin to ''internal recordkeeping.'' *Id.* The pharmacy kept something that Mr. Bryce referred to as the ''due diligence binder'' to document instances when prescriptions were not filled ''in anticipation of having problems.'' Tr. 899–900. In terms of how it was used, Mr. Bryce said that he and the other pharmacists would ''add stuff'' to the binder if there was an issue with a prescription. Tr. 901. This single voluminous binder was not in alphabetical order or organized in a way where the pharmacists could reliably keep track of problematic prescriptions. *Id.* He stated that when a pharmacist accessed this binder, it was generally to put something in it. Tr. 902. He could not recall for certain whether he ever accessed the binder in deciding whether or not fill a particular prescription stating that sometimes he would ''put certain items in there that triggered a memory of a situation.'' Tr. 903. Thus, it appears that every time a pharmacist at the Respondent pharmacy declined to fill a controlled substance prescription, a copy of the prescription was placed

*[D] Omitted for clarity.

[116] Tr. 891.

[117] Tr. 889.

[118] Tr. 894.

[119] No explanation was offered by the Respondent as to why PIC Fontenot was not called as a witness, and the record revealed no indication of any issue regarding the availability of the Respondent pharmacy PIC, or any issue that would make him unamenable to process. Tr. 897–98, 1063–64.

(in no particular order) into a binder and mostly ignored and forgotten. Tr. 901–03. As described, it seems clear that the ''due diligence'' file had very little do to with any diligence due, but was essentially a vessel created to store declined scrips in no order that was in any way amenable to retrieval or even monitoring. Tr. 900–04. [Omitted for brevity.]

Mr. Bryce noted that he and the other pharmacists ''should have documented more in the computer system'' but they failed to. Tr. 901. He added that since the ISO, he has ''definitely learned a lot'' about when and how documentation should occur. Tr. 900. He surmised that part of the reason why he was put in charge of compliance was his ''willingness to hold people's feet to the fire'' in following the new procedures. *Id.* According to Mr. Bryce, the computer system that the pharmacy now uses (Pioneer) tracks the identity of the pharmacist who dispensed a particular prescription. Tr. 911–13. Mr. Bryce noted his obligations under the Louisiana Administrative Code [120] to keep records of dispensing events. Tr. 911–12.

According to Mr. Bryce, even prior to the ISO, the Respondent pharmacy would refuse to fill a prescription if upon checking the PMP it was clear that the patient was filling prescriptions for controlled substances at other pharmacies. Tr. 928. Mr. Bryce described using the PMP to prevent ''pharmacy hopping'' or ''doctor shopping''. *Id.* The Respondent pharmacy has also refused to fill prescriptions for pain medication that did not come from a pain specialist. Tr. 929. Mr. Bryce explained that if the patient profile and the PMP data both showed that a patient was receiving pain medication from a physician who was not a pain specialist, oncologist, hospice specialist, or physical rehabilitation specialist, the pharmacists at the Respondent pharmacy would refuse to fill the prescription and explain to the patient that they need to be seeing a specialist. Tr. 930. The Respondent pharmacy maintained no list of prescribers whose prescriptions it refused to fill, but eventually concluded that there was an issue with a single, local provider, Dr. GB, a practitioner whose name factored heavily in the Government's case. Tr. 931. Mr. Bryce stated that the pharmacists at the Respondent pharmacy were aware that Dr. GB was having potential criminal issues with the DEA and would ''call daily'' to see if Dr. GB's COR was still active. *Id.* Thus, it was not Dr. GB's pattern prescribing that ultimately black-listed him from the Respondent pharmacy, but his legal troubles with DEA and warnings from a wholesaler.[121] Tr. 1055. Mr. Bryce was likewise apparently unimpressed with any indicia that Nurse Practitioner (NP) AH was, as the Government's expert determined, a pattern prescriber because he was familiar with her prescribing. Tr. 1034–40. Mr. Bryce discounted the evidence of NP AH's pattern prescribing, with the assurance that he is ''familiar with her practice and her prescribing abilities.'' Tr. 1038. The witness provided the following explanation about the opinions he has formed in his community about prescribers, including NP AH:

> I would say that [our opinions on reputation] are reliable opinions that we have on them. So we get a feel as far as whether we would trust them personally as well. Because it's our family, friends and our neighbors that are going to these prescribers, for the most part.

Tr. 1040.

On the issue of pharmacy shopping, Mr. Bryce allowed that in the past when he has encountered situations where Respondent pharmacy customers were getting controlled substance prescriptions dispensed to them at multiple pharmacies, he would insist that all controlled substance prescriptions be filled at the Respondent pharmacy. Tr. 932. Mr. Bryce testified that he was involved in Medication Therapy Management (MTM) as part of managing Medicare Part D plans. Tr. 933. He stated that Medicare would send lists of patients who needed a complete medication review. *Id.* Mr. Bryce would review the patients' medications with them and often explain to them, if only pain medications were on file with the Respondent pharmacy, that unless they filled all of their prescriptions at his pharmacy, they could not continue filling those customers' pain medications. *Id.* Mr. Bryce testified that he was able to ascertain that pharmacists at the Respondent pharmacy queried the state PMP system over 18,000 times between 2016 and 2019. Tr. 934. Mr. Bryce stated that checking the PMP prior to dispensing all controlled substances is now a requirement under the new MP, Inc. post-ISO protocols, and that this is a step beyond what is required under state law. Tr. 935–36.

Mr. Bryce stated the new post-ISO procedure requires the pharmacists to make a notation on the hard copy of a declined controlled substance prescription, and the declined, annotated prescription must be scanned into the Respondent pharmacy's computer system. Tr. 938–39. He further explained that hard copies of this information are currently in a box that he needs to alphabetize, but the electronic information is available with the patient profile. Tr. 939. The new Pioneer software brings up a comments section anytime a prescription is accessed which allows the pharmacist to document any issues. Tr. 941. Under the post-ISO policies, the Respondent pharmacy also will no longer fill prescriptions where there is a morphine milligram equivalent (MME) greater than 90 without written prior authorization. Tr. 942. As far as Mr. Bryce understands, a comment section is not generated on a patient profile until a comment is entered. Tr. 943. Mr. Bryce estimates that around fifteen percent of the prescriptions that the Respondent pharmacy filled during the period referenced in the ISO were for controlled substances. Tr. 945. He confirmed that this information was of interest to the Respondent pharmacy's wholesalers because they preferred their customers to remain within a certain ratio. Tr. 946. Mr. Bryce indicated that he now understands certain combinations of controlled substances, including the ''trinity,'' to be a ''hard stop'' or unresolvable red flag. Tr. 950. He also indicated that prior to the ISO, the pharmacy's software did not register the combination of an opioid, a benzodiazepine, and carisoprodol as problematic and flag it accordingly. Tr. 952. The pharmacists now have the ability to flag that combination for individual patients. Tr. 952–53. They now ''won't touch a Soma [122] prescription with a ten-foot pole.'' Tr. 953.

Under the post-ISO procedures, if a prescription is not filled, the pharmacist will make a copy of it, log it in the PMP, and return the prescription to the patient unless the prescribing physician cancels it. *Id.* However, they will make

[120] This tribunal took official notice of the Louisiana Administrative Code § 1123. Tr. 914–15.

[121] There is no indication in the record that Dr. GB's on-again-off-again DEA registration status provided any sort of a clue to the Respondent's pharmacists and staff that dispensing controlled substances for this prescriber might be problematic. It seems that so long as Dr. GB held a current registration on the day the prescription was presented, his patients could fill any number of prescriptions at the Respondent pharmacy. The record is unclear as to whether any of the written materials disseminated by the Louisiana Pharmacy Board specifically informed its regulated community that continuing to dispense for a practitioner who keeps losing and regaining his DEA registration on a day-by-day basis could potentially raise concerns for a pharmacist.

[122] Soma is a common brand name for carisoprodol.

a notation on the prescription as a means of notifying the next pharmacy where they may attempt to fill it. Tr. 954. Mr. Bryce created the new policies and procedures which are now in effect at MP West, over the weekend (that is, over one weekend) after the ISO was served on the Respondent pharmacy. Tr. 957. He decided that MP, Inc. pharmacies should no longer fill prescriptions from Dr. GB, because one of their wholesalers indicated that they would no longer do business with them if they continued to fill his prescriptions. Tr. 957, 1055.

Mr. Bryce explained how MME levels would be factored into dispensing decisions in the post-ISO protocol. For an MME range of zero to fifty, the pharmacist will look at the frequency of refills, which pharmacies the patient has patronized, and the prescribing physician. Tr. 961. For MME ranges between fifty and ninety, the prescription must be from a specialist, and a PMP report must be generated. Tr. 959, 961. For MMEs over ninety, all of the above precautions are taken but end-of-life palliative care is given ''a little more leeway.'' Tr. 962. Mr. Bryce described MMEs over ninety as a ''hard stop'' meaning that more monitoring and discussion with the patient is required. *Id.* When faxing the prescriber a prior authorization form, a copy of the patient's PMP report is also sent as a way of confirming that the doctor is intending to prescribe a given MME. Tr. 964–965. The pharmacists are instructed to inform the prescribing physician that the prescription will not be filled until they fill out the prior authorization form and send it back to the pharmacy. Tr. 965. Mr. Bryce got a prior authorization form from the Louisiana Pharmacy Board. *Id.*

Mr. Bryce mentioned that other pharmacists in the area have contacted him about the post-ISO procedures and that some of those pharmacists have indicated (to him) that he has a reputation in the Baton Rouge area pharmacy community as a ''hard-ass.'' Tr. 969. He admitted that prior to the ISO, the Respondent pharmacy was filling ''trinity'' cocktail prescriptions, a practice which he now has concluded, in his new, enlightened estimation, ''we should never have done.'' Tr. 975. He stated that ''even though it wasn't reported to us through any state means,'' he now understands [*E] he cannot fill prescriptions of this type. *Id.* He recounted that he and the other pharmacists at the Respondent pharmacy knew, for example, customer JMB who had been in an accident and was prescribed the trinity cocktail as part of treatment for injuries. Tr. 977. Because the Respondent pharmacy staff had some measure of an existing relationship with customer JMB, abuse or diversion was not suspected, and the medications were dispensed. *Id.* The tenor of Mr. Bryce's testimony [*F] in this regard gave the clear impression that he feels that the decision to dispense the trinity to JMB was not incorrect based on the Respondent pharmacy's understanding of the customer and his injuries, but that the pharmacy will simply no longer dispense this combination because this is the only way (reason and judgment notwithstanding) to comply with federal law.

Like Mr. Vicellio, Mr. Bryce found it significant that the Louisiana Pharmacy Board has not put out any information about the trinity cocktail in their published literature, but (accurately) conceded that this lack of information did not excuse the Respondent pharmacy's failures in this regard. Tr. 977–78. Mr. Bryce further explained that the Texas Board of Pharmacy publications do provide, in Mr. Bryce's view, a much more thorough treatment of this issue.[123] Tr. 978. Regarding what Mr. Bryce (like Mr. Vicellio) perceives as a failure on the part of the Louisiana Pharmacy Board with respect to the absence of red flag treatment in its literature, he offered that the Board had ''nothing published, and once again, [he] wish[ed] they would emulate what the Texas [Pharmacy] Board has done.'' Tr. 979. Mr. Bryce stated that the ISO experience has prompted him to become more involved in the Louisiana pharmacy community because ''if neighboring states are providing this information to their pharmacists, it should definitely be available'' ''even though it's still no excuse for us filling [controlled substances in the face of diversion red flags].'' *Id.* He stated that he knows the trinity cocktail is filled at other pharmacies in the area. *Id.* In fact, he is aware that customers who formerly filled such prescriptions at the Respondent pharmacy are now filling them elsewhere. *Id.*

Mr. Bryce also agreed that combination prescribing of an opioid with a benzodiazepine is ''definitely a concern'' to a patient's health. Tr. 980. He stated that prior to the ISO, this was a ''common combination'' that the pharmacy would see and now acknowledges that dispensing this combination [without documenting warnings to the patient] was ''a violation of our corresponding responsibility,'' but his concession in this regard is hardly unqualified. *Id.* Mr. Bryce's admission that Respondent pharmacy personnel ''did not document our warnings to the patient or the prescriber,'' is interesting because the record is devoid of any indication that such warnings were issued in any manner.[*G] *Id.* The witness's answer arguably supplies the (unsupported) impression that such warnings were given, but not documented.

According to the Respondent pharmacy's post-ISO procedures, carisoprodol will not be filled at all.[124] Tr. 982. With respect to combinations of opioids and benzodiazepines, Mr. Bryce is apparently unconvinced that all such combinations constitute diversion red flags that require scrutiny on the part of a DEA-registered pharmacy. Tr. 985, 989. According to Mr. Bryce, sometimes these prescription combinations can emanate from two different prescribers. Tr. 985. For example, sometimes a primary care provider will prescribe the benzodiazepine and a pain management specialist will prescribe the opioid such that the patient is not necessarily ''doctor shopping.'' Tr. 985. The witness explained that following the implementation of the post-ISO policies that require prescriber contact, multiple prescribers have discontinued benzodiazepine prescriptions. Tr. 986–87. Under the Respondent's post-ISO

[*E] Omitted for clarity.

[*F] Because the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings regarding demeanor set forth in his recommended decision are entitled to significant deference. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951); *Jeffery J. Becker, D.D.S., and Jeffery J. Becker, D.D.S., Affordable Care,* 77 FR 72387, 72403 (2012). I find the Chief ALJ's characterization of Respondent's reaction in making these statements to be important in this case, where, as I have addressed more thoroughly *infra,* at Respondent's Exceptions, Respondent's witnesses have made general statements that seem to accept full responsibility while also making statements that tend to undermine that acceptance of responsibility.

[123] Mr. Bryce was never offered or accepted as an expert in the controlled substance prescribing standards in Texas. Based on his background as represented, there is no basis upon which to find an opinion as to his competence to speak to Texas law or controlled substance dispensing in Texas. In the absence of objection, Mr. Bryce provided an affirmative answer to the question of whether he had ''seen [or] become exposed to the Texas Board of Pharmacy [ ] in terms of [ ] the information that it was passing out to its members.'' Tr. 978.

[*G] Edits were made to this sentence to conform to the insertion in the previous sentence.

[124] This new policy is puzzling. The record contains no citation as to why declining to dispense an FDA-approved, DEA-controlled medication, such as carisoprodol, would render a registrant somehow in greater compliance. If anything, this policy suggests that the Respondent pharmacy and its staff are essentially throwing up their hands and banning the filling of potentially legitimate prescriptions based presumably on a lack of ability to discern legitimate carisoprodol prescriptions from illegitimate ones.

polices, if this combination is dispensed, a print-out of the FDA's warning about this combination gets attached to the patient's prescription package. Tr. 987–88. Mr. Bryce stated that his interpretation of the FDA guidance was that there was no intended ''hard stop'' to trinity combination prescribing, and that based on an article he read in the Journal of the American Medical Association (JAMA), there has been only a modest national decline in prescribing combinations of opioids and benzodiazepines since the publication of the black box warning. Tr. 989. Thus, on the one hand, Mr. Bryce acknowledges that the dispensing of trinity-combination prescriptions is problematic,[125] but on the other, he cites authority and his own conclusions for the proposition that the black box warning was not a definitive statement,[126] and had a negligible impact on professional prescribing. Indeed, much of Mr. Bryce's testimony strode an odd line between contextualizing and minimizing responsibility [omitted for brevity].

Regarding alternating payment methods, Mr. Bryce explained that among the first steps taken by a pharmacy upon presentation of a prescription is to input data and evaluate whether and to what extent available insurance will cover the cost of the medication. Tr. 993. According to Mr. Bryce, pharmacies ''get [insurance] rejections all day long.'' *Id.* He further explained that on Medicare Part D and Medicaid plans, the coverage is very restrictive and the plans sometimes require prior authorizations or simply do not cover certain medications. Tr. 994. He explained that the Respondent pharmacy has a loyalty plan to compensate for high co-pays or gaps in insurance coverage. *Id.* Sometimes, customers will use the loyalty plan instead of insurance if it is less expensive. Tr. 992. However, he stated that even before the ISO, if a patient/customer asked the pharmacist to ''run it off [their] insurance'' that always ''perked [their] ears up'' and prompted the pharmacists to first run the prescription through insurance. Tr. 995. If a drug is not covered, the pharmacist will give the option to pay cash and use the loyalty program. Tr. 996. However, if a prior authorization is required for insurance coverage of a medication, the pharmacist will give the patient/customer the option of either waiting for the prior authorization to come through or paying cash. Tr. 996–97.

[125] Tr. 1061.

[126] Tr. 989.

Mr. Bryce was apparently unwilling to confess error regarding all potential alternate payment method red flags cited by the Government's case-in-chief. In reference to patient LC, who filled two prescriptions for oxycodone-acetaminophen one week apart and used insurance for one but cash for the other, Mr. Bryce remarked that he (still) believes that no diversion red flag is indicated. Tr. 998. Rather, he stated that, to him, these are no more than indicia of an opioid naïve patient or an insurance plan that will only pay for a seven day supply of opioids. Tr. 999. He indicated that this a common phenomenon. *Id.* He also stated that there was a recent change in Louisiana law limiting opioid prescriptions to opioid naïve patients to a seven day supply. *Id.* Otherwise, the prescriber must indicate on the prescription that the larger supply is medically necessary. Tr. 999–1000. Regarding patient BB, who had two prescriptions filled close together for benzodiazepines, Mr. Bryce recounted that one of those prescriptions was from a cardiologist who routinely prescribes low doses of benzodiazepines to help patients with the anxiety of getting a stent procedure. Tr. 1005–06. Based on his knowledge of both the patient and the prescriber, Mr. Bryce does not believe that this situation (ever) presented as a red flag. Tr. 1006–07.

Mr. Bryce elaborated that in his entire time working at the Respondent pharmacy, he has never had even an hour pass without an insurance rejection. Tr. 1008. He further explained that employees at the Respondent pharmacy have access to a system called Appriss, which allows for the sharing of PMP data across state jurisdictions. Tr. 1010. If a patient comes in who is not local, the Respondent's pharmacists, in the post-ISO environment, will now run PMP data through Appriss to check the information from neighboring states. *Id.* Mr. Bryce described how more complete information, including PMP reports, will now be included in the new and improved due diligence file. Tr. 1014, 1018–25; Resp't Ex. 4 at 1–4. He additionally described how both pharmacies [omitted] [*H] subscribe to an FDA publication called *Drug Facts and Comparisons* which lists [the recommended and maximum dosages of controlled substances].[127] Tr. 1032–34.

He also admitted that he believes the Louisiana standard prior authorization form existed before the ISO, but he was not previously aware of it.[*I] Tr. 1057. He stated that he was previously aware that the drugs which constitute the trinity cocktail are all drugs of concern for abuse and diversion. Tr. 1061.

[Omitted for brevity.] He testified that a number of Respondent pharmacy patients who traveled long distances to fill their prescriptions at the Respondent pharmacy had been customers for many years. Tr. 1044–45. Mr. Bryce essentially chalked up distance prescribing as it pertained to the Respondent pharmacy as outside the realm of a legitimate red flag requiring analysis and documentation. In discussing the issue on the stand, Mr. Bryce provided his thought process:

[*H] Respondent objected to the Chief ALJ's statement that Mr. Bryce, ''described how both pharmacies *now* subscribe to an FDA publication called *Drug Facts and Comparisons* . . .'' Resp Exceptions, at 13–15 (emphasis added). In a footnote, the Chief ALJ went on to say ''it is bewildering to fathom why this important source only became available to the Respondent's pharmacists after the service of the ISO in this case.'' RD, at n. 127. As grounds for its objection, Respondent explained that the Chief ALJ incorrectly concluded that Respondent only started subscribing to the publication after the ISO. *Id.* As the relevant testimony occurred generally while Mr. Bryce was testifying regarding changes to Respondent's policies and procedures following the ISO and the testimony is not particularly clear on the issue, I understand how the Chief ALJ reached his conclusion. However, I credit Respondent's position that this was not the meaning of Mr. Bryce's testimony and I have made edits accordingly. The Respondent further objected that the publication's purpose is not to ''list available treatments for various medical conditions,'' but to list ''the recommended and maximum dosages for the controlled substances at issue.'' Resp Exceptions, at 15. I agree with Respondent on this point and I have made changes accordingly. However, these technical edits do not impact my decision in this matter and I still find that Respondent's remedial measures, particularly in light of Respondent's failure to unequivocally accept responsibility, are insufficient to for me to entrust Respondent with a registration.

[127] Omitted as set forth in *supra* n. *H.

[*I] Respondent, in its Exceptions, objected to the Chief ''ALJ's finding regarding the prior authorization form's purpose.'' Resp Exceptions, at 16. The Exception proceeds to address an argument made by the Government in its Posthearing Brief that the form existed to help pharmacists resolve potential red flags. *Id.* The Exceptions explain the legislature's intent in creating the form, including the intended purpose of the form, and claim that ''Medical Pharmacy is using this form in a creative way to fulfill its corresponding responsibilities, but there has never been a requirement for this form to be used to combat diversion and the form was not created for that purpose.'' *Id.* However, the Chief ALJ did not make any finding regarding the purpose of the prior authorization form. Therefore, instead of objecting to the RD, the Respondent appears to be responding to the Government's Posthearing Brief. Ultimately, I find that the Chief ALJ's finding accurately summarizes the testimony of Mr. Bryce. This Exception, even assuming the truth of the assertions therein, is irrelevant to and has no impact on my decision in this matter. The only relevance that this form has to this proceeding is whether Respondent's use of it now for the purpose Respondent has offered it, constitutes, in combination with other proposed measures, adequate remedial measures to demonstrate that I can entrust it with a registration, all of which is addressed below in the Sanction Section.

. . . I would assume the reason [the distance customers] like us is we do have great customer service. We know our patients when they come in, we try to have the medication they need. We are a busy pharmacy, we have high volume, but we take care of our customers.

Tr. 1044. Thus, to Mr. Bryce, it appears that he feels that the Respondent pharmacy was justified in its distance prescribing. It may have been a red flag for some pharmacies, but due to his self-described ''great customer service,'' it was never an issue for the Respondent pharmacy. Presumably, ascribing to this view, this is just another circumstance where the DEA regulators got it wrong. [However, Mr. Bryce went on to testify that he ''definitely accept[s] the distance as a potential red flag and [we should] definitely resolve it before we dispense any medications for them. And that can be handled with a discussion with a patient.'' Tr. 1046. Mr. Bryce, based on discussions he has had with his customers, provided examples of reasons why customers have filled prescriptions with Respondent despite living further away. Tr. 1042–47. Mr. Bryce testified that distance is ''a resolvable red flag,'' Tr. 1047, but that the past failures to document the resolutions was ''[a]bsolutely wrong. We since learned we should not, without the documentation to resolve the red flag, we should not have filled [the prescription] . . . . [a]nd that's . . . where we've failed and that's where we've made the adjustments to make sure that we had documentation on those red flags moving forward.'' Tr. 1048.]

Mr. Bryce presented as a generally credible witness in terms of the factual accuracy of some of the information he provided. [Omitted for clarity. However, several of his positions were contrary to what the Government's expert established as being the applicable usual course of professional practice.] Mr. Bryce seems to disagree to varying degrees that the Respondent pharmacy wrongfully dispensed in the face of distance prescribing [128] (they knew their customers), pattern prescribing [129] (they knew the prescribers and had positive opinions of them), alternating payment methods [130] (it is all really a cost-saving and an insurance issue), doctor shopping [131] (different specialists prescribe for different ailments), and in some cases trinity prescribing [132] (other pharmacies are still filling these drugs and the FDA never really called a ''hard stop''). On numerous occasions, Mr. Bryce appeared to minimize the Respondent pharmacy's non-compliance with clear state and federal pharmacy standards, and at other times, by couching his testimony in terms of a simple failure to adequately document, gave the unsupported impression that insightful analysis of red flags was taking place but was regrettably not adequately documented.

Even beyond minimization, the testimony of Mr. Bryce (like that of Mr. Vicellio) repeatedly points to what he perceives as deficient guidance from the Louisiana Pharmacy Board, literally because it (apparently) does not invoke the magic words ''red flag.'' Tr. 979. There appeared to be little recognition or understanding that markers for diversion have been present since pharmacists have been practicing their profession, and it was up to the pharmacists and staff at the Respondent pharmacy to act as the controlled substance gatekeepers by applying the principles that distinguish them from grocery store clerks. [Omitted for brevity.] [133]

Astonishingly, Mr. Bryce insisted that as a pharmacist he was unaware that certain combinations of medications were dangerous and even described some of these dangerous combinations as ''common.'' Tr. 980. Whether the Louisiana Pharmacy Board disseminated this information to his personal satisfaction or not, as a seasoned pharmacist Mr. Bryce and the rest of the Respondent pharmacy staff can reasonably have been expected to know (well before the issuance of the ISO in this case) that trinity combinations are dangerous and that they had a host of concrete obligations as practitioners in a highly-regulated industry. It is commendable that the Respondent pharmacy had awareness of its prescribers, took steps to help its customers, knew their ailments, knew some of their history, and even helped its customers in navigating ways to afford their medications. These are admirable attributes for any professional, community-based pharmacy. However, in his testimony Mr. Bryce often conflates the laudable and professional practice of a conscientious pharmacist knowing his patients and doctors, with exercising the care, analysis, and documentation attendant with his corresponding responsibility.

Taken as a whole, Mr. Bryce does not seem to appreciate that the pharmacy operation he oversees as compliance manager actually had that much of a serious problem. Mr. Bryce peppered his testimony with periodic statements of ''100%'' taking responsibility and glib mentions of being ''wrong,'' but those statements were not entirely consistent with the content of his presentation. It is impossible and beyond the scope of this recommended decision to understand whether Mr. Bryce was motivated by pride in or loyalty to his place of employment, concern for potential tertiary liability, the professional reputation of the Respondent pharmacy (and himself) in his community, or some other reason(s), but it is clear that his equivocations squarely undermined the value of his testimony for the continuation of the COR he was trying to save. Stated differently, if Mr. Bryce is convinced that the established red flags were not really red flags for this pharmacy, there would be no logical reason for him to insist on having those issues identified, analyzed, and resolved by his staff in the future. [Omitted for brevity.]

Even beyond Mr. Bryce's intermittent minimizing, the depth of the remedial steps outlined by this witness does not really enhance the Respondent pharmacy's position. Even fully crediting his account of matters, the hundreds of transgressions persuasively outlined by the Government in its case-in-chief was met here with a single weekend staff training session [134] and a 16-page bullet-point, large-character, document that can be charitably described as sophomoric and lacking in any serious analysis. Resp't Ex. 1; Resp't Ex. 2. Laudable policies regarding increased documentation and scanning requirements that are touted as state-of-the-art comprise a standard that should have been present from the outset, and no person associated with the Respondent pharmacy has been subject to a single consequence. On balance, Mr. Bryce's hyperbolic characterizations of the organization's efforts notwithstanding, the Respondent's efforts at remedial steps can be fairly characterized as underwhelming.

Other facts necessary for a disposition of this case are set forth in the balance of this recommended decision.

The Analysis

The Government seeks revocation based on its contention that the Respondent pharmacy, through its pharmacists and employees, has committed acts that would render its

[128] Tr. 1044–45.

[129] Tr. 931, 1038–40.

[130] Tr. 992–97.

[131] Tr. 1005–07.

[132] Tr. 989.

[133] [Omitted]

[134] To the extent that the Respondent's closing brief suggests that ''[t]he pharmacy staff *has been receiving* training on these new procedures'' (ALJ Ex. 20 at 7,¶ 12) (emphasis supplied), that is not borne out by the evidence of record.

continued registration inconsistent with the public interest as provided in 21 U.S.C. 823(f). The gravamen of the Government's allegations and evidence in this case focuses on the Respondent's alleged (1) dereliction in exercising its corresponding responsibility in dispensing controlled substance prescriptions and (2) violation of federal and state laws relating to controlled substances.

The Respondent has assented to every factual stipulation offered by the Government in this matter. Despite these numerous stipulations, the Government offered additional evidence of dispensing events where red flags were present and not resolved. For its part, the Respondent, while facially acknowledging error, pushed back on some particulars of the Government's case and challenged the underlying justifications for numerous red flags of diversion (some of them long-established red flags) cited in support of the Government's petition for sanction. The Respondent also presented evidence on the issue of remedial steps.

Public Interest Determination: The Standard

Under 21 U.S.C. 824(a)(4), the Agency may revoke the COR of a registrant if the registrant ''has committed such acts as would render its registration . . . inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Congress has circumscribed the definition of public interest in this context by directing consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

''[T]hese factors are to be considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Agency may properly give each factor whatever weight it deems appropriate in determining whether a registrant's COR should be revoked. *Id.; see Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Moreover, the Agency is ''not required to make findings as to all of the factors,'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Morall,* 412 F.3d at 173, and is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (holding that the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors, and that remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest . . . .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009).

In adjudicating a revocation of a DEA COR, the DEA has the burden of proving that the requirements for the revocation it seeks are satisfied. 21 CFR 1301.44(e). Where the Government has met this burden by making a *prima facie* case for revocation of a registrant's COR, the burden of production then shifts to the registrant to show that, given the totality of the facts and circumstances in the record, revoking the registrant's COR would not be appropriate. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008). Further, ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the re-occurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010); *accord Krishna-Iyer,* 74 FR at 464 n.8. In determining whether and to what extent a sanction is appropriate, consideration must be given to both the egregiousness of the offense established by the Government's evidence and the Agency's interest in both specific and general deterrence. *David A. Ruben, M.D.,* 78 FR 38363, 38364, 38385 (2013).

Normal hardships to the registrant, and even to the surrounding community, which are attendant upon lack of registration, are not a relevant consideration. *See Linda Sue Cheek, M.D.,* 76 FR 66972, 66972–73 (2011); *Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009). Further, the Agency's conclusion that ''past performance is the best predictor of future performance'' has been sustained on review in the courts, *Alra Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *see also Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (holding that the respondent's attempts to minimize misconduct undermined acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Krishna-Iyer,* 74 FR at 463; *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078 (2009); *Med. Shoppe-Jonesborough,* 73 FR at 387.

Although the burden of proof at this administrative hearing is a preponderance-of-the-evidence standard, *see Steadman* v. *SEC,* 450 U.S. 91, 100–03 (1981), the Agency's ultimate factual findings will be sustained on review to the extent they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. While ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Administrator's ability to find facts on either side of the contested issues in the case, *Shatz* v. *U.S. Dep't of Justice,* 873 F.2d 1089, 1092 (8th Cir. 1989), all ''important aspect[s] of the problem,'' such as a respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Vill. Pharmacy* v. *DEA,* 509 F.3d 541, 549 (D.C. Cir. 2007); *see Humphreys* v. *DEA,* 96 F.3d 658, 663 (3d Cir. 1996). [Omitted for brevity.]

[Omitted for brevity.] It is well settled that, because the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *see Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Agency's final decision. *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Administrator and do not limit the exercise of that discretion. 5 U.S.C. 557(b); *River Forest Pharmacy, Inc.* v. *DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* § 8(a) (1947).

Factors 2 and 4: The Respondent's Experience Dispensing Controlled Substances and Compliance With Federal, State, and Local Law

The Government has founded its theory for sanction exclusively on Public Interest Factors 2 and 4, and it is to those two factors that the evidence of record relates.[135]

Applying the record evidence to Factor 2 (experience in dispensing controlled substances) in accordance with Agency precedent,[136] the Respondent is operated by MP, Inc., and has been licensed in Louisiana since 1968. Tr. 802, 805. No evidence was introduced regarding any basis upon which to characterize its level of compliance prior to the allegations that form the basis of this litigation.

The lion's share of the evidence presented in this litigation is most readily considered under Factor 4 (compliance with laws related to controlled substances). To effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Under the regulations, ''[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.'' 21 CFR 1306.04(a).[*J] The pharmacy registrant's responsibility under the regulations is not coextensive or identical to the duties imposed upon a prescriber, but rather, it is a *corresponding* one. 21 CFR 1306.04(a); *see Tewelde* v. *Louisiana Bd. of Pharmacy,* 93 So.3d 801, 810 (La.App. 1 Cir. 2012) (affirming that Louisiana pharmacies are required to adhere to the corresponding responsibility requirements imposed by federal as well as state law). The regulation does not require the pharmacist to practice medicine; it instead imposes the responsibility to decline to dispense based upon an order that purports to be a prescription, but may not be, because evidence (either apparent on the prescription or attendant to the presentation of that prescription) would lead a reasonable pharmacist to suspect that the practitioner issued the prescription outside the scope of legitimate medical practice. *E. Main St. Pharmacy,* 75 FR 66149, 66157 n.30 (2010).[*K]

[According to the CSA's implementing regulations, a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). While the ''responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, . . . a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* The regulations establish the parameters of the pharmacy's corresponding responsibility.

> An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of . . . 21 U.S.C. 829 . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Id. ''The language in 21 CFR 1306.04 and caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons.'' *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990) (citing *United States* v. *Hayes,* 595 F.2d 258 (5th Cir. 1979), *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds)). As the Supreme Court explained in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

To prove a pharmacist violated her corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See* 21 CFR 1306.04(a) (''[T]he person *knowingly* filling [a prescription issued not in the usual course of professional treatment] . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'') (emphasis added). DEA has also consistently interpreted the corresponding responsibility regulation such that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see also JM Pharmacy Group, Inc. d/b/a Pharmacia Nueva and Best Pharmacy Corp.,* 80 FR 28667, 28670–72 (2015) (applying the standard of willful blindness in assessing whether a pharmacist acted with the requisite scienter). Pursuant to their corresponding responsibility, pharmacists must exercise ''common sense and professional judgment'' when filling a prescription issued by a physician. *Bertolino,* 55 FR at 4730. When a pharmacist's suspicions are aroused by a red flag, the pharmacist must question the prescription and, if unable to resolve the red flag, refuse to fill the prescription. *Id.; Medicine Shoppe-Jonesborough,* 300 F. App'x 409, 412 (6th Cir. 2008) (''When pharmacists' suspicions are aroused as reasonable professionals, they must at least verify the prescription's propriety, and if not satisfied by the answer they must refuse to dispense.'').

Finally, ''[t]he corresponding responsibility to ensure the dispensing

[135] The record contains no recommendation from any state licensing board or professional disciplinary authority (Factor 1). [Where the record contains no evidence of a recommendation by a state licensing board that absence does not weigh for or against revocation. *See Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011) (''The fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest.'').] Similarly, there is no record evidence of a conviction record relating to regulated activity (Factor 3). Even apart from the fact that the plain language of this factor does not appear to emphasize the absence of such a conviction record, myriad considerations are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities which lessen the logical impact of the absence of such a record. *See Robert L. Dougherty, M.D.,* 76 FR 16823, 16833 n.13 (2011); *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry.''), aff'd, *MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 FR 6056, 6057 n.2 (2009). Therefore, the absence of criminal convictions militates neither for nor against the revocation sought by the Government. Since the Government's allegations and evidence fit squarely within the parameters of Factors 2 and 4 and do not raise ''other conduct which may threaten the public health and safety,'' (Factor 5) Factor 5 militates neither for nor against the sanction sought by the Government in this case.

[136] *JM Pharmacy,* 80 FR at 28667 n.2; *Krishna-Iyer,* 74 FR at 462.

[*J] Omitted to reduce repetition with added text. *See infra* n. *L.

[*K] Omitted to reduce repetition with added text. *See infra* n. *L.

of valid prescriptions extends to the pharmacy itself.'' *Holiday CVS,* 77 FR at 62,341 (citing *Med. Shoppe—Jonesborough,* 73 FR at 384; *United Prescription Servs., Inc.,* 72 FR 50,397, 50,407–08 (2007); *EZRX, L.L.C.,* 69 FR 63178, 63181 (2004); *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies,* 75 FR 61613, 61617 (2010); *Issuance of Multiple Prescriptions for Schedule II Controlled Substances,* 72 FR 64,921, 64,924 (2007) (other citations omitted)). The DEA has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist, or other key employee. *EZRX, L.L.C.,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR 36910, 36911 (1988). Similarly, ''[k]nowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself.'' *Holiday CVS,* 77 FR at 62341.

In this matter, the Government did not allege that Respondent dispensed the subject prescriptions having actual knowledge that the prescriptions lacked a legitimate medical purpose. Instead, the Government alleged that Respondent violated the corresponding responsibility regulation for each of the patients at issue in this matter by filling prescriptions ''without addressing or resolving multiple red flags of abuse or diversion.'' Govt Prehearing, at 22. Agency decisions have consistently found that prescriptions with the same red flags at issue here were so suspicious as to support a finding that the pharmacists who filled them violated the Agency's corresponding responsibility rule due to actual knowledge of, or willful blindness to, the prescriptions' illegitimacy. 21 CFR 1306.04(a); *see, e.g., Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10876, 10898, *pet. for rev. denied,* 789 F. App'x 724 (11th Cir. 2019) (long distances; pattern prescribing; customers with the same street address presenting the same prescriptions on the same day; drug cocktails; cash payments; early refills); *Hills Pharmacy,* 81 FR 49816, 49836–39 (2016) (multiple customers presenting prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting similar prescriptions on the same day; long distances; drug cocktails); *The Medicine Shoppe,* 79 FR 59504, 59507, 59512–13 (2014) (unusually large quantity of a controlled substance; pattern prescribing; irregular dosing instructions; drug cocktails); *Holiday CVS,* 77 FR 62316, 62317–22 (2012) (long distances; multiple customers presenting prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting virtually the same prescriptions within a short time span; payment by cash); *East Main Street Pharmacy,* 75 FR 66149, 66163–65 (2010) (long distances; lack of individualized therapy or dosing; drug cocktails; early fills/refills; other pharmacies' refusals to fill the prescriptions). Here, the Government established the presence of red flags on the prescriptions that Respondent pharmacy filled.] *L [137]

The Louisiana Administrative Code largely mirrors the DEA regulations in that it specifies that a prescription for a controlled substance may only be issued ''for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.'' LA. Admin. Code tit. 46, § 2745(B)(1) (2019). Like the DEA version, the pharmacy's responsibility references penalties for knowingly dispensing ''[a]n order purporting to be a prescription issued not in the usual course of professional treatment.'' *Id.* The State of Louisiana specifically requires the dispensing pharmacy ''to ascertain that [a controlled substance] prescription was issued for a legitimate medical purpose.'' *Id.* at § 2747(E)(2)(a). Further, a pharmacist in Louisiana must ''exercise sound professional judgment [in] ascertain[ing] the validity of a controlled substance prescription, and ''[i]f, in the pharmacist's professional judgment, a prescription is not valid, [a controlled substance] prescription shall not be dispensed.'' *Id.* at § 2747(E)(2)(b).

In this case, the Government alleged and presented evidence that the Respondent pharmacy violated federal and state laws relating to controlled substances and filled prescriptions in a manner that violated its corresponding responsibility to ensure that controlled substances are dispensed only upon an effective prescription by failing to recognize and resolve red flags of diversion prior to dispensing. 21 CFR 1306.04(a). Specifically, the Government alleges that the Respondent violated laws applicable to the dispensing of controlled substances by dispensing multiple controlled substances to multiple patients in the face of unresolved red flags indicating possible or even likely diversion. ALJ Ex. 1. Specifically, the Government alleges that the Respondent ignored diversion red flags based on: (1) Dangerous combinations of controlled medications (cocktail prescribing and combination prescribing); (2) cash payments made by pharmacy customers for controlled medications; (3) patterns of controlled substance prescribing that should alert a reasonable pharmacist that the medications are not being prescribed for legitimate medical objectives; (3) long distances between customers, prescribers, and the registrant pharmacy; and (4) controlled substance prescriptions issued at potencies and quantities that should alert a reasonable pharmacist that the medications are likely not being prescribed for legitimate medical objectives.

The CSA and its implementing regulations require that pharmacists only dispense prescriptions that are issued for a legitimate medical purpose in the usual course of professional practice. 21 CFR 1306.04(a). While prescribers are responsible for writing only legally sound prescriptions, a corresponding responsibility rests with the pharmacist to refuse to fill prescriptions that are not valid. *Id.* Louisiana law imposes a similar responsibility and requires pharmacists to exercise sound professional judgment in dispensing and respond with ''appropriate action'' where a prescription presents signs of therapeutic duplication, possible abuse/misuse, or inappropriate dosing. LA Admin. Code. tit. 46, Part LIII §§ 515, 2745(B)(1), 2747(E)(2)(a).

The stipulated facts and additional problematic dispensing events alleged by the Government point to a pattern and practice of dispensing dangerous controlled substances in the face of numerous red flags. The evidence of record demonstrates that on one hundred separate occasions, the Respondent pharmacy dispensed ''cocktail'' medications, that is, combinations of drugs that are known to be abused and diverted.[138] On an additional nineteen separate occasions, the Respondent pharmacy dispensed combinations of medications that posed serious risks to patients.[139] On seven occasions the Respondent pharmacy also dispensed controlled substances,

*L The supplemented text in this section clarifies the analysis of a pharmacist's corresponding responsibility under 21 CFR 1306.04(a).

[137] [Omitted.]

[138] *See* Stip. 3(a)–(d); Stip. 4(a)–(d), (h)–(f), (i)–(m), (p)–(yy); Stip. 5(a)–(g); Stip. 6(a)–(ddd); Stip. 7(a)–(z); Stip. 8(a)–(dd).

[139] *See* Stip. 4(rr)–(tt); Stip. 9(a)–(c); Stip. 10(a)–(f); Stip. 11(a)–(c); Stip. 12(a)–(b); Stip. 13(a)–(c); Stip. 14(c)–(k); Stip. 15(a)–(b); Stip. 16(a)–(c); Stip. 17(a)–(d).

where alternating payment methods were employed, and customers tendered cash for some medications and utilized insurance for others without any scrutiny from the Respondent pharmacy's pharmacists or staff.[140] The Respondent pharmacy filled pattern prescriptions from problematic prescribers on eighteen stipulated occasions and others highlighted by Dr. Ginsburg.[141] Its pharmacists additionally filled prescriptions for customers in the face of unresolved distance red flags.[142] Finally, the Respondent pharmacy filled prescriptions for quantities and strengths of drugs that posed a risk to the patients who would be taking them on twenty one separate occasions as well as others explained by Dr. Ginsburg without identifying the combinations as problematic and resolving and documenting any rationale.[143]

The Respondent stipulated to one hundred occasions where it dispensed cocktail medications and dangerous combinations of medications, including but not limited to the ''trinity'' cocktail of an opioid, a benzodiazepine, and carisoprodol.[144] DI credibly testified that the PMP data from the Respondent pharmacy demonstrated that a high quantity of ''trinity'' cocktail prescriptions were being dispensed. Tr. 71. Dr. Ginsburg persuasively testified that while not a violation on its own, such prescriptions presented red flags that would require documented resolution in order for the Respondent pharmacy to comply with its corresponding responsibility. Tr. 308, 312, 314, 316–20, 322, 325, 330, 336–43, 347–51, 358, 359–66, 376–88, 392–93, 395–96, 550–52. In response to administrative subpoenas, the Respondent pharmacy did not produce patient records or profiles that provided any identification or resolution of any red flags identified prior to dispensing. Tr. 53–54; Gov't. Ex. 64; Gov't. Ex. 66. Mr. Bryce testified that he and the other pharmacists ''should have documented more in the computer system'' but they failed to. Tr. 900. Mr. Vicellio further indicated that where records were not turned over to the DEA, it was because they did not exist. Tr. 862.

During the course of his guarded testimony, Mr. Bryce seemed intent on giving the impression that the root of the problem here was limited to inadequate documentation. To be clear, the lack of documentation during the period in question was certainly deplorable [and outside the usual course of professional practice], but the transgressions of the Respondent pharmacy were not limited to documentation deficiencies. If this case were limited to a failure to document (here serious enough to warrant a sanction on its own), the Respondent could easily have furnished the testimony of the Respondent pharmacy's PIC, Mr. Fontenot, to explain that the proper analyses had been performed by his line pharmacists but not documented. That did not happen, so no one really knows what the PIC and his line pharmacists at the Respondent pharmacy were thinking.[*M]

Regarding alternating payments, the Government alleged numerous occasions on which the Respondent pharmacy filled prescriptions where pharmacy customers used multiple payment methods to cover different prescriptions. Tr. 297–98, 398–99. Dr. Ginsburg persuasively testified that this a red flag requiring resolution prior to dispensing because a patient electing such payment methods may be attempting to shield certain prescriptions from scrutiny by insurance. Tr. 298–99. No reason was offered for this practice other than an explanation of attempts to save customers money through the use of the Respondent's loyalty plan. Tr. 992–96. The Respondent's argument here is facially appealing but analytically bankrupt. To the extent that a red flag of diversion reveals itself during a controlled substance dispensing event, it is incumbent upon the pharmacy registrant to identify the red flag and resolve the issue prior to dispensing the medication. The holder of a DEA pharmacy registration bears the obligation, by the exercise of its corresponding responsibility, to act as a gatekeeper to the closed controlled-substance system. Responsible actions by the registrant protect the customer from dangerous abuse and the public from wholesale diversion of powerful, dangerous drugs. Here, the Respondent argues that in the face of this potential red flag, without any circumspection, it evaluated a method whereby the drugs can be dispensed in the cheapest way possible. A good monetary deal for the prescription holder is not necessarily synonymous with the responsible exercise of a registrant's obligations to discharge its corresponding responsibility. [Furthermore, even if Respondent had legitimate reasons why it was receiving different types of payments for controlled substance prescriptions, the resolution of this red flag was not documented anywhere.]

The Government established that the pharmacists at the Respondent pharmacy repeatedly filled prescriptions from prescribers who exhibited clear signs of being pattern prescribers. Dr. Ginsburg identified several prescribers who repeatedly prescribed the same combinations of high-dose opioids to many patients. Tr. 435, 502–04, 506–09. There were no documented attempts to resolve this red flag. Tr. 327, 329–31, 336–37, 550–52. Mr. Bryce further admitted that despite exhortation from one of the Respondent pharmacy's distributors, the pharmacy continued to fill prescriptions from Dr. GB. Tr. 931. He testified that the pharmacy would have to call frequently in order to confirm whether Dr. GB's DEA COR was still active, surely a sign of a problematic prescriber (even

[140] *See* Stip. 4(n)–(o); Stip. 4(rr)–(tt); Stip. 18(a)–(b); Stip. 19(a)–(b); Stip. 20(a)–(b); Stip. 21(a)–(b).

[141] *See* Stip. 4(rr)–(tt); Stip. 9(a)–(b); Stip. 10(a)–(b); Stip. 14(a)–(b); Stip. 18(a)–(b); Stip. 22(a)–(b); Stip. 23(a)–(b); Stip. 24(a)–(b); Stip. 25(b); Stip. 26(a)–(c); Stip. 27(a)–(b); Stip. 28(a); Stip. 29(a)–(b); Stip. 30(a)–(b); Stip. 31(a)–(b); Tr. 509–11; Gov't Ex. 39 at 1; Tr. 519–22; Gov't Exs. 42 at 1, 43 at 2; Tr. 528–35; Gov't Exs. 56 at 1, 57 at 2, 58 at 1, 59 at 1.

[142] Tr. 295–97.

[143] *See* Stip. 10 (a)–(b); Stip. 14(l); Stip. 18(a)–(b); Stip. 22(a)–(b); Stip. 23(a)–(b); Stip. 24(a)–(b); Stip. 25(b); Stip. 26(a)–(c); Stip. 37; Stip. 38; Stip. 39; Stip. 40; Stip. 41; Stip. 42; Stip. 43; Stip. 44; Stip. 45; Stip. 46; Tr. 482–84, 493–94, 496–97; Gov't Exs. 50 at 1.

[144] *See* Stip. 3(a)–(d); Stip. 4(a)–(d), (h)–(f), (i)–(m), (p)–(yy); Stip. 5(a)–(g); Stip. 6(a)–(ddd); Stip. 7(a)–(z); Stip. 8(a)–(dd).

[*M] [Text relocated.] No explanation was offered by the Respondent as to why the PIC was not called as a witness, and the record revealed no indication of any issue regarding the availability of the Respondent pharmacy PIC, or any issue that would make him unamenable to process. Tr. 897–98, 1063–64. The tribunal may, as a matter of discretion, draw an adverse inference from Mr. Fontenot's absence from the proceedings. Where a party fails to produce relevant evidence within its control, it is appropriate to draw an adverse inference. *Int'l Union (UAW)* v. *NLRB,* 459 F.2d 1329, 1338 (D.C. Cir. 1972) (holding that NLRB committed reversible error by declining to apply the adverse inference rule where one of the parties had relevant evidence within his control which he failed to produce.); *see also Callahan* v. *Schultz,* 783 F.2d 1543, 1545 (11th Cir. 1986) (applying the adverse inference rule against the Government in quashing an IRS summons.); *Pharmacy Doctors Enterprises, d/b/a Zion Clinic Pharmacy,* 83 FR 10876, 10899 (2018). At the hearing, both sides were put on notice that the tribunal was considering the issue of an adverse inference. Tr. 1077–78. [The Chief ALJ concluded], as an evidentiary matter, [omitted] that if this witness had presented testimony, that testimony would have supported the proposition that not only did the Respondent pharmacy staff neglect to document the actions they took in response to red flags of potential diversion, but they also did not identify or analyze these red flags in any serious way. [I, however, do not find the drawing of an adverse inference to be necessary. The record evidence established, and Respondent has largely conceded, that not all red flags were resolved and in no instance was the potential resolution of any red flag documented. Accordingly, there is ample evidence without an adverse inference to establish that Respondent pharmacy issued these prescriptions outside the usual course of professional practice and in violation of its corresponding responsibility.]

without threats from a distributor and before the issuance of the ISO in this case). *Id.* Regarding this red flag, the Respondent was aware that at least some of these prescriptions were problematic, dispensed them nonetheless, and made no attempt to verify if these prescriptions were issued for a legitimate medical purpose in the usual course of professional practice.

Dr. GB's prescriptions, among others that were filled by the Respondent pharmacy, presented potentially hazardous quantities and strengths of opioid and benzodiazepine medications. Tr. 435; Gov't Ex. 4 at 1. According to Dr. Ginsburg's uncontroverted testimony, the documentation provided by the Respondent pharmacy was insufficient to demonstrate resolution of this red flag. Tr. 502–03, 505–06, 512–16, 526, 535–38, 550–52. While Mr. Bryce indicated some steps that MP West has taken to better identify and resolve this red flag [in the future], he provided no explanation, beyond a bland expression of contrition, for why these prescriptions were filled. Tr. 952–62.

The evidence of record demonstrates that the Respondent has neglected its corresponding responsibility imposed by the CSA and the Louisiana Administrative Code. *See* 21 CFR 1306.04(a) (establishing corresponding responsibility under the Controlled Substances Act); *Liddy's Pharmacy,* 76 FR at 48895 (affirming that only lawful prescriptions may be dispensed); LA. Admin. Code tit. 46, § 2745(B)(1) (2019) (establishing corresponding responsibility under Louisiana state law). The Respondent, through its pharmacists and staff, demonstrably knew or had reason to know that these prescriptions were not issued for a legitimate medical purpose in the usual course of professional practice. *See Med. Shoppe-Jonesborough,* 73 FR at 381 (quoting *Medic-Aid Pharmacy,* 55 FR 30043, 30044 (1990)) (requiring a pharmacist to refuse to fill such prescriptions). By dispensing these prescriptions despite knowing that they were potentially dangerous and failing to investigate further, the Respondent pharmacy failed to follow its legal responsibilities. *See Sun & Lake Pharmacy, Inc.,* 76 FR at 24530 (quoting *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990) (stating that a pharmacist may not ''close his eyes and thereby avoid [actual] knowledge'' of possible abuse or diversion).

[Omitted for clarity. The record evidence establishes that] the prescriptions detailed in the Government's evidence and agreed stipulations [were issued] without resolving the red flag(s) presented and documenting that resolution.[145] The red flags detailed above required the Respondent and its pharmacists to question these prescriptions and they did not. *See Bertolino,* 55 FR at 4730 (requiring pharmacists to question prescriptions that present red flags for abuse or diversion). [Omitted for brevity.]

The quantity of questionable prescriptions that the Respondent pharmacy filled, coupled with the virtual absence of attempts, documented or not, to resolve red flags points inexorably and conclusively toward willful blindness. First, the Respondent, in business for decades, maintained no formal procedures whatsoever for responding to red flags. Tr. 833. Further, the evidence of record demonstrates an astonishing level of ignorance (sincere or not) among the Respondent's corporate officers and employees regarding their legal obligations. Mr. Vicellio testified that although he has been aware that operating a pharmacy is a highly-regulated activity, which requires careful and diligent adherence to federal and state laws and regulations, until the ISO he made no sustained effort to familiarize himself with these requirements and, as a non-pharmacist, assumed his pharmacy-trained employees would keep him out of trouble. Tr. 835–36. Mr. Bryce, the newly-appointed compliance officer, also admitted knowledge that many of these prescriptions presented dangerous combinations of drugs and [yet they were dispensed.] *[N] Tr. 1061. [Omitted for brevity.] To be persuaded by the Respondent's case, it would be necessary to assume there was no way that professional pharmacists and pharmacy staff could be aware of their obligations to avoid wholesale drug diversion without the issuance of an ISO by DEA, or the use of the specific term ''red flag'' in the literature disseminated by the Louisiana Pharmacy Board.[146] The Respondent here, through its pharmacists, staff, and management, ran the busiest pharmacy in the local area, presided over ''controlled chaos,'' and kept its foot on the gas until stopped by the DEA's ISO. [Omitted for brevity.]

[Accordingly, I find that Respondent has operated outside the usual course of professional practice (in violation of 21 CFR 1306.06 and La. Admin Code tit. 46, Part LIII, §§ 2745(b)(1), 2747(E)(2)(a)) and in violation of its corresponding responsibility (in violation of 21 CFR 1306.04(a) and La. Admin Code tit. 46, Part LIII, §§ 515, 2745(b)(1), 2747(E)(2)(a).] Based on the foregoing, the Government has made a *prima facie* case that the Respondent has committed acts which render its registration inconsistent with the public interest.*[O] Accordingly, all allegations enumerated in the OSC/ISO[147] are *sustained.*

[145] *See* Appendix. [Footnote was relocated.]

*[N] Modified for clarity.

[146] ALJ Ex. 20 at 9.

*[O] For purposes of the imminent danger inquiry, my findings lead to the conclusion that Respondent has ''fail[ed] . . . to maintain effective controls against diversion or otherwise comply with the obligations of a registrant'' under the CSA. 21 U.S.C. 824(d)(2). The substantial evidence that Respondent issued controlled substance prescriptions outside the usual course of the professional practice established ''a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension'' of Respondent's registration. *Id.* There was ample evidence introduced to establish that Respondent, without first resolving red flags, repeatedly dispensed combinations of medications that posed serious risks to patients. *See supra* n. 23. Thus, as I have found above, at the time the Government issued the OSC/ISO, there was clear evidence of imminent danger.

[147] ALJ Ex. 1. At the hearing (Tr. 435–41, 774–91) and in its closing brief (ALJ Ex. 20 at 2–5), the Respondent lodged an objection as to notice. Specifically, the Respondent avers that the Government's charging document (ALJ Ex. 1 at 11, ¶ 12) and Prehearing Statement (ALJ Ex. 4 at 21–22) supplied a definition of pattern prescribing that is at some variance with the definition utilized by the Government through its expert, Dr. Ginsburg. Specifically, the Respondent argues that the Government's noticed definition refers to a pattern of scrips issued by ''a physician who regularly prescribes common drugs of abuse and diversion in the same dosages and quantities to many of his or her patients sharing the same surnames and/or addresses and uses the same diagnosis codes to justify these prescriptions.'' ALJ Ex. 4 at 21. The OSC/ISO in this case informs that ''[p]attern prescribing refers to a practitioner who regularly prescribes common drugs of abuse or diversion in the same dosages and quantities to multiple patients where the patients often share the same surnames and/or addresses, and/or where the prescriber uses the same diagnosis codes to justify these prescriptions.'' ALJ Ex. 1 at 11, ¶ 12. The objection was overruled at the hearing (Tr. 439–40, 782–91), but the issue was timely raised and preserved for appeal. In the APA, Congress provided that an administratively-imposed sanction must be preceded by notice of, *inter alia,* ''the matters of fact and law asserted.'' 5 U.S.C. 554(b)(3). The DEA regulations require the charging document to supply ''a summary of the matters of fact and law asserted.'' 21 CFR 1301.37(c). [Omitted for relevance.] This is not a close case. The Agency has long held that the parameters of its administrative hearings are circumscribed by the allegations in its charging documents and the prehearing statements filed by the parties. *See, e.g., Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48896 (2011); *CBS Wholesale Distribs.,* 74 FR 36746, 36750 (2009); *Darrell Risner, D.M.D., P.S.C.,* 61 FR 728, 730 (1996). Under the Agency's precedent, ''[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law'', *Clair L. Pettinger, M.D.,* 78 FR 61591, 61596 (2013), and ''[t]he rules governing DEA hearings do not require the formality of amending a [charging document] to comply with the evidence.'' *Id.; Roy E. Berkowitz, M.D.,* 74 FR 36758, 36759–60 (2009). The Agency has interpreted the standard to be keystoned on whether the Respondent had notice that a subject

[Sanction] *P

The evidence of record preponderantly establishes that the Respondent has committed a massive volume of acts which render its continued registration inconsistent with the public interest. *See* 21 CFR 1301.44(e) (establishing the burden of proof in DEA administrative proceedings). Since the Government has met its burden in demonstrating that the revocation it seeks is proper, the Respondent must show that given the totality of the facts and circumstances revocation is not warranted. *See Med. Shoppe-Jonesborough,* 73 FR at 387. In order to rebut the Government's *prima facie* case, the Respondent must demonstrate not only an unequivocal acceptance of responsibility but also a demonstrable plan of action to avoid similar conduct in the future. *Jeri Hassman, M.D.,* 75 FR 8236. It has accomplished neither objective.

Agency precedent is clear that a Respondent must ''unequivocally admit fault'' as opposed to a ''generalized acceptance of responsibility.'' *The Medicine Shoppe,* 79 FR 59504, 59510 (2014); *see also Lon F. Alexander, M.D.,* 82 FR 49704, 49728 (2017). To satisfy this burden, the Respondent must ''show true remorse'' or an ''acknowledgment of wrongdoing.'' *Robert A. Leslie,* 68 FR 15527, 15528 (2003). The Agency has made it clear that unequivocal acceptance of responsibility is paramount for avoiding a sanction. *Robert L. Dougherty, M.D.,* 76 FR 16823, 16834 (2011) (citing *Jayam Krishna-Iyer,* 74 FR 459, 464 (2009)). This feature of the Agency's interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *MacKay* v. *DEA,* 664 F.3d 808, 822 (10th Cir. 2011).

The Respondent's incantations of ''regret[ ]'' [148] in this case are unconvincing and serve as something of a testament to the elevation of form over substance.*Q Simply put, the Government's *prima facie* case has not been rebutted. Words purporting to accept responsibility are planted into a mosaic of equivocation and qualification which, in this case, undermines any attempt to demonstrate that the Respondent understands what it did wrong in any meaningful way and diminishes confidence in its future performance as a registrant. To be sure, the Respondent assented to the Government's proposed stipulations,[149] but its case rested primarily on its pervasive view that every transgression was not really all that bad. ALJ Ex. 5 at 2. As detailed above, these stipulations include numerous dispensing events that presented one or more unresolved red flags.[150] As discussed, *supra,* testimony from Mr. Vicellio and Mr. Bryce contained equal measures of purported admissions of wrongdoing and justifications about why the red flags should not be red flags, how even if the red flags were arguably valid they did not really apply to the instances involving the Respondent pharmacy, that even if the red flags did have some application, the offense was again, really not all that bad, and even if the offenses were bad, the Louisiana Pharmacy Board should have been more like Texas and included the words ''red flag'' in its guidance documents.

Mr. Bryce provided some lip service to contrition, but continually undermined those words by such propositions as distance prescribing was justified in this case because the Respondent's staff knew their customers,[151] pattern prescribing evidence was dispatched with the representation that the staff knew the prescribers,[152] alternative payment issues were dismissed by protestations that the pharmacy was simply trying to make life affordable for its customers,[153] doctor shopping was addressed with a lecture that different specialists prescribe for different ailments, and by Mr. Bryce's view of the facts, trinity prescribing could not have been so bad (only a ''concern'' [154]), because the FDA's guidance was never really a ''hard stop,'' and trinity prescriptions, even after the black box warning, are still alive and well.[155] Perhaps the most discouraging of Mr. Bryce's equivocations was his adoption of Mr. Vicellio's theme that the Louisiana Pharmacy Board is somehow responsible for the Respondent's troubles, because unlike Texas, the Louisiana Pharmacy Board has not used the exact words ''red flag.'' [156]

The Respondent's closing brief made it clear that its witnesses' acceptances of responsibility equivocations (as ubiquitous as they were) could not be easily dismissed as unartful or unintentional misstatements borne of the pressure of testifying at a hearing. In its brief, the Respondent prefixes its acceptance of flying through red flags of diversion by highlighting that ''the Louisiana Board of Pharmacy has not identified th[e trinity] combination as involving a red flag (or discussed 'red flags' or officially acknowledged that there is such a thing for that matter). . . .'' ALJ Ex. 20 at 2. Elsewhere in its closing brief, in the course of challenging the credentials of the Government's expert, the Respondent makes the following point:

> The Louisiana Board of Pharmacy does not even mention the term ''red flag'' in any of its publications, policy statements or regulations, and that term is not used in the statutes governing pharmacy in Louisiana.

Id. at 9.[157] Similarly, the FDA black box warnings are dismissed as all but irrelevant because:

''would be at issue in the proceeding.'' *Pharmacy Doctors,* 83 FR at 10898. The Agency has declined to find inadequate notice, even where the Government has actually cited an errant provision of the regulations. *Wesley Pope, M.D.,* 82 FR 14944, 14946 (2017). Here, the charging document and Government's Prehearing Statement provided a definition of pattern prescribing with conjunctive terms and proceeded on a subset of its definition. The language in the charging document included ''*many*'' patients with the same surname and diagnosis codes (ALJ Ex. 1 at 11, ¶ 12) and the language in the Government's Prehearing Statement alleged that this was ''*often*'' the case. ALJ Ex. 4 at 21. It is unpersuasive to argue that the Respondent was fatally misled because some or even all of the pattern prescribing alleged by the Government failed to contain every potential attribute listed in the charging document and prehearing statement. Inclusion of all elements all pattern prescribing was not alleged by the plain language in either document. The Respondent received adequate notice that pattern prescribing was an issue in the case, and its objection in this regard is unfounded. In any event, even if every pattern prescribing allegation set forth by the OSC/ISO and the Government's Prehearing Statement were not sustained in this case, it would not alter the outcome. The remaining massive volume of misconduct alleged and preponderantly established by the Government even without any of the pattern prescribing alleged and established in this case would render the pattern prescribing evidence superfluous.

*P I am replacing portions of the Sanction section in the RD with preferred language regarding prior Agency decisions; however, the substance is primarily the same.

[148] ALJ Ex. 4 at 23.

*Q Prior Agency decisions have made it clear that in order to avoid sanction once the Government has established a *prima facie* case, a registrant must do more than say the right thing on the stand and in filings. ''The degree of acceptance of responsibility that is required does not hinge on the respondent uttering ''magic words'' of repentance, but rather on whether the respondent has credibly and candidly demonstrated that he will not repeat the same behavior and endanger the public in a manner that instills confidence in the Administrator.'' *Jeffrey Stein, M.D.,* 84 FR 46968, 49973 (2019).

[149] ALJ Ex. 5 at 2.

[150] *See* Appendix.

[151] Tr. 1044–45.

[152] Tr. 931, 1038–40.

[153] Tr. 992–97.

[154] Tr. 980.

[155] Tr. 987–89.

[156] Tr. 977.

[157] Ironically, the Respondent, in its closing brief, appears to level criticism based on the fact that unlike Texas ''in both Louisiana and federal law, the term 'pill mill' is at most a colloquial or slang term which is not used in any official way by either the Louisiana Board of Pharmacy or the [DEA], and is not found anywhere in Louisiana or federal statutory or regulatory law.'' *Id.* at 9. In light of the evidence as developed in this case, this observation,

Continued

The FDA never said any such thing about such a requirement being imposed upon pharmacists. There is nothing within the FDA's 2016 statement that states or suggests that a pharmacist should ''carefully review'' anything about the purpose for which these [trinity] prescriptions are issued.

Id. at 3. Thus, the Respondent, through its counsel, still actively takes the position that the FDA warnings about the potential perils attendant upon a particular combination of drugs should have no effect whatsoever on its pharmacists' dispensing practices, or even impact upon their analyses as professionals. The Respondent's closing brief echoes Mr. Bryce's dismissal of the danger by pointing out that ''[t]here are literally millions of such [trinity] combinations of these two medications being prescribed every year, and the FDA's 2016 statement has not significantly reduced this number.'' *Id.*

The Respondent's brief likewise makes quick work of the red flag of alternative payment methods right before its incongruent purported acceptance of responsibility in the following way:

Today, when all but one state has a PMP (including Louisiana) a patient could not avoid detection of doctor-shopping through this means, and there exist multiple commercial services which often provide a lower price for medications than is available through insurance—such services, such as Good RX advertise this feature. Many of the instances in which cash payments were used [by the Respondent pharmacy] occurred because the patient's health insurance would not pay for the medication, or would only pay for a portion of the prescription because the benefits available only covered a shorter period.

Id. at 4. The Respondent is apparently not concerned here either. The theory is that this should not even be a red flag for pharmacy registrants because the PMP will pick up the issue anyway.

There is likely no more telling argument set forth in the Respondent's brief than its handling of the DEA's exercise in investigatory lenity in allowing the on-hand controlled substances at the Respondent pharmacy to be transferred to MP West instead of seizing the drugs.[158] By the Respondent's reckoning, this discretionary act of forbearance at the execution of the ISO ''is something that the [DEA] agents would not have done had they believed that the pharmacy's personnel were engaged in ongoing lawless behavior.'' *Id.* at 10. As it happens, the evidence here preponderantly and convincingly established that the Respondent's pharmacy personnel *were* in fact ''engaged in ongoing lawless behavior.'' *Id.* It seems that it is the Respondent's managers who are unwilling to believe it, and this interpretation of events speaks volumes as to how an exercise in discretionary lenity in the Agency's final order would likely be viewed by the Respondent.

Notwithstanding the staggering volume of transgressions established by the record, the Respondent dismisses the number as ''a very tiny percentage of the almost 800,000 prescriptions filled during the time period covered by the ISO.'' *Id.* at 20. The Respondent's acceptance of responsibility is narrowly tailored (consistent with the testimony of its witnesses) to ''its improper filling of certain controlled substances including, in some instances, is failure to document the resolution of red flags.'' *Id.* at 2. Suffice to say, the Respondent has not supplied the Agency with an unequivocal acceptance of responsibility. More than that, it is clear that beyond equivocating, the Respondent somehow does not comprehend that it was wrong, and egregiously and voluminously so.

While the transgressions alleged and proved here are serious and numerous, it is arguable that a true, unequivocal acceptance of responsibility, coupled with a thoughtful plan of remedial action could have gone a long way to supporting a creditable case for sanction lenity. The Agency has frequently required unambiguous acceptance of responsibility and a remedial action plan as an essential component to avoid a sanction,[159] and in this case the reality that the Respondent, truly acknowledging no deficiencies that are immune from explanation, has limited its remedial action investments to increased documentation requirements, a single staff training session, a sixteen-page list of talking points, and stepping up internal documentation rules to a point where they should always have been. Neither the Respondent pharmacy PIC (who even yet remains the PIC), nor any other employee or manager received any form of discipline or consequence as a result of the wholesaling doling out of dangerous drugs for three years with reckless abandon. Tr. 836–37. In the Respondent's view, its pharmacists really did nothing wrong once the circumstances were explained. Although the Respondent put in place some improved documentation requirements, the remedial plan is by no means a thoughtful or comprehensive one, staff training is not ongoing, and in light of myriad excuses and explanations it is difficult to be confident that the Respondent and its staff would make responsible choices as a registrant in the future. [Omitted.]*[R] Thus, in the face of a *prima facie* case, without the Respondent meeting the evidence with a convincing, unequivocal acceptance of responsibility and proposing thoughtful, concrete remedial measures geared toward avoiding future transgressions, the record supports the imposition of a sanction. That a sanction is supported does not end the inquiry, however.

In determining whether and to what extent imposing a sanction is appropriate, consideration must also be given to the Agency's interest in both specific and general deterrence and the egregiousness of the offenses established by the Government's evidence. *Ruben,* 78 FR at 38364, 38385.

Considerations of specific and general deterrence militate in favor of revocation. As discussed, *supra,* the Respondent has made it clear that it feels that it was not so much wrong as misunderstood. Its interpretation of the decision to forego drug seizure on the date of the ISO execution reveals a thought process that leniency connotes lack of trepidation on the part of the Agency. The interests of specific deterrence, therefore, compel the imposition of a sanction.

Likewise, as the regulator in this field, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *Ruben,* 78 FR at 38385. To continue the Respondent's registration privileges on the present record would send a message to the regulated community that so long as there is some deficiency in the literature disseminated by state regulatory authorities, or some contextual justification for the failure to identify, resolve, and document dispensing in the face of clear red flags, compliance that might bear some efficiency costs on a busy pharmacy are optional. Even if the Agency discovers legions of improper dispensing events, impactful consequences can be avoided merely by a single training afternoon on

if assumed, *arguendo,* as valid, likely inures to the Respondent's benefit.

[158] 21 U.S.C. 824(f).

[159] *Hassman,* 75 FR at 8236. [Edited the footnoted sentence for clarity.]

*[R] Respondent took exception to this text claiming that the Chief ALJ ''transformed his 'difficult to be confident' finding into a finding that absent a registration sanction the agency would be 'creating a likelihood that it will be instituting new proceedings, charging the same conduct, soon thereafter.' '' Resp Exceptions, at 8. I adopt the Chief ALJ's finding that it is difficult to be confident in Respondent's future compliance and therefore find that I cannot trust Respondent with a registration. I find that the Chief ALJ's further findings are irrelevant to my final decision in this case and do not impact my sanctions determination.

a pamphlet, and promising more documentation in the future.

Regarding the egregiousness of the Respondent's conduct, as discussed, *supra,* the evidence demonstrates a staggering volume of improper actions, and it is clear that this Respondent's pharmacists had no interest in monitoring for, identifying, or resolving any indicators of potential controlled substance diversion. The comparative volume of controlled substance purchases uncovered by DEA during the course of its investigation reveals staggering disparities between the amount purchased by the Respondent pharmacy compared to other, similarly-situated enterprises through multiple lenses. [Omitted for relevance.] *S Mr. Bryce's testimony gave the sense that the Respondent views these charges as the failure of regulators to understand the analysis that was naturally done by the pharmacists on duty, and the venial sin of neglecting to adequately document.*T As it happens, this Respondent did fail to exercise the level of care in dispensing and (equally importantly) documenting its dispensing decisions in a manner that would allow a meaningful evaluation by those charged with regulating controlled substances.

A balancing of the statutory public interest factors, coupled with consideration of the Respondent's failure to meaningfully accept responsibility, the absence of record evidence of thoughtful and continuing remedial measures to guard against recurrence, and the Agency's interest in deterrence, supports the conclusion that the Respondent should not continue to be entrusted with a registration.*U [160]

Accordingly, the Respondent's DEA COR should be *revoked,* and any pending applications for renewal should be *denied.**V

John J. Mulrooney, II,
Chief Administrative Law Judge.

The Respondent's Exceptions

On July 22, 2020, Respondent filed its Exceptions to the RD. I find that Respondent's six Exceptions *W are largely without merit and I have addressed the majority of them in footnotes added to the corresponding parts of the RD above. The remaining Exceptions are addressed herein. While I have made some modifications to the RD based on the Exceptions, none of those changes and none of Respondent's arguments persuaded me to reach a different conclusion than the Chief ALJ in this matter. Therefore, I reject Respondent's Exceptions and affirm the RD's conclusion that Respondent's continued registration is inconsistent with the public interest, and that revocation is the appropriate sanction.

Exception 3, Regarding Acceptance of Responsibility

Respondent takes exception to the Chief ALJ's finding that Respondent failed to unequivocally accept responsibility for its actions in this case. Resp Exceptions, at 9. First, Respondent explained, the Government took the position that Respondent's acceptance of responsibility in this case was sufficient to make out a *prima facie* case against the Respondent.*X Resp Exceptions, at 9 (*citing* Gov Posthearing, at 29–30). Respondent seems to be suggesting that because of the Government's position (which was not relied upon in reaching this decision), I am estopped from finding that Respondent's acceptance of responsibility was not unequivocal. This argument is unconvincing. In enforcement actions, it is my responsibility to determine whether registrants can be entrusted with a registration and my decision is not bound by an in-the-alternative *Y argument presented in a Posthearing Brief. Furthermore, DEA decisions have long established that once the Government has made a *prima facie* case establishing one or more grounds for revocation, I review the evidence and argument Respondent submitted to determine whether or not it has presented ''sufficient mitigating evidence to assure the Administrator that [it] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988)). Contrary to Respondent's position, DEA decisions have frequently sanctioned registrants who have stipulated to the full extent of the violations in the Government's *prima facie* case based on DEA's inability to entrust them with a registration in the face of egregious violations of law. *See William Ralph Kincaid, M.D.,* 86 FR

*S The Respondent, in its Exceptions, objected to the Chief ALJ's finding that ''[t]he Respondent's objective appeared to be to inexorably dispense as many controlled substances as possible as fast as possible, while asking as few questions as possible.'' Respondent points out that the record evidence does ''not reveal the percentage of controlled substances versus non-controls being dispensed at the pharmacy'' and that only 15% of Respondent's dispensed prescriptions were controlled substances which was an indication of proper pharmacy practice. Resp Exceptions, at 12. I have omitted the Chief ALJ's finding because it is not relevant to my decision in this matter. This case is about whether or not the prescriptions at issue (which were largely stipulated to) were issued outside the usual course of professional practice such that Respondent's continued registration would be against the public interest. This case is not about Respondent's dispensing of non-controlled substances or about the percentage of controlled versus non-controlled substances dispensed. While positive dispensing experience can be considered under Factor Two, that experience is limited to positive dispensing of controlled substances. For the purpose of this case I have assumed that every prescription, other than those at issue in this case, was lawfully issued. Still, I find that Respondent's dispensing of the prescriptions at issue was sufficiently egregious to support revocation of its registration and my decision is not changed by Respondent's fourth Exception. Resp Exceptions, at 11–13.

*T Omitted for brevity.

*U Omitted for clarity. I agree with the Chief ALJ's analysis above which focuses on whether or not, in light of the egregiousness of their actions, their equivocal acceptance of responsibility, and their proposed remedial measures, Respondent's current ownership and leadership can currently be entrusted with a registration. And I agree with the Chief ALJ that they cannot. The Chief ALJ went on to evaluate Respondent's historical circumstances, not as irrelevant community impact evidence, but as evidence in support of Respondent's ability to comply with the CSA at some unknown point in the future. Although I credit Respondent for being a long-standing fixture in the community, I do not find that there is any evidence on the record that demonstrates that this is relevant to its compliance with the CSA. As I have stated, I have assumed that all controlled substance prescriptions not at issue in this case were filled legitimately. Although logically the pressure of a long-standing family business could provide some incentive towards integrity, the fact is that the current owners and employees of Respondent pharmacy have not convinced me that this pharmacy can be entrusted with a registration.

[160] Tr. 802–03.

*V The Chief ALJ went on to state that if ''the Respondent presents the Agency with a comprehensive remedial action plan truly aimed at avoiding recurrence, and communicates credible *indicia* of an unequivocal acceptance of responsibility, it is further recommended that strong consideration be made to favorable consideration of a COR application filed no earlier than two years from the date of the publication of the Agency's final order in the **Federal Register**.'' RD, at 67. This recommendation, which seems to be related to the analysis in *supra* n.*U, is too theoretical to include in my final decision, and I do not find that such inclusion is warranted. Any new application in the future would be appropriately evaluated on its own merits, to include Respondent pharmacy's behavior in the intervening timeframe. *See Robert L. Doughtery, M.D.,* 76 FR 16823, 16835 (2011) (stating that when determining whether to grant an application where misconduct has already been proven, ''DEA has long held that the paramount issue is not how much time has elapsed since his unlawful conduct, but rather, whether during that time Respondent has learned from past mistakes and has determined that he would handle controlled substances properly if entrusted with a new registration'' (cleaned up)).

*W The exceptions are numbered 1–5, then 7, skipping 6.

*X I note that in its Posthearing, the Government seems to have first set forth the evidence it produced to establish its *prima facie* case and then argued, in the alternative, that the *prima facie* case was also met through Respondent's admission. Gov Posthearing, at 21–30.

*Y The Government also argued that Respondent failed to unequivocally accept responsibility, and Respondent is certainly not suggesting that I be bound by that argument. Gov Posthearing, at 2.

40636 (2021); *Robert Wayne Locklear,* 86 FR 33738 (2021); *Jeffrey Stein, M.D.,* 86 FR 46968 (2019). Next, Respondent argued that the Chief ALJ used the Respondent's explanation of ''how it came to be in the position of dispensing these prescriptions'' and identification of ''instances where it appeared that a claim was being made that was not supported by the facts'' against Respondent in determining that Respondent did not unequivocally accept responsibility. Resp Exceptions, at 9–10. The two specific factual references that the Respondent states should not have been weighed against its acceptance of responsibility were that the ''Louisiana Board of Pharmacy failed to provide any guidance for its pharmacists regarding 'red flags' '' and that ''literally millions of prescriptions for [an opiate and a benzodiazepine] were being issued by doctors in the United States every year.'' *Id.*

I recognize that Respondent has every right to present its case and defend its actions in this matter. However, the agency has long considered statements that are aimed at minimizing the egregiousness of its conduct to weigh against a finding of acceptance of full responsibility. *See Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (Respondent did not accept responsibility noting that he ''repeatedly attempted to minimize his [egregious] misconduct''; *see also Michael White, M.D.,* 79 FR 62957, 62967 (2014) (finding that Respondent's ''acceptance of responsibility was tenuous at best'' and that he ''minimized the severity of his misconduct by suggesting that he thinks the requirements for prescribing Phentermine are too strict.''). The Agency does not bar explanations or rationale as to why the misconduct might have occurred, as long as the acceptance of responsibility is unequivocal and credible, *see Michele L. Martinho, M.D.,* 86 FR 24012, 24020 (2021), but the Agency analyzes such acceptance on a case-by-case basis and the crucial aspect of a Respondent's acceptance of responsibility is that it demonstrate to me that it can be entrusted with a registration—that it will not repeat the egregious behavior that occurred.

Here, Respondent through its two witnesses repeatedly made general statements claiming full acceptance of responsibility. For example, Mr. Vicellio testified, ''[b]efore we [did not] have [written policies and procedures] and . . . [t]hat is on me, and I do apologize.'' Tr. 837. Mr. Bryce testified ''we 100 percent acknowledge our failure on our . . . corresponding responsibility and we are dedicated, devoted, going overboard, as a matter of fact, because I can guarantee you [there is] no pharmacy in Louisiana that we are aware of or that we even gather you could find that is doing the level of documentation and fulfilling their corresponding responsibilities like we are.'' Tr. 990–91. However, when the testimony more narrowly focused on the specific deficiencies at issue, it became clear that Respondent was minimizing the extent of its misconduct as the Chief ALJ set forth fully in his decision. *See supra* at The Respondent's Case. Mr. Bryce was particularly unapologetic for the Respondent's failures with regard to accepting alternating payment methods (a cost-saving and an insurance issue), doctor shopping (different specialists prescribe for different ailments), and in some cases trinity prescribing (other pharmacies are still filling these drugs and the FDA never really called a ''hard stop''). Respondent did not convince me that it believed that these red flags were indicators of potential diversion that needed serious consideration and proper resolution, and minimized the potential harmful consequences of its actions by stating that the FDA never put a ''hard stop'' on prescribing the trinity cocktail and it is still being prescribed. In this case, the Respondent's comments regarding red flags demonstrate a lack of full understanding of the extent of its wrongdoing. If I believed that it had demonstrated a complete understanding of its misconduct and understood and accepted the potential for harm that it caused, I would be less concerned about its future compliance. *See Robert Wayne Locklear, M.D.,* 86 FR 33738, 33745 (2021) (finding that a respondent's inability to understand the full consequences of his actions weighed against a finding of acceptance of responsibility). As it stands, I was not convinced that Respondent had fully and unequivocally accepted responsibility for its actions. I recognize that Respondent put policies in place that it believes will better identify these potential red flags. Correcting unlawful behavior and practices is very important to establish acceptance of responsibility; however, conceding wrongdoing is critical to reestablishing trust with the Agency. *Holiday CVS, L.L.C.,* 77 FR 62316, 62346 (2012), *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74801 (2015). I agree with the Chief ALJ's finding that Respondent failed to unequivocally accept responsibility for its actions in this case.

Exception 2, Regarding Remedial Measures

Where a respondent has not credibly accepted responsibility for its misconduct, I am not required to consider evidence of remedial measures. *See Jones Total Health Care Pharmacy, L.L.C.,* 81 FR 79202–03. Even if Respondent's acceptance of responsibility for his wrongdoing had been sufficient such that I would consider remedial measures, Respondent has not offered adequate remedial measures here to assure me that I can entrust it with a registration. *See Carol Hippenmeyer, M.D.,* 86 FR 33748, 33773 (2021). And if Respondent had offered adequate remedial measures to assure me under other circumstances, my sanctions analysis in this case would still have supported revocation as a sanction. This is because remedial measures, when considered, are only one of several elements that I evaluate when determining how to exercise my discretionary authority to sanction a registrant.*[Z] If, following that analysis, I am not confident that I can entrust a respondent with the weighty responsibility of maintaining a registration, then I can only find that revocation is an appropriate sanction.

Respondent takes exception to the Chief ALJ's finding that Respondent's remedial measures, namely new policies and procedures, were not sufficient to prevent the recurrence of future CSA violations. Respondent advances this argument from several different angles. First, Respondent claims that there was no ''evidence challenging the facial validity of these procedures.'' Resp Exceptions, at 6. Respondent claims that no ''government witness addressed the content of the new procedures,'' ''no evidence was offered to show [what] a set of procedures that have been declared sufficient might look like,'' and that ''the ALJ effectively acted as his own witness in making the subject determination regarding the new procedures.'' *Id.* at 6–8. Respondent has offered no support for its proposition that I am required to accept its proposed policies and procedures as ''facially valid'' or that I am required to receive counter evidence regarding the efficacy of its proposed remedial measures.

*[Z] ''While the CSA establishes parameters for issuing and terminating registrations, the final registration-related decision, such as granting or denying a registration, and continuing, suspending, or revoking a registration, is left to the reviewable discretion of the Attorney General. 21 U.S.C. 823 and 824 (using the word ''may'' in provisions to confer discretion on the Attorney General regarding the granting, denying, continuing, suspending, and revoking of practitioner registrations).'' *See Frank Joseph Stirlacci, M.D.,* 85 FR 45229, n.18 (2019).

Where the Government has established a *prima facie* case for revocation of a registrant's COR, the burden of production then shifts to the registrant to show that, given the totality of the facts and circumstances in the record, revoking the registrant's COR would not be appropriate. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008). Here, the Respondent has not presented convincing evidence that I can entrust it with a registration.

Next, Respondent argues, the Chief ALJ erred by speculating as to whether or not the proposed remedial measures would be effective because, ''[p]redictions [are not] needed when actual facts are available.'' Resp Exceptions, at 8. The ''facts,'' which Respondent claims were not considered by the ALJ, are that Respondent has ''invit[ed] the agency to check out the operations at Medical Pharmacy West,'' because an investigation would capture whether or not ''the new procedures were . . . effectively preventing prescriptions from being filled despite these unresolved red flags.'' *Id.* Respondent has not provided any support for the notion that DEA's lack of an inspection is proof of the legality of a pharmacy's operation. It is clear that ''the agency has discretion regarding whether to bring an enforcement action.'' *See Ester Mark, M.D.,* 86 FR 16760, 16762 (2021) (respondent argued that a time lapse in the investigation and the renewal of her registration during the investigation did not align with the DEA being concerned about her prescribing behavior); (*citing Stirlacci,* 85 FR at 45236). I sincerely hope, as Respondent contests, that Respondent's sister pharmacy is complying with the law as the Agency will continue to regulate that pharmacy's controlled substances registration; however, after numerous, egregious violations of federal and state law were proven, it was incumbent on the Respondent pharmacy to present the evidence required to demonstrate that its remedial measures were adequate.

Finally, Respondent argues that Mr. Bryce, who was tendered as an expert in the practice of pharmacy in Louisiana, offered uncontroverted testimony that the new policies and procedures ''were designed to address the red flags at issue in the case.'' Resp Exceptions, at 9. Respondent goes on to suggest that I am bound by an uncontradicted opinion of an expert. *Id.* However, Mr. Bryce's testimony on the matter was:

> Q: And the new policies and procedures adopted by Medical Pharmacy West that will go into effect at the pharmacy, designed to attempt to resolve, to handle those red flags and provide a set means of doing so in the future?
>
> A: Yes, sir. They're designed to provide guidance without any question as to how we are going to handle the red flag and the documentation as such, that they are to be resolved.

Tr. 1050. This testimony appears to be fact testimony explaining what goals Mr. Bryce intended to accomplish when he drafted the new policies. This does not appear to be expert testimony opining as to whether or not the procedures are sufficient to ensure that any prescriptions issued pursuant to policy will be in compliance with the CSA. Even if Mr. Bryce did intend to testify to the latter, I must consider a witness's credibility in determining what weight to give the testimony. Here, I am not convinced that Mr. Bryce fully understands Respondent's corresponding responsibility under the CSA *[AA] such that I would credit his opinions on the requirements necessary to comply with the CSA.

Additionally, in assessing remedial measures, the Agency must consider its mission in preventing the diversion and misuse of controlled substances and the feasibility of monitoring and enforcing such measures. DEA budgets for approximately 2000 Diversion positions involved in regulating more than 1.9 million registrants overall. *See* DEA FY2022 Budget Request available at *https://www.justice.gov/jmd/page/file/1398361/download.* Ensuring that a registrant is trustworthy to comply with all relevant aspects of the CSA without constant oversight is crucial to the Agency's ability to complete its mission of preventing diversion within such a large regulated population. *See Jeffrey Stein, M.D.,* 84 FR at 46974.

Most importantly, the fact remains that, following my sanctions analysis, I am not confident that I can entrust Respondent with the weighty responsibility of maintaining a registration. If I cannot entrust Respondent to implement its proposed remedial measures, then it does not matter whether the measures themselves would adequately address the misconduct. This is why generally I do not consider remedial measures without first establishing an adequate acceptance of responsibility. I need to be confident that the policies will be followed, and I do not have such confidence that would persuade me to place the burden on the Agency whose trust Respondent broke to monitor its compliance with its remedial measures. *See Kaniz Khan Jaffery,* 85 FR 45667, 45690 (2020) (finding that respondent hid behind rote diversion controls without legitimately attending to and documenting red flags). Due to the extent and egregiousness of Respondent's misconduct, its failure to adequately accept responsibility, Respondent has not given me reassurance that it can be entrusted with a registration. *See Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988) (describing revocation as a remedial measure ''based upon the public interest and the necessity to protect the public from individuals who have misused controlled substances or their DEA Certificate of Registration and who have not presented sufficient mitigating evidence to assure the Administrator that they can be trusted with the responsibility carried by such a registration.''). Accordingly, I reject Respondent's Exceptions and affirm the RD's conclusion that Respondent's registration should be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I hereby revoke DEA Certificate of Registration No. AL3398117 issued to Medical Pharmacy. Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I further hereby deny any pending applications for renewal or modification of this registration, as well as any other pending application of Medical Pharmacy for registration in Louisiana. This Order is effective January 19, 2022.

Anne Milgram,

Administrator.

United States Department of Justice

Drug Enforcement Administration

In the Matter of: Medical Pharmacy.

Docket No. 20–04

Appendix to the Recommended Decision

The following dispensing events were established by the mutual stipulation of the parties.

*[AA] For example, as the Chief ALJ set forth in *supra* n. 124, rather than having in-depth, ongoing training on how to spot and resolve red flags and verify the legitimacy of prescriptions, Respondent decided they would no longer dispense, carisoprodol, a legal controlled substance. Tr. 982. While this remedial measure may prevent illegitimate prescriptions of carisoprodol from being dispensed, it does not fill me with confidence that Respondent fully understands the requirements of its corresponding responsibility. Additionally, Respondent's minimization of the severity of the potential dangers of prescribing the trinity cocktail by stating that it is still being frequently filled do not demonstrate a complete understanding of the misconduct that occurred.

Patient CH

The Government's evidence established the following dispensing events with respect to Patient CH:

Dispensing event	Date	Medications	Source
CH1	9/12/2017	Carisoprodol 350 mg, 120 tablets	Stip. 3(a).
CH2	9/12/2017	Alprazolam 1 mg, 90 tablets	Stip. 3(b).
CH3	9/12/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 3(c).
CH4	9/12/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 3(d).

Patient JMB

The Government's evidence established the following dispensing events with respect to Patient JMB:

Dispensing event	Date	Medications	Source
JMB1	6/05/2017	Hydromorphone 8 mg, 120 tablets	Stip. 4(a).
JMB2	6/05/2017	Alprazolam 1 mg, 60 tablets	Stip. 4(b).
JMB3	6/05/2017	Carisoprodol 350 mg, 120 tablets	Stip. 4(c).
JMB4	6/05/2017	Morphine SO4 ER 30 mg, 90 tablets	Stip. 4(d).
JMB5	7/05/2017	Hydromorphone 8 mg, 120 tablets	Stip. 4(h).
JMB6	7/05/2017	Alprazolam 1 mg, 60 tablets	Stip. 4(e).
JMB7	7/05/2017	Carisoprodol 350 mg, 120 tablets	Stip. 4(g).
JMB8	7/05/2017	Morphine SO4 ER 30 mg, 90 tablets	Stip. 4(f).
JMB9	9/14/2017	Alprazolam 1 mg, 60 tablets	Stip. 4(i).
JMB10	9/27/2017	Morphine SO4 ER 30 mg, 30 tablets	Stip. 4(j).
JMB11	9/27/2017	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(k).
JMB12	9/27/2017	Carisoprodol 350 mg, 120 tablets	Stip. 4(l).
JMB13	9/27/2017	Hydromorphone 8 mg, 120 tablets	Stip. 4(m).
JMB14	10/27/2017	Carisoprodol 350 mg, 120 tablets	Stip. 4(n).
JMB15	10/27/2017	Hydromorphone 8 mg, 120 tablets	Stip. 4(o).
JMB16	12/20/2017	Carisoprodol 350 mg, 120 tablets	Stip. 4(p).
JMB17	12/20/2017	Alprazolam 1 mg, 50 tablets	Stip. 4(q).
JMB18	12/20/2017	Hydromorphone 8 mg, 120 tablets	Stip. 4(r).
JMB19	12/21/2017	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(s).
JMB20	8/16/2018	Alprazolam 1 mg, 60 tablets	Stip. 4(t).
JMB21	8/30/2018	Hydromorphone 8 mg, 120 tablets	Stip. 4(u).
JMB22	8/30/2018	Carisoprodol 350 mg, 120 tablets	Stip. 4(v).
JMB23	9/10/2018	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(w).
JMB24	9/21/2018	Alprazolam 1 mg, 60 tablets	Stip. 4(x).
JMB25	9/27/2018	Carisoprodol 350 mg, 120 tablets	Stip. 4(y).
JMB26	9/27/2018	Hydromorphone 8 mg, 120 tablets	Stip. 4(z).
JMB27	10/15/2018	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(aa).
JMB28	10/24/2018	Carisoprodol 350 mg, 120 tablets	Stip. 4(bb).
JMB29	10/24/2018	Hydromorphone 8 mg, 120 tablets	Stip. 4(cc).
JMB30	11/13/2018	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(dd).
JMB31	11/27/2018	Hydromorphone 8 mg, 120 tablets	Stip. 4(ee).
JMB32	11/27/2018	Carisoprodol 350 mg, 120 tablets	Stip. 4(ff).
JMB33	11/29/2018	Alprazolam 1 mg, 60 tablets	Stip. 4(gg).
JMB34	12/24/2018	Carisoprodol 350 mg, 120 tablets	Stip. 4(hh).
JMB35	12/24/2018	Hydromorphone 8 mg, 120 tablets	Stip. 4(ii).
JMB36	12/28/2018	Alprazolam 1 mg, 60 tablets	Stip. 4(jj).
JMB37	1/08/2019	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(kk).
JMB38	1/22/2019	Hydromorphone 8 mg, 120 tablets	Stip. 4(ll).
JMB39	1/22/2019	Carisoprodol 350 mg, 120 tablets	Stip. 4(mm).
JMB40	2/08/2019	Alprazolam 1 mg, 60 tablets	Stip. 4(nn).
JMB41	2/08/2019	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(oo).
JMB42	2/19/2019	Carisoprodol 350 mg, 120 tablets	Stip. 4(pp).
JMB43	2/19/2019	Hydromorphone 8 mg, 120 tablets	Stip. 4(qq).
JMB44	7/01/2019	Morphine SO4 ER 30 mg, 60 tablets	Stip. 4(rr).
JMB45	7/08/2019	Carisoprodol 350 mg, 120 tablets	Stip. 4(ss).
JMB46	7/08/2019	Hydromorphone 8 mg, 120 tablets	Stip. 4(tt).
JMB47	8/05/2019	Hydromorphone 8 mg, 120 tablets	Stip. 4(uu).
JMB48	8/05/2019	Carisoprodol 350 mg, 120 tablets	Stip. 4(vv).
JMB49	8/20/2019	Alprazolam 1 mg, 60 tablets	Stip. 4(ww).
JMB50	8/27/2019	Hydromorphone 8 mg, 120 tablets	Stip. 4(xx).
JMB51	8/27/2019	Carisoprodol 350 mg, 120 tablets	Stip. 4(yy).

Patient TD

The Government's evidence established the following dispensing events with respect to Patient TD:

Dispensing event	Date	Medications	Source
TD1	7/13/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets	Stip. 5(a).
TD2	8/08/2017	Clonazepam 0.5 mg, 60 tablets	Stip. 5(b).
TD3	8/08/2017	Carisoprodol 350 mg, 60 tablets	Stip. 5(c).
TD4	8/12/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets	Stip. 5(d).
TD5	7/11/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets	Stip. 5(e).
TD6	7/18/2018	Clonazepam 0.5 mg, 60 tablets	Stip. 5(f).
TD7	7/18/2018	Carisoprodol 350 mg, 60 tablets	Stip. 5(g).

Patient DG

The Government's evidence established the following dispensing events with respect to Patient DG:

Dispensing event	Date	Medications	Source
DG1	2/10/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(a).
DG2	2/10/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(b).
DG3	2/21/2017	Diazepam 10 mg, 60 tablets	Stip. 6(c).
DG4	3/09/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(d).
DG5	3/09/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(e).
DG6	3/21/2017	Diazepam 10 mg, 60 tablets	Stip. 6(f).
DG7	4/06/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(g).
DG8	4/06/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(h).
DG9	4/26/2017	Diazepam 10 mg, 60 tablets	Stip. 6(i).
DG10	5/04/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(j).
DG11	5/04/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(k).
DG12	5/30/2017	Diazepam 10 mg, 60 tablets	Stip. 6(l).
DG13	6/01/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(m).
DG14	6/01/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(n).
DG15	6/29/2017	Diazepam 10 mg, 60 tablets	Stip. 6(o).
DG16	6/29/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(p).
DG17	6/29/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(q).
DG18	7/27/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(r).
DG19	7/27/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(s).
DG20	7/28/2017	Diazepam 10 mg, 60 tablets	Stip. 6(t).
DG21	8/23/2017	Diazepam 10 mg, 60 tablets	Stip. 6(u).
DG22	8/24/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(v).
DG23	8/27/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(w).
DG24	9/21/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(x).
DG25	9/21/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(y).
DG26	9/25/2017	Diazepam 10 mg, 60 tablets	Stip. 6(z).
DG27	11/16/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(aa).
DG28	11/16/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(bb).
DG29	11/20/2017	Diazepam 10 mg, 60 tablets	Stip. 6(cc).
DG30	12/14/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(dd).
DG31	12/14/2017	Carisoprodol 350 mg, 30 tablets	Stip. 6(ee).
DG32	12/14/2017	Diazepam 10 mg, 60 tablets	Stip. 6(ff).
DG33	1/12/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(gg).
DG34	1/12/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(hh).
DG35	1/24/2018	Diazepam 10 mg, 60 tablets	Stip. 6(ii).
DG36	2/09/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(jj).
DG37	2/09/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(kk).
DG38	2/21/2018	Diazepam 10 mg, 60 tablets	Stip. 6(ll).
DG39	3/09/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(mm).
DG40	3/09/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(nn).
DG41	3/26/2018	Diazepam 10 mg, 60 tablets	Stip. 6(oo).
DG42	6/06/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(pp).
DG43	6/06/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(qq).
DG44	6/14/2018	Diazepam 10 mg, 60 tablets	Stip. 6(rr).
DG45	7/05/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(ss).
DG46	7/05/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(tt).
DG47	7/16/2018	Diazepam 10 mg, 60 tablets	Stip. 6(uu).
DG48	8/02/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(vv).
DG49	8/02/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(ww).
DG50	8/13/2018	Diazepam 10 mg, 60 tablets	Stip. 6(xx).
DG51	8/30/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(yy).

Dispensing event	Date	Medications	Source
DG52	8/30/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(zz).
DG53	9/08/2018	Diazepam 10 mg, 60 tablets	Stip. 6(aaa).
DG54	10/26/2018	Carisoprodol 350 mg, 30 tablets	Stip. 6(bbb).
DG55	10/26/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 6(ccc).
DG56	11/06/2018	Diazepam 10 mg, 60 tablets	Stip. 6(ddd).

Patient JH

The Government's evidence established the following dispensing events with respect to Patient JH:

Dispensing event	Date	Medications	Source
JH1	2/07/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 45 tablets	Stip. 7(a).
JH2	2/07/2017	Diazepam 10 mg, 18 tablets	Stip. 7(b).
JH3	2/07/2017	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 7(c).
JH4	2/09/2017	Carisoprodol 350, 90 tablets	Stip. 7(d).
JH5	7/13/2017	Diazepam 10 mg, 90 tablets	Stip. 7(e).
JH6	7/13/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 40 tablets	Stip. 7(f).
JH7	7/13/2017	Carisoprodol 350, 120 tablets	Stip. 7(g).
JH8	7/31/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 40 tablets	Stip. 7(h).
JH9	8/11/2017	Diazepam 10 mg, 90 tablets	Stip. 7(i).
JH10	8/11/2017	Carisoprodol 350, 120 tablets	Stip. 7(j).
JH11	9/29/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 7(k).
JH12	10/10/2017	Carisoprodol 350, 120 tablets	Stip. 7(l).
JH13	10/11/2017	Diazepam 10 mg, 90 tablets	Stip. 7(m).
JH14	10/26/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 7(n).
JH15	4/26/2018	Carisoprodol 350, 120 tablets	Stip. 7(o).
JH16	4/26/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 7(p).
JH17	4/26/2018	Diazepam 10 mg, 35 tablets	Stip. 7(q).
JH18	5/24/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 7(r).
JH19	5/24/2018	Carisoprodol 350, 120 tablets	Stip. 7(s).
JH20	5/24/2018	Diazepam 10 mg, 35 tablets	Stip. 7(t).
JH21	9/20/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 7(u).
JH22	9/20/2018	Carisoprodol 350, 120 tablets	Stip. 7(v).
JH23	9/20/2018	Diazepam 10 mg, 35 tablets	Stip. 7(w).
JH24	10/18/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 7(x).
JH25	10/18/2018	Carisoprodol 350, 120 tablets	Stip. 7(y).
JH26	10/18/2018	Diazepam 10 mg, 35 tablets	Stip. 7(z).

Patient RI

The Government's evidence established the following dispensing events with respect to Patient RI:

Dispensing event	Date	Medications	Source
RI1	8/17/2017	Alprazolam 1 mg, 120 tablets	Stip. 8(a).
RI2	8/25/2017	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 8(b).
RI3	8/25/2017	Carisoprodol 350 mg, 30 tablets	Stip. 8(c).
RI4	8/25/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(d).
RI5	9/11/2017	Alprazolam 1 mg, 120 tablets	Stip. 8(e).
RI6	9/25/2017	Carisoprodol 350 mg, 30 tablets	Stip. 8(f).
RI7	9/25/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(g).
RI8	10/12/2017	Alprazolam 1 mg, 120 tablets	Stip. 8(h).
RI9	10/25/2017	Carisoprodol 350 mg, 30 tablets	Stip. 8(i).
RI10	10/25/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(j).
RI11	11/13/2017	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 8(k).
RI12	11/13/2017	Alprazolam 1 mg, 120 tablets	Stip. 8(l).
RI13	11/24/2017	Carisoprodol 350 mg, 30 tablets	Stip. 8(m).
RI14	11/24/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(n).
RI15	12/09/2017	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 8(o).
RI16	12/13/2017	Alprazolam 1 mg, 120 tablets	Stip. 8(p).
RI17	12/23/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(q).
RI18	12/27/2017	Carisoprodol 350 mg, 30 tablets	Stip. 8(r).
RI19	8/15/2018	Alprazolam 1 mg, 90 tablets	Stip. 8(s).
RI20	8/24/2018	Carisoprodol 350 mg, 30 tablets	Stip. 8(t).
RI21	8/24/2018	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(u).
RI22	11/08/2018	Alprazolam 1 mg, 90 tablets	Stip. 8(v).

Dispensing event	Date	Medications	Source
RI23	11/23/2018	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 8(w).
RI24	11/24/2018	Carisoprodol 350 mg, 30 tablets	Stip. 8(x).
RI25	11/24/2018	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(y).
RI26	12/06/2018	Alprazolam 1 mg, 90 tablets	Stip. 8(z).
RI27	12/24/2018	Oxycodone-Acetaminophen 10 mg/325 mg, 30 tablets	Stip. 8(aaa).
RI28	12/24/2018	Hydrocodone-Acetaminophen 5 mg/325 mg, 10 tablets	Stip. 8(bbb).
RI29	12/24/2018	Carisoprodol 350 mg, 30 tablets	Stip. 8(ccc).
RI30	1/04/2019	Alprazolam 1 mg, 90 tablets	Stip. 8(ddd).

Patient JB

The Government's evidence established the following dispensing events with respect to Patient JB:

Dispensing event	Date	Medications	Source
JB1	7/02/2019	Dextroamphetamine-Amphetamine 20 mg, 90 tablets	Stip. 9(a).
JB2	7/02/2019	Alprazolam 0.5 mg, 60 tablets	Stip. 9(b).
JB3	7/02/2019	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 9(c).

Patient PW

The Government's evidence established the following dispensing events with respect to Patient PW:

Dispensing event	Date	Medications	Source
PW1	4/04/2019	Alprazolam 0.5 mg, 60 tablets	Stip. 10(a).
PW2	4/04/2019	Hydrocodone-Acetaminophen 10 mg.325 mg, 30 tablets	Stip. 10(b).
PW3	8/01/2019	Alprazolam 0.5 mg, 60 tablets	Stip. 10(c).
PW4	8/01/2019	Hydrocodone-Acetaminophen 10 mg.325 mg, 30 tablets	Stip. 10(d).
PW5	8/29/2019	Alprazolam 0.5 mg, 60 tablets	Stip. 10(e).
PW6	8/29/2019	Hydrocodone-Acetaminophen 10 mg.325 mg, 30 tablets	Stip. 10(f).

Patient LH

The Government's evidence established the following dispensing events with respect to Patient LH:

Dispensing event	Date	Medications	Source
LH1	6/14/2017	Alprazolam 1 mg, 360 tablets	Stip. 11(a).
LH2	6/22/2017	Dextroamphetamine-Amphetamine 30 mg, 30 tablets	Stip. 11(b).
LH3	6/22/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 20 tablets	Stip. 11(c).

Patient AP

The Government's evidence established the following dispensing events with respect to Patient AP:

Dispensing event	Date	Medications	Source
AP1	8/02/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 25 tablets	Stip. 12(a).
AP2	8/02/2017	Zolpidem Tartrate 10 mg, 30 tablets	Stip. 12(b).

Patient MA

The Government's evidence established the following dispensing events with respect to Patient MA:

Dispensing event	Date	Medications	Source
MA1	10/12/2017	Alprazolam 1 mg, 30 tablets	Stip. 13(a).
MA2	10/12/2017	Dextroamphetamine-Amphetamine 30 mg, 60 tablets	Stip. 13(b).
MA3	10/12/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 13(c).

Patient BB

The Government's evidence established the following dispensing events with respect to Patient BB:

Dispensing event	Date	Medications	Source
BB1	10/19/2017	Alprazolam 1 mg, 90 tablets	Stip. 14(a).
BB2	10/19/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 14(b).
BB3	1/11/2017	Alprazolam 0.5 mg, 2 tablets	Stip. 14(c).
BB4	1/11/2017	Diazepam 10 mg, 2 tablets	Stip. 14(d).
BB5	1/12/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 14(e).
BB6	2/8/2017	Alprazolam 0.5 mg, 2 tablets	Stip. 14(f).
BB7	2/8/2017	Diazepam 10 mg, 2 tablets	Stip. 14(g).
BB8	2/10/2017	Alprazolam 0.5 mg, 60 tablets	Stip. 14(h).
BB9	2/10/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 14(i).
BB10	3/9/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 14(j).
BB11	3/9/2017	Alprazolam 0.5 mg, 60 tablets	Stip. 14(k).
BB12	5/4/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 14(l).

Patient TD

The Government's evidence established the following dispensing events with respect to Patient TD:

Dispensing event	Date	Medications	Source
TD1	3/07/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 180 tablets	Stip. 15(a).
TD2	3/07/2018	Clonazepam 0.5 mg, 60 tablets	Stip. 15(b).

Patient LD

The Government's evidence established the following dispensing events with respect to Patient LD:

Dispensing event	Date	Medications	Source
LD1	8/19/2019	Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 16(a).
LD2	8/19/2019	Lorazepam 0.5 mg, 60 tablets	Stip. 16(b).
LD3	8/19/2019	Morphine SO4 ER 30 mg, 60 tablets	Stip. 16(c).

Patient RW

The Government's evidence established the following dispensing events with respect to Patient RW:

Dispensing event	Date	Medications	Source
RW1	8/12/2019	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 17(a).
RW2	8/12/2019	Diazepam 5 mg, 30 tablets	Stip. 17(b).
RW3	9/09/2019	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 17(c).
RW4	9/09/2019	Diazepam 5 mg, 30 tablets	Stip. 17(d).

Patient LC

The Government's evidence established the following dispensing events with respect to Patient LC:

Dispensing event	Date	Medications	Source
LC1	3/21/2019	Oxycodone-Acetaminophen 7.5 mg/325 mg, 14 tablets	Stip. 18(a).
LC2	3/21/2019	Oxycodone-Acetaminophen 7.5 mg/325 mg, 16 tablets	Stip. 18(b).

Patient KW

The Government's evidence established the following dispensing events with respect to Patient KW:

Dispensing event	Date	Medications	Source
KW1	4/16/2019	Alprazolam 0.25 mg, 60 tablets	Stip. 19(a).
KW2	4/16/2019	Dextroamphetamine-Amphetamine 20 mg, 90 tablets	Stip. 19(b).

Patient DM

The Government's evidence established the following dispensing events with respect to Patient DM:

Dispensing event	Date	Medications	Source
DM1	6/08/2017	Alprazolam 1 mg, 60 tablets	Stip. 20(a).
DM2	6/08/2017	Dextroamphetamine-Amphetamine, 60 tablets	Stip. 20(b).

Patient KS

The Government's evidence established the following dispensing events with respect to Patient KS:

Dispensing event	Date	Medications	Source
KS1	6/26/2017	Dextroamphetamine-Amphetamine 30 mg, 60 tablets	Stip. 21(a).
KS2	6/26/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 21(b).

Patient PB

The Government's evidence established the following dispensing events with respect to Patient PB:

Dispensing event	Date	Medications	Source
PB1	6/26/2019	Methadone 10 mg, 60 tablets	Stip. 22(a).
PB2	6/26/2019	Oxycodone-Acetaminophen	Stip. 22(b).

Patient CS

The Government's evidence established the following dispensing events with respect to Patient CS:

Dispensing event	Date	Medications	Source
CS1	6/11/2019	Oxycodone 30 mg, 90 tablets	Stip. 23(a).
CS2	7/09/2019	Oxycodone 30 mg, 90 tablets	Stip. 23(b).

Patient SN

The Government's evidence established the following dispensing events with respect to Patient SN:

Dispensing event	Date	Medications	Source
SN1	6/05/2019	Hydrocodone-Acetaminophen 7.5 mg/325 mg, 30 tablets	Stip. 24(a).
SN2	6/19/2019	Hydrocodone-Acetaminophen 7.5 mg/325 mg, 30 tablets	Stip. 24(b).

Patient DF

The Government's evidence established the following dispensing events with respect to Patient DF:

Dispensing event	Date	Medications	Source
DF1	6/04/2019	Alprazolam 0.5 mg, 120 tablets	Stip. 26(a).
DF2	6/04/2019	Dextroamphetamine-Amphetamine 30 mg, 60 tablets	Stip. 26(b).
DF3	6/04/2019	Butalbital-Acetaminophen-Caffeine 50 mg/325 mg/40 mg, 60 tablets	Stip. 26(c).

Patient DL

The Government's evidence established the following dispensing events with respect to Patient DL:

Dispensing event	Date	Medications	Source
DL1	8/09/2017	Diazepam 10 mg, 90 tablets	Stip. 27(a).
DL2	8/09/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 27(b).

Patient ML

The Government's evidence established the following dispensing events with respect to Patient ML:

Dispensing event	Date	Medications	Source
ML1	8/02/2017	Diazepam 10 mg, 45 tablets	Stip. 28(a).

Patient KC

The Government's evidence established the following dispensing events with respect to Patient KC:

Dispensing event	Date	Medications	Source
KC1	10/09/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 75 tablets	Stip. 29(a).
KC2	10/09/2017	Alprazolam 1 mg, 60 tablets	Stip. 29(b).

Patient GC

The Government's evidence established the following dispensing events with respect to Patient GC:

Dispensing event	Date	Medications	Source
GC1	10/10/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 30(a).
GC2	10/10/2017	Alprazolam 1 mg, 90 tabelts	Stip. 30(b).

Patient VM

The Government's evidence established the following dispensing events with respect to Patient VM:

Dispensing event	Date	Medications	Source
VM1	10/20/2017	Hydrocodone-Acetaminophen 10 mg.325 mg, 120 tablets	Stip. 31(a).
VM2	10/20/2017	Alprazolam 1 mg, 60 tablets	Stip. 31(b).

Patient PR

The Government's evidence established the following dispensing events with respect to Patient PR:

Dispensing event	Date	Medications	Source
PR1	10/24/2017	Hydrocodone-Acetaminophen 10 mg.325 mg, 112 tablets	Stip. 25(a).
PR2	6/13/2019	Hydrocodone-Acetaminophen 10 mg.325 mg, 112 tablets	Stip. 25(b).

Patient AG

The Government's evidence established the following dispensing events with respect to Patient AG:

Dispensing event	Date	Medications	Source
AG1	9/06/2016	Oxycodone 15 mg, 90 tablets	Stip. 32(a).
AG2	6/27/2019	Oxycodone 15 mg, 120 tablets	Stip. 32(b).
AG3	7/24/2019	Oxycodone 15 mg, 120 tablets	Stip. 32(c).
AG4	8/22/2019	Oxycodone 15 mg, 120 tablets	Stip. 32(d).

Patient TB

The Government's evidence established the following dispensing events with respect to Patient TB:

Dispensing event	Date	Medications	Source(s)
TB1	5/22/2017	Oxycodone 15 mg, 90 tablets	Stip. 33(a); Gov't Ex 46
TB2	6/25/2018	Oxycodone 15 mg, 60 tablets	Stip. 33(b).
TB3	7/09/2018	Oxycodone 15 mg, 60 tablets	Stip. 33(c).
TB4	7/23/2018	Oxycodone 15 mg, 60 tablets	Stip. 33(d).

Patient KR

The Government's evidence established the following dispensing events with respect to Patient KR:

Dispensing event	Date	Medications	Source
KR1	4/09/2019	Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 34(a).
KR2	8/04/2018	Oxycodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 34(b).

Patient LW

The Government's evidence established the following dispensing events with respect to Patient LW:

Dispensing event	Date	Medications	Source
LW1	7/27/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 35(a).
LW2	7/27/2017	Alprazolam 1 mg, 90 tablets	Stip. 35(b).
LW3	7/27/2017	Dextroamphetamine-Amphetamine 20 mg, 60 tablets	Stip. 35(c).
LW4	7/27/2017	Phentermine 37.5 mg, 30 tablets	Stip. 35(d).

Patient KJ

The Government's evidence established the following dispensing events with respect to Patient KJ:

Dispensing event	Date	Medications	Source
KJ1	5/21/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 36(a).
KJ2	7/21/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 36(b).
KJ3	11/19/2018	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 36(c).

Patient VE

The Government's evidence established the following dispensing events with respect to Patient VE:

Dispensing event	Date	Medications	Source
VE1	5/22/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 37.

Patient TP

The Government's evidence established the following dispensing events with respect to Patient TP:

Dispensing event	Date	Medications	Source
TP1	5/22/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 38.

Patient IJ

The Government's evidence established the following dispensing events with respect to Patient IJ:

Dispensing event	Date	Medications	Source
IJ1	5/23/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 39.

Patient RS

The Government's evidence established the following dispensing events with respect to Patient RS:

Dispensing event	Date	Medications	Source
RS1	5/26/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 40.

Patient RW

The Government's evidence established the following dispensing events with respect to Patient RW:

Dispensing event	Date	Medications	Source
RW1	6/01/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 120 tablets	Stip. 41.

Patient JW

The Government's evidence established the following dispensing events with respect to Patient JW:

Dispensing event	Date	Medications	Source
JW1	5/12/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 42.

Patient MS

The Government's evidence established the following dispensing events with respect to Patient MS:

Dispensing event	Date	Medications	Source
MS1	5/12/2017	Oxycodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 43.

Patient PF

The Government's evidence established the following dispensing events with respect to Patient PF:

Dispensing event	Date	Medications	Source
PF1	5/22/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 44.

Patient DW

The Government's evidence established the following dispensing events with respect to Patient DW:

Dispensing event	Date	Medications	Source
DW1	5/22/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 90 tablets	Stip. 45.

Patient KD

The Government's evidence established the following dispensing events with respect to Patient KD:

Dispensing event	Date	Medications	Source
KD1	5/04/2017	Hydrocodone-Acetaminophen 10 mg/325 mg, 60 tablets	Stip. 46.

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Part III

Department of the Interior

Bureau of Indian Affairs
25 CFR Part 15

Office of the Secretary
43 CFR Part 30

American Indian Probate Regulations; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 15

Office of the Secretary

43 CFR Part 30

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American Indian Probate Regulations

AGENCY: Bureau of Indian Affairs, Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (Department) is finalizing updates to its regulations governing probate of property that the United States holds in trust or restricted status for American Indians, in an effort to continually improve the services the Department provides to individual Indians and Tribes. These updates allow the Office of Hearings and Appeals (OHA) to adjudicate probate cases more efficiently by, among other things, establishing an expedited process for small, funds-only estates, reorganizing the purchase-at-probate process so that estates may be closed more quickly, and specifying which reasons justify reopening of closed probate estates. The revisions also enhance OHA's processing by adding certainty as to how estates should be distributed when certain circumstances arise that are not addressed in the statute, and improve notification to interested parties by, among other things, requiring posting of probate notices on a devoted OHA web page.

DATES: This rule is effective on January 19, 2022.

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SUPPLEMENTARY INFORMATION:

I. Executive Summary

This final rule updates regulations that address how OHA probates property that the United States holds in trust or restricted status for American Indians. These revisions allow OHA to adjudicate probate cases more efficiently by, among other things, establishing an expedited process for small, funds-only estates, reorganizing the purchase-at-probate process so that estates may be closed more quickly, and specifying which reasons justify reopening of closed probate estates. The revisions also enhance OHA's processing by adding certainty as to how estates should be distributed when certain circumstances arise that are not addressed in the statute, and improve notification to interested parties by, among other things, requiring posting of probate notices on a devoted OHA web page.

II. Background and History of This Rulemaking

The Department probates thousands of estates each year for American Indian individuals who own trust or restricted property. The Bureau of Indian Affairs (BIA), OHA, and the Office of the Special Trustee for American Indians (OST) each play a role in the probate process. BIA compiles the information necessary to build a case record (*i.e.,* the probate file) and then transfers the record to OHA for a judge to adjudicate and issue a final probate decision. In accordance with the final probate decision, OST distributes trust funds from the estate and BIA distributes the trust or restricted real property.

After the American Indian Probate Reform Act (AIPRA) was enacted in 2004, the Department codified implementing regulations at 25 CFR part 15 for the BIA and OST portions of the probate process and at 43 CFR part 30 for the OHA adjudication process. 73 FR 67255 (November 13, 2008); 76 FR 45198 (July 28, 2011). In 2016 and 2017, BIA reached out to Tribes for input on how the probate process was working, hosting a Tribal listening session in Spokane, Washington, on June 27, 2016, hosting two Tribal consultation teleconference sessions on July 12 and 13, 2016, and accepting written comment through January 4, 2017. In 2019, the Department identified issues in the existing regulations and sought input, through an advance notice of proposed rulemaking (ANPRM), on where improvements may be made through regulatory change. 84 FR 58353 (October 31, 2019).

In January 2021, the Department then published a proposed rule. 86 FR 1037 (January 7, 2021). In the preamble to the proposed rule, the Department addressed each of the six comment submissions it received in response to the ANPRM. During the public comment period, the Department hosted a Tribal consultation session on February 9, 2021, and a public meeting on February 11, 2021. The Department also held an additional public session at the request of Tribal members on March 9, 2021. The original deadline for comments on the proposed rule was March 8, 2021; however, in response to requests to extend the comment deadline, the Department announced on its website in March that it would be extending the deadline for comments to April 8, 2021, and later to April 29, 2021. 86 FR 19585 (April 14, 2021).

III. Proposed Rule Comments and Responses

The Department received 24 written comment submissions on the proposed rule, including three from Tribes. The Department also received several comments during its Tribal consultation and public hearing sessions. The following provides a summary of the comments and the Department's responses.

A. Trust Funds for Funeral Services (§ 15.301)

The two Tribes that commented on § 15.301 expressed their support of increasing the amount of funding available for funeral services from decedents' Individual Indian Money (IIM) accounts. One Tribe also expressed support for the proposed removal of the requirement for the IIM account to have a specific balance in order for funds to be disbursed for funeral services.

Response: The final rule adopts the proposal to increase the funeral service funding available from $1,000 to $5,000 and remove the requirement for the IIM account to have a specific balance in order for funds to be disbursed for funeral services.

One Tribe noted that in some circumstances, the descendant's Tribe may pay for funeral costs and that BIA should ensure the Tribe has not paid, to safeguard Individual Indian Money (IIM) accounts. An individual commenter also noted that the Tribe may pay for funeral arrangements.

Response: To address these comments, the final rule adds a condition to receiving funds that the requestor has not received sufficient funds from the decedent's Tribe to pay the entire cost of the funeral arrangements. *See* § 15.301(a)(2).

One commenter requested that the creditor claims regulations that were in place prior to enactment of AIPRA be restored.

Response: The proposed rule did not propose any changes to creditor claim provisions beyond increasing the amount of funding from IIM accounts available for funerals. The creditor claims regulations that were in place prior to the enactment of AIPRA were replaced through public notice and comment rulemaking in 2005 and 2008. *See* 70 FR 11803 (March 9, 2005); 73 FR 67255 (November 13, 2008).

B. Definitions (§ 30.101)

A commenter requested a new definition for ''co-owner'' and for the phrase ''potential or actual heirs who may or will inherit solely as co-owners.''

Response: The final rule adds a new definition for co-owner in § 30.101, to mean persons who own an undivided trust or restricted interest in the same parcel in which the decedent owns an interest. No definition of the other phrase was added because the proposed provisions using that phrase were not adopted in the final rule.

C. Mailed Notice of Probate to Co-Owners (§ 30.114)

Four individual commenters objected to the proposed rule's approach to providing notice of the probate to potential heirs who may inherit solely as co-owners (*i.e.,* persons who own an undivided trust or restricted interest in the same parcel in which the decedent owns an interest). The proposed rule at § 30.114 stated that potential heirs who may inherit solely based on their status as co-owners would not receive mailed notice of a probate proceeding unless they previously filed a request for notice with BIA or OHA. The commenters who objected to this approach stated that the co-owners should continue to receive mailed notice of the probate without having to file a request to receive notice.

Response: To address commenters' objections, the final rule retains the current regulations' approach, which requires that all interested parties—including co-owners, when they are potential heirs—receive mailed notice of probate proceedings. *See* § 30.114 and definition of ''interested party'' in § 30.101. Nevertheless, it is important to note that a co-owner is not necessarily an heir, and the statute requires actual written notice only to ''all heirs.'' *See* 25 U.S.C. 2206(m). A co-owner may potentially be an heir in only one circumstance: If a decedent dies without any eligible person heirs as listed in AIPRA's order of succession, and there is no Tribe with jurisdiction over the allotment.

One commenter asked how co-owners would know of the opportunity to purchase decedent's interest at probate if they are not notified of the probate.

Response: Under both the current and final rule, co-owners receive mailed notice if they are potential heirs; all other co-owners receive notice through posting.

D. Determination of Indian Status (§ 30.123)

A Tribe stated its support of limiting determinations as to whether heirs and devisees have Indian status in § 30.123 to those situations where the determinations are necessary for the probate decision and stated that this change would increase efficiency.

Response: The final rule includes this proposed change at both § 30.123 and § 30.235, so that judges will make the determination of Indian status only when relevant.

An individual stated that determining Indian status cannot be eliminated because it is relevant in determining whether a person takes in fee or is eligible for Tribal membership. This individual stated that it is more difficult to identify when Indian status does not have to be determined than to determine the status for everyone, and suggested a chart needs to be prepared to show all situations in which Indian status is relevant.

Response: The final rule does not eliminate the requirement to determine Indian status. The final rule adopts the proposed rule provision requiring a determination of Indian status ''where relevant.'' There are situations where Indian status is not relevant, and under the final rule, the judge would not issue a determination of Indian status in those situations; however, the judge would issue a determination of Indian status when that status is relevant.

E. Presumption of Death (§ 30.124)

A Tribe who commented on the proposed presumption of death provisions agreed that the six-year period should begin on the date of the last known contact with the absent person and stated that allowing for a presumption will improve efficiency while allowing parties to present evidence to rebut the presumption if appropriate.

Response: The final rule includes these proposed presumption of death provisions.

An individual stated their opposition to the proposed presumption of death provisions, stating that there are a lot of people who are absent for six years and that should not allow a presumption that they no longer exist without evidence of the person's routine daily activities and social relationships and documentation of the measures taken to locate the person.

Response: The requirements for BIA to initiate a probate case when a person has been absent without explanation for six or more years are at § 15.106 and would not change under either the proposed or final rule. The final rule adopts the proposed rule's provisions for allowing the judge to presume that the person died at a certain time (*i.e.,* the date of last contact based on signed affidavits or sworn testimony by those in a position to know that facts and other records show that the person has been absent from his or her residence for no apparent reason, or has no identifiable place of residence and cannot be located, and has not been heard from for at least 6 years.).

F. Partition (§ 30.125)

A Tribe who commented on the proposed partition section at § 30.125 noted that it is a good idea to allow someone to partition their land by will.

Response: The final rule includes these proposed provisions allowing for partition by will.

G. Renunciations (§§ 30.180–30.192)

The Tribe who commented on the proposed renunciation provisions expressed support of the expanded opportunities for renunciation to protect property from going out of trust.

Response: The final rule adopts the proposed renunciation provisions expanding opportunities for renunciation.

An individual stated that there is no downside to allowing maximum opportunities for parties to renounce inheritance of interests. A group of individuals commenting together recounted their experience with a Tribe renouncing an interest in a specific estate.

Response: The final rule increases the opportunity for renunciations by allowing renunciations at the rehearing stage. To clarify that entities, in addition to individuals, may renounce, the final rule explicitly adds in § 30.180 that entities may renounce.

H. Summary Probate Proceedings (§§ 30.200–30.209)

An individual objected to the proposed rule's approach to summary probate proceedings as a violation of due process because affected parties would not receive notice of the probate before the probate decision is issued.

Response: The final rule adopts the proposed rule's approach to notice in summary probate proceedings because there is no violation of due process for the following reasons: (1) While interested parties do not receive notice of the summary probate until a probate decision is issued, at that time, the interested parties have the right to file a request for review of the probate decision and the probate decision does not become final unless and until the 30-day period for them to request review has expired without any interested party filing a timely request. This approach mirrors the current summary probate proceeding approach, except that the term ''proposed summary probate decision'' is no longer used. (2) The proposed and final rule also limit the estates that are subject to summary probate proceedings by lowering the dollar threshold (from $5,000 to $300), meaning that interested parties in more estates will receive formal probate proceeding notice. The amount of due process that is appropriate depends upon the circumstances, and this rule's approach appropriately considers the circumstances. (3) Other revisions to the summary probate process that allow estates to be handled more efficiently obviate the need for notice prior to the issuance of the summary probate decision: Elimination of the option to convert the proceedings to formal probate proceedings, elimination of consideration of claims against the estate, and extending the deadline for renouncing to 30 days after the mailing of the probate decision. The probate decision under the proposed rule would then not only set out and explain the distribution but also provide instructions on how to renounce or seek review of the decision. This proposal also promotes due process by providing the opportunity for anyone adversely affected by a summary probate proceeding decision to file a request for review and streamlines that review process by allowing for reconsideration rather than de novo review.

A commenter stated that eliminating hearings for simple estates undermines due process and that more due process is owed because of the trust responsibility. Another commenter stated that due process should be afforded even for small estates.

Response: Due process is still being afforded to interested parties in summary probate proceedings because, as explained above, the summary probate decision does not become final until the period for interested parties to request review has passed. As noted above, this approach mirrors the current approach except that the probate decision is no longer being called a ''proposed summary probate decision.''

A Tribe stated their support of disallowing claims against small estates in summary probate proceedings. An individual asked for an explanation for disallowing claims.

Response: The final rule continues to disallow claims with the goal of efficient handling of low value cash-only estates.

A commenter stated that summary probate proceedings should not be applied to estates containing real property.

Response: Summary probate proceedings are available only for cash-only estates.

One Tribe objected to reducing the monetary threshold for estates from $5,000 to $300 for summary probate.

Response: The Department considered this comment and determined that the summary process will be more effective if it focuses on estates that are valued at $300 or less. The Department concluded that there is a value to conducting formal probate proceedings for cash only estates valued between $301 and $5,000.

The same Tribe objected to allowing 30, rather than 10, days in § 30.208 for OHA to notify the agencies and interested parties that a request review of a summary probate decision has been filed, noting that the extension conflicts with the stated purpose of the revisions to make the process more efficient.

Response: The rule expanded the time for OHA to notify agencies and interested parties that a request for review of a summary probate decision has been filed, because this expansion is necessary to allow OHA flexibility in balancing workloads and the maximum additional 20 days this could add to the process is outweighed by the efficiencies gained from eliminating the option for converting summary probate proceedings to formal probate proceedings.

One commenter suggested the Department use a ''transfer on death deed'' for small estates, rather than the summary probate process to allow assets to transfer to a single beneficiary immediately upon decedent's death without having to go through any OHA process.

Response: The Department has reviewed the possibility of allowing for ''payable on death'' provisions but has determined that a legislative change is necessary to provide authority for such an approach.

An individual commenter requested the definition of ''summary probate proceeding'' and the provision at § 30.200(b) be revised to add the phrase ''and does not include any trust or restricted land.''

Response: The final rule does not incorporate these edits because the definition and § 30.200(b) are both clear in saying that the estate includes ''only an IIM account'' and ''only funds in an IIM account,'' respectively.

I. Posted and Published Notice of Probate (§ 30.211)

Two Tribes and two individuals expressed concern about the proposal to allow for no physical posting of the formal probate proceeding if the agency office is closed or inaccessible or if extenuating circumstances prevent personnel physically posting. One of these Tribes stated that it would be helpful to post at the local BIA agency when possible. The other Tribe stated that there should be physical posting in at least one public location.

Response: To address these comments, the final rule requires physical posting in at least one location: The agency or, if posting at the agency is not possible due to the agency office being closed or inaccessible, then at a conspicuous place near that agency. The

final rule does not adopt the proposal to allow for no physical posting in some circumstances and deletes the condition for extenuating circumstances preventing personnel physically posting as well as the proposed definition for ''extenuating circumstances'' in § 30.101.

Two Tribes expressed their support for posting hearing notices on a central website. One of the Tribes recommended a centralized website for all notices related to probate cases and other non-probate matters. An individual also expressed support for posting notices on OHA's website.

Response: The final rule includes the proposed provision requiring OHA to post probate notices on its website. BIA is also working on making additional appropriate information on the probate process available on its website.

One Tribe agreed with the proposal to remove the requirement for newspaper notices as no longer necessary; however, another Tribe noted that publication in the Tribal newspaper may better reach elders in the community.

Response: The final rule adds that an OHA judge may cause notice to be published in a local newspaper or other publication if the judge determines that additional notice is appropriate. *See* § 30.211(d).

J. Rehearing (§§ 30.238–30.242) and Reopening (§§ 30.243–30.249)

The Tribe that commented on the rehearing and reopening provisions supported imposing limitations on reopening to avoid prolonging the probate, limiting who may seek rehearing to only interested parties, requiring a rehearing to be based on correcting a substantive error, and allowing a rehearing petition to be considered as a reopening petition if not timely filed so the petitioner would not have to refile. The Tribe also supported prohibiting successive petitions for rehearing by the same party to prevent parties from abusing the process and supported the limit of one year (from discovery of the error) for reopening when an individual or BIA on behalf of an individual for reopening and requiring a showing of an error of fact or law.

Response: The final rule adopts all these proposed provisions.

An individual stated the provisions barring persons from seeking post-decision review because they were not present at the original hearing does not account for how poor U.S. mail service is on Indian reservations.

Response: Neither the proposed nor final rule bar persons who were not present at the original hearing from seeking post-decision review. *See* § 30.238(d)(1) (''whether or not you attended the hearing.'')

The same individual objected to the 30-day period for seeking a rehearing (at § 30.238(a)) and stated that the 60-day period allowed under regulations in place before AIPRA was enacted should never have been changed.

Response: The period for seeking reopening has been 30 days since 2008 and there have been no practical issues with that time period, as most challenges are resolved quickly and 60 days needlessly prolongs the process.

A commenter objected to limitations on petitions to reopen, noting that individuals fail to participate in probates for legitimate reasons.

Response: The limitations on petitions to reopen apply to those who received proper notice of the probate and so had the opportunity to participate in the probate but did not avail themselves of that opportunity.

An individual stated that any legitimate family member should be allowed to petition the judge to reopen a probate.

Response: Family members who are interested parties should receive sufficient notice and opportunity to participate in the probate; if they have not received sufficient notice, then they may seek reopening if proper grounds are shown.

A Tribe stated that an explicit timeframe, such as 10 days, should be added for OHA to notify BIA of the filing of a petition for rehearing, rather than ''as soon as practicable.''

Response: The final rule retains the phrase ''as soon as practicable'' rather than adding a specific period because this phrase recognizes the urgency but allows for more flexibility than a specific number of days would afford.

An individual stated that the season for reopening petitions to be filed runs indefinitely under proposed § 30.243, and that an end point should be added to establish finality and certainty.

Response: The final rule does not add an outer bound deadline because a deadline would limit the judge's discretion in balancing whether the need to reopen to correct the error outweighs the interests of the public and heirs and devisees in the finality of the probate proceeding.

An individual suggested certain clarification edits, including adding to § 30.241 that a rehearing is for the same probate and adding to § 30.243 that reopening petitions are filed with the judge.

Response: The final rule incorporates these suggested edits.

The same individual suggested adding a new paragraph (c) to § 30.245, regarding the legal standard for reopening, to require the judge to notify interested parties of a determination to reopen.

Response: The judge notifies interested parties under § 30.248(c) of the final order. This final rule provision is broader than the current regulations, which require notification only to affected parties.

This individual also suggested adding to § 30.246(c)(6), that in considering the interest in administrative finality the judge should consider ''a concise justification of why and how the information provided in support of the petition to reopen would lead the judge to determine that the need to correct the error outweighs the interests of the public and heirs or devises in the finality of the probate proceedings.''

Response: The final rule does not add this additional language because the substance of the suggested language is already set out in paragraphs (a) and (b), as well as the introductory language in paragraph (c) of § 30.246.

The individual commenter expressed agreement with § 30.248(b)(2)(iii) and recommended adding a requirement to suspend any changes to title to the underlying property while the reopening procedures are pending.

Response: The final rule states that the judge will suspend further distribution of the estate or income during the reopening proceedings, if appropriate.

K. Correction of Non-Substantive Errors in Probate Decision (§ 30.250)

A Tribe expressed support for authorizing BIA to make non-substantive corrections to a probate decision but noted that OHA should have final authority over any corrections.

Response: Under the proposed and final provisions, BIA contacts OHA in all cases to issue a correction to a probate decision.

Another Tribe expressed general support for allowing OHA to address typographical and other non-substantive errors in a probate decision without reopening a probate case, but recommended clearly defining what would be a ''non-substantive error.''

Response: The regulation at § 30.250 states that errors are non-substantive if they are merely typographical, clerical, or their correction would not change the distribution of a decedent's property.

L. Inventory Corrections: New Property Added After Probate Decision (§ 15.404/§ 30.251) and Incorrectly Included Property (§ 15.405/§ 30.252)

A Tribe supported the proposed process for reconsideration of a distribution order directing distribution of additional property or modifying distribution, rather than requiring parties to appeal a final order.

Response: The final rule includes the proposed process for reconsideration of the distribution order and clarifies that if an interested party raises an inventory dispute in the petition for reconsideration, the judge may order that the distribution order be vacated and remand BIA's petition to the BIA to resolve the inventory dispute. *See* § 30.253(f)

An individual stated that the regulations that were in place prior to the enactment of AIPRA worked fine by allowing for administrative modifications.

Response: The regulations that were in place prior to the enactment of AIPRA are no longer relevant because enactment of AIPRA changed the legal landscape.

An individual stated that the probate decision should include verbiage stating that if any other property is later discovered that should have been part of the estate, then it must be distributed according to the decision, rather than having to reopen the case to add property.

Response: Under AIPRA, property may pass differently depending on whether the property constitutes greater than or less than 5% of undivided interests. Specific will language, renunciations, special statutes, or approved Tribal probate codes may also lead to property passing differently than set out in a decision. Judges direct distribution of property specifically identified in the inventory. Adopting the approach suggested by the commenter would put BIA, rather than the judge, in the position of having to determine the appropriate distribution.

An individual suggested adding a deadline for petitions to add or omit property from the inventory.

Response: The final rule does not adopt this suggestion because imposing a limitation would result in inaccurate distributions and property that is never distributed.

An individual suggested adding ''and/or minerals only estates'' following ''trust or restricted land'' in § 15.404(a)(1).

Response: The final rule does not adopt this suggestion because minerals only estates are already included in ''trust or restricted land'' for purposes of this section.

An individual stated that ''trust or restricted property'' is used in § 30.251 for the first time in the proposed rule and suggested using ''trust or restricted land'' for consistency.

Response: The current regulations and final rule define both ''trust property'' and ''restricted property.'' ''Trust land'' is used in some instances to distinguish from ''trust property'' because ''trust property'' includes personalty.

An individual requested clarification of the phrase ''a certification that all interested parties have been associated to the case and their names and addresses are current'' that appears in § 15.404(a)(5), § 15.405(a)(4), § 30.251(b)(5), and § 30.252(b)(4).

Response: The certification the commenter is inquiring about is certification from the BIA to OHA that all the interested parties have been associated to (*i.e.,* identified as interested parties in) that particular case in the Department's probate system. No change was made to the rule to clarify because the language relates to an internal Departmental procedure.

An individual noted that § 30.252 appears to repeat the process covered in § 15.405(a).

Response: Part 15 addresses BIA processes, while Part 30 addresses OHA processes; each has a role in the process as set out in the applicable part.

An individual suggested an edit to § 30.252(b) to clarify who is petitioning for the removal of property and who is reviewing the petition.

Response: The final rule changes the pronoun ''it'' to ''BIA'' to clarify that BIA removes the property then petitions OHA for an order addressing any changes in distribution resulting from the correction.

An individual requested adding a provision to § 30.252(d) requiring BIA to suspend further distribution of the estate during reopening and suspend any changes to title to the underlying property during the reopening proceeding.

Response: The Department determined that the suspension of the estate distribution while awaiting OHA's determination is more suited to internal procedures and is considering possible modifications therein.

An individual requested adding a provision to § 30.252 to require the judge to notify interested parties of the determination to reopen.

Response: Notifications to interested parties are provided in § 30.252(e).

An individual provided a personal account of a probate in which they believe errors in the inventory of decedent's land resulted in loss of an inheritance.

Response: The procedures in these regulations provide safeguards to allow for corrections to estate inventories.

M. Purchase at Probate (Subpart M)

An individual stated that changes to the purchase at probate process in the regulations must be preceded by substantive amendments to AIPRA.

Response: AIPRA's existing provisions authorize purchase at probate, which these regulations implement.

A commenter stated that the proposed rule would eliminate the right of ''eligible purchasers'' to notice when OHA receives a request to purchase at probate and would put the onus on them to tell BIA that they wish to be told of such purchase offers. The commenter objected saying the approach undermines basic concepts of justice and fair play. Another individual commenter also stated that all eligible purchasers should be kept notified by mail.

Response: Neither the proposed nor final rule would eliminate the right of eligible purchasers to notice; rather, the proposed and final rule add an opportunity for co-owners to receive mailed notice when they otherwise would not have. Mailed notice of the probate hearing includes an attached inventory of a decedent's interests in trust or restricted land, and notifies recipients of the possibility of purchase at probate of those interests. *See* § 30.214(g). AIPRA requires that such notice be mailed only to three groups: Eligible heirs, other devisees, and the Indian Tribe with jurisdiction over the interest. *See* 25 U.S.C. 2206(o)(4).

- An heir is any individual or entity eligible to receive property from a decedent in an intestate proceeding.
- A devisee is a person or entity that receives property under a will.

An ''eligible purchaser'' by contrast, is one of the following:

- An heir or devisee who is receiving an interest in the same parcel of land;
- Any co-owner,
- The Tribe with jurisdiction over the parcel containing the interest, or
- The Secretary on behalf of the Tribe. *See* 25 U.S.C 2206(o)(2).

Co-owners are eligible purchasers, but are heirs only in certain limited circumstances. In cases in which the co-owners are also heirs, the co-owners will receive mailed notice (of both the hearing and the opportunity to purchase). If co-owners are not heirs, OHA is not statutorily required to send written notice to those co-owners and doing so would significantly delay the

resolution of cases. *See* 25 U.S.C. 2206(o)(4)(B). Instead, under the current process and the proposed and final rule process, co-owners who are not heirs receive notice of a probate proceeding through posting. The proposed and final rule provide an opportunity for co-owners who are not heirs to receive notice. Co-owners may receive mailed notice simply by notifying BIA in writing that they wish to receive it. *See* § 30.413(b)(5). This opportunity for notice is beyond what is required by the statute and what is provided for in the current regulations.

An individual commenter expressed concern with the proposed rule's approach to consent for purchase at probate in § 30.403, noting that the proposed rule would place the responsibility on the heir or devisee to state their unwillingness to sell the property.

Response: The final rule adds provisions to make clear that the heir or devisee must affirmatively consent in order for a purchase at probate to occur (rather than state their unwillingness to sell the property to stop a purchase at probate from occurring). The final rule also explicitly states that consent may not be presumed.

An individual objected to the ability of the Tribe to purchase without consent when decedent's interest at the time of death was less than 5 percent of the entire undivided ownership of the land. This individual also opposed that the Secretary can give Tribes the resources to purchase the interest but does not extend that financial support to individual heirs and devisees. Another individual also stated that it is not fair to allow the Secretary to provide financial assistance only to the Tribe to purchase at probate and not individual heirs and devisees.

Response: The provision allowing the Tribe to purchase without consent when the decedent's interest at the time of death was less than 5 percent of the entire undivided ownership of the land and the provision allowing the Secretary to provide resources to the Tribe for the purchase are statutory provisions that are not being changed by these regulations. *See* 25 U.S.C. 2206(o)(5). Under the statute and regulations, if the heir or surviving spouse is a member of or eligible for membership in the Tribe, then consent is required. No statutory authority exists for the Secretary to provide resources to individuals who wish to purchase property at probate.

An individual asked whether purchase at probate requires a majority consent of the heirs and devisees or if each individual heir and devisee must consent to sell his or her interest.

Response: Each heir and devisee must consent for their interest to be purchased at probate, under both the current regulations and this final rule.

A Tribe stated that the regulations should apply the valuation of mineral interests used in Interior's Land Buy-Back Program to purchase at probate of minerals-only interests.

Response: Under AIPRA, a judge may not approve a purchase at probate for less than fair market value of the real property interest. *See* 25 U.S.C. 2206(o)(4)(A). Interior's Land Buy-Back Program for Tribal Nations is a specific time-limited program that is working under particular authorizations which do not apply to probate.

An individual stated that individual Indians who are members of the Tribe with jurisdiction over the land and who own a majority of the interests in a tract or the largest individual interest should have either the first option to purchase or a right of first refusal to purchase any other undivided interest in the tract.

Response: Individuals who own an undivided interest in a tract of land can seek to purchase their co-owners' interests at any time, outside of probate. Purchase at probate provides no benefit to co-owner purchasers over purchasing during the decedent's lifetime, as each seller's consent is still required. AIPRA does not provide authority for the regulations to grant a first option to purchase or right or first refusal to Tribal members. AIPRA does at times allow the heir or devisee to select the purchaser, however. *See, e.g.,* 25 U.S.C. 2206(o)(3)(B).

An individual stated that the U.S. Government should ensure that heirs are aware of Tribal governments' ability to purchase property and outline the heirs' right to oppose the sale.

Response: AIPRA provides that the Tribe with jurisdiction is an eligible purchaser. The judge will ensure that heirs or devisees are aware of the purchase process through written decisions and orders issued in a particular case. The judge will notify heirs or devisees as to whether consent is required. Heirs or devisees who disagree with a finding that their consent to a purchase is not required can challenge that finding by seeking rehearing.

This individual asserted that her Tribe does not have the authority to participate in purchase at probate because the Tribe's constitution includes a provision stating that the Tribe may not regulate the inheritance of allotted lands within the Tribe's jurisdiction.

Response: A Tribe's participation in purchase at probate as an eligible purchaser is substantively distinct from a Tribe's action to regulate the inheritance of property.

N. Miscellaneous

One individual stated that the proposed rule's attempt to define how trust personalty will be distributed in § 30.507 is an impermissible attempt to address a defect in the legislation through regulations.

Response: The proposed and final rule at § 30.507 fill a gap using the Secretary's authority where the statute is silent.

A Tribe expressed support for the proposed change clarifying joint tenancy will be presumed in § 30.501 where a testator devised their interest to more than one person.

Response: The final rule includes this proposed change.

One individual asked how BIA and OHA identify the property that is included in the estate, and whether it includes land and mineral rights and IIM accounts.

Response: In preparing for the probate process, BIA checks the system of record for land, which includes all trust or restricted land and mineral interests, and checks the Trust Funds Accounting System (TFAS) to determine the IIM account assets on record held by decedent.

A commenter stated that there should be language in the regulations for how a valuation is conducted and the expertise needed to issue a valuation.

Response: These regulations are specific to probate; in this context, valuation is relevant to purchase at probate. The final rule adopts the proposed rule's language at § 30. 411(a) requiring compliance with USPAP or other approved valuation method.

One Tribe and one individual recommended establishing and enforcing timelines for completion of the probate process to improve timeliness.

Response: The completion of a probate is dependent on many factors that are outside of BIA and OHA's control including the cooperation of the family in providing documentation for the probate file. These factors, along with the varying levels of complexity among probate cases prevent the Department from imposing specific timeframes.

An individual requested the regulations include a policy to protect individual Indians' property from being taken by Tribal governments and others and noted that the BIA mission includes protection of trust assets of American Indians.

Response: The BIA strives to meet its mission in all aspects of the services it provides to individual Indians and Tribes. To the extent that the commenter is requesting that BIA refuse to allow Tribes to purchase interests at probate, the Department is unable to adopt this suggested approach because it would be contrary to direction provided by Congress in AIPRA.

A few individuals stated that Federal policy is being geared to benefit Tribes over individual Indians.

Response: The final rule does not benefit Tribes over individual Indians in any manner beyond what is required to implement the statute.

An individual suggested that the Federal Government should provide ongoing information about AIPRA to Tribal citizens.

Response: The Department provides information on AIPRA and the probate process at *https://www.bia.gov/bia/ots/dop/your-land.*

A Tribe requested confirmation that the rule does not affect its Secretarially approved inheritance code.

Response: These regulatory changes do not affect Secretarially approved Tribal probate codes. The Department intends to continue honoring and applying those Secretarially approved Tribal probate codes.

An individual requested adding to § 15.202(b)(6), addressing what must be included in the probate file if the estate includes only cash, provisions similar to (a)(12) (''Documentation of any payments made on requests filed under the provisions of § 15.301 [Funds for funeral services]'') and (a)(13) (''All the documents acquired under § 15.105'').

Response: The final rule adds these provisions as suggested.

A commenter stated that a copy of the probate file should be sent to each interested party along with the notice of hearing.

Response: This comment relates to § 15.504 in the current regulations, which was not proposed for change and is not being changed. The Department allows interested parties access to probate files, but does not automatically send copies of the files to every interested party because doing so would not be efficient and would risk disclosure of personally identifiable information.

An individual stated that BIA should have to correct their errors in front of affected family and the judge.

Response: Property is not added or removed to an estate as a result of corrections of mistakes on inventories under this section, but because of a situation such as where the decedent inherits additional property or there was a probate order change for a predeceased decedent.

A few individuals commented with requests for BIA to store wills or assist individuals with writing wills. One individual asked how BIA obtains access to wills to probate them.

Response: These regulations do not address storage or writing of wills. BIA no longer assists individuals with writing wills and relies on family members to provide the decedents' wills. It is each testator's choice to communicate to family members where the will is located and how to gain access to it.

A commenter stated that interested parties have a right to legal counsel but many do not have access to legal counsel either because they cannot afford or cannot find counsel with experience in the field of Federal probate. This commenter stated that the lack of access to counsel combined with the complexity of Indian probate limits due process.

Response: Nothing in these regulatory changes affects interested parties' right or ability to engage legal counsel in a probate case. OHA makes every effort to provide due process to interested parties, including unrepresented parties, in probate cases.

Several individuals commented on aspects of AIPRA, such as the single heir rule and whether adopted children should be considered heirs, that are not affected by these regulations.

Response: Nothing in these regulatory changes affects the single heir rule or whether adopted children are considered heirs. The Department encourages individuals who would like to provide their trust or restricted property to certain people to either write a will or convey that property through a gift deed during their lifetime; otherwise, the land will pass by intestate succession according to applicable law.

IV. Overview of Final Rule

The Department is finalizing revisions to its regulations governing probate to provide due process while allowing probate cases to be closed so that distribution to heirs and devisees may occur more quickly. Each open probate case has the potential to create ripple effects of uncertainty as heirs and devisees become decedents themselves. The Department recognizes both the financial and emotional toll open probate cases take on families and, with this final rule, aims to provide certainty for families and future generations more expeditiously.

A. Summary of Final Rule

This final rule makes a number of changes throughout the probate regulations to eliminate ambiguities and procedural delays. Specifically, the rule:

- Overhauls the process and criteria for summary probate proceedings, to establish a process for very small estates, to include estates that contain no interests in trust or restricted land and that include only funds (no other trust personalty) of $300 or less. The expedited process for these small estates will allow OHA to adjudicate the cases based on the probate file alone, while allowing anyone adversely affected by the decision a limited time to seek review.
- Eliminates the need for the judge to determine the status of eligible heirs or devisees as Indian when not relevant to the probate decision;
- Allows OHA to issue a correction order to correct non-substantive and typographical errors without reopening the probate case;
- Revises processes for adding and removing property from an estate inventory when it is discovered after issuance of the probate decision that additional property must be added to an estate inventory or that property was incorrectly included in the estate inventory, and revises processes for challenging these types of decisions through reconsideration rather than appeal to the IBIA;
- Allows heirs and devisees to renounce their interests at hearings (having their written declarations acknowledged before a judge) and allows them to renounce not just prior to issuance of the probate decision, but also within 30 days of the decision, upon rehearing, or when additional property is added to the decedent's estate.

The final rule also includes revisions to expand notice to interested parties to provide that, in addition to mailing notice to heirs and devisees and others listed in § 30.114, OHA:

- Will post notice of formal probate proceedings on its website;
- Will physically post notice at the agency location or, if the agency office is closed or inaccessible, at a conspicuous location near the agency; and
- May cause notice to be published in a local newspaper or other publication if the judge determines that additional notice is appropriate.

The rule's requirement for OHA to post on its website accommodates the increased use of telephonic and other alternatives to in-person hearings, which are occurring and are anticipated

to continue to occur as a result of technological advances. Posting notice on OHA's website also establishes one location that is available for anyone to access regardless of residency.

The final rule clarifies terminology and states what happens when various eventualities arise, which will help judges decisively address the issues and provide clarity for heirs and devisees throughout the process. For example, the rule delineates:

- That there is one probate ''decision,'' which results from the summary probate proceeding or formal probate proceeding, and all other written rulings issued by judges are ''orders,'' such as an order on rehearing, an order on reopening, or a distribution order;
- The evidence a judge may rely on to presume that an individual has died and their date of death;
- How a judge will partition an allotment when a will attempts to divide an allotment into two or more distinct portions and devises at least one of those portions;
- Who receives personal, mailed notice of a formal probate proceeding and how public notice is posted;
- Rehearing and reopening processes and how they relate to each other;
- The meanings of joint tenancy and tenants-in-common and how the presumption of joint tenancy and the anti-lapse provision each operate in the determination of heirs and devisees;
- How trust personalty will be distributed when there are no eligible family heirs, and when there are either no land interests in the decedent's estate or there are land interests within the jurisdiction of more than one Tribe.

The final rule also overhauls the purchase at probate process. The current purchase at probate provisions are unwieldy in their fit with the formal probate proceedings and result in probate cases being kept open indefinitely while the purchase at probate process, including appraisals/valuations, continues. Additionally, because the current provisions require the purchase at probate to be completed before the probate decision is issued, purchases at probate are completed based on provisional heirs and devisees, which causes uncertainty and increases the chance of having to redo the already-lengthy process. This final rule instead sequences the purchase at probate process to allow the probate to be closed, while the purchase at probate continues, as follows:

- The eligible purchaser may request to purchase at any time before the completion of the first probate hearing (including at the hearing) or within 30 days of the distribution order mailing date, when requesting to purchase property newly added to the inventory.
- If the request is still pending at the time the probate decision is issued and is not denied in the decision, OHA then includes in the probate decision (or reconsideration order if property was added) a list of all the purchase at probate requests that have been submitted, direction to BIA to obtain an appraisal/valuation of the interest, and direction to heirs or devisees on how to consent if they wish to do so. The property is distributed and any property subject to the purchase at probate request is conveyed with an encumbrance.
- If consent is needed for the purchase, BIA holds off on ordering the appraisal/valuation until at least one heir or devisee has filed the written notification that the heir or devisee would consider selling the interest.
- BIA obtains the appraisal/valuation.
- BIA files a Petition to Complete Purchase at Probate, and OHA issues an Order to Submit Bids to all potential bidders that includes the fair market value.
- Anyone who may be affected by the determination of the fair market value may object to the fair market value stated in the Order to Submit Bids by filing a written objection with OHA within 45 days.
- OHA determines whether the bid is successful based on whether the bid was timely, equal to or greater than the fair market value, and, when consent is required for the purchase, the applicable heir, devisee, or surviving spouse accepts the bid.
- OHA notifies parties of the successful bid.
- The successful bidder pays for the interest purchased and the interest transfers.
- Any interested party who is adversely affected by the judge's order to approve or disapprove the purchase at probate may appeal to the IBIA within 30 days of the order.

B. Changes From Proposed Rule to Final Rule

The final rule makes the following changes to the proposed rule.

Section	Topic	Change final rule makes to proposed rule
§ 15.202(b)	Items included in the probate file	Adds a missing word ''in'' in the introductory language of paragraph (b). Adds new paragraphs (b)(7) and (b)(8) in response to comment.
§ 15.301(a)	Funds for funeral services from decedent's IIM account.	Adds a new paragraph (a)(2) regarding payment of funeral expenses by the decedent's Tribe, in response to comment.
§ 30.101	Definitions	Adds a new definition for ''co-owner'' in response to comment. Deletes definition of ''extenuating circumstances'' because the provision in which that phrase was used has been deleted in response to comment. Deletes from definition of ''interested party'' the phrase ''except for potential or actual heirs who may or will inherit solely as co-owners of an allotment'' because that was removed from § 30.114 in response to comment.
§ 30.114	Notice to co-owners	Deletes proposed provision requiring potential heirs who may inherit solely as co-owners to file a request for notice, in response to comment.
§ 30.180	Renunciations	Adds new paragraph (b) to make explicit that entities may renounce, in response to comment.
§ 30.183	Renunciation	Replaces phrase in paragraph (b) with newly defined term ''co-owner,'' the definition for which was added in response to comment.
§ 30.186	Renunciation	Adds reference to a ''Tribal resolution'' to make explicit how a Tribe may renounce, in response to comment.
§ 30.211	Public notice of formal probate proceeding.	Adds a new paragraph (b) to provide that a judge may also cause notice to be published in a local newspaper, in response to comment. (Updated appropriate citations) Revises proposed paragraph (e) (final paragraph (f)) to require physical posting at the agency or, if posting at the agency is not possible because the agency office is closed or inaccessible, posting in a conspicuous place near that agency, in response to comment.

Section	Topic	Change final rule makes to proposed rule
§ 30.214	Contents of notice regarding purchase at probate.	Adds reference to Federal law or Secretarially approved Tribal probate codes.
§ 30.241	Rehearing	Adds a clarification that successive petitions may not be filed ''in the same probate case'' in response to comment.
§ 30.243	Reopening	Adds in paragraph (a) that the petition for reopening must be filed with the judge.
§ 30.248	Decision on reopening	Clarifies in paragraph (a)(2) that the petition may be summarily dismissed if it ''raises issues or objections that were previously addressed'' rather than requesting the same relief, for clarification. Updates citation in paragraph (a)(5).
§ 30.251	Identification of additional property after probate decision.	Clarifies in paragraph (e)(4) that the right of reconsideration must allege an error in the inventory of additional property, rather than the original inventory.
§ 30.252	Identification of incorrectly included property after probate decision.	Clarifies that BIA removes property from the estate inventory in paragraph (b).
§ 30.253	Reconsideration of distribution order.	Adds a new paragraph (f) to clarify that the judge may vacate the distribution order and remand to the BIA. Clarifies in final paragraphs (g) and (h) the ''final order on reconsideration'' to distinguish from the distribution order.
§ 30.401	Who may purchase at probate	Replaces phrase with the newly defined term ''co-owner,'' the definition for which was added in response to comment.
§ 30.404	Consent in purchase at probate	Adds new paragraphs (b) through (d) to clarify how an heir or devisee may consent to purchase at probate, that consent will not be presumed, and that an heir or devisee may withdraw consent any time before the purchase is final.
§ 30.409	Effect of purchase at probate on distribution.	Adds clarification that the decision or distribution order will identify the interest that is subject to a pending request for purchase at probate.
§ 30.410	Continuation of purchase at probate process.	Corrects a typographical error to change ''approval/valuation'' to ''appraisal/valuation.''
§ 30.413	Potential bidders in purchase at probate.	Replaces phrase in (b)(5) with the newly defined term ''co-owner,'' the definition for which was added in response to comment.
§ 30.418	Payment for purchase at probate	Clarifies the successful bidder ''must'' make payment.
§ 30.506	Law applicable when decedent dies intestate.	Replaces the phrase ''co-owners of the parcel'' in (b)(1) and (2) with the newly defined term ''co-owners,'' the definition for which was added in response to comment.

C. Crosswalk of Current Regulation to New Regulation

The following chart provides a high-level crosswalk of the current regulatory provisions as compared to the new and revised provisions established by this final rule. Sections not listed in the ''current'' column are unaffected by this final rule.

In 25 CFR part 15:

Current §	New §	Summary of changes
15.202 What items must the agency include in the probate file?	15.202 What items must the agency include in the probate file?	Redesignates paragraphs and adds a new paragraph (b) to establish a more limited universe of documents required to be included in estates that will be subject to a summary probate proceeding (*i.e.,* estates with no land and $300 or less in funds). Also adds a new paragraph (a)(16) to address the need for the probate file to include valuation reports in the limited circumstances in which a special statute applies that requires the valuation report.
15.301 May I receive funds from the decedent's IIM account for funeral services?	15.301 May I receive funds from the decedent's IIM account for funeral services?	Increases the amount that may be requested and approved for distribution from a decedent's IIM account to pay for funeral expenses from $1,000 to $5,000. Also deletes requirement for the IIM account to contain at least $2,500 and clarifies that funds, if approved, are taken from the balance of the account as of the date of death.
N/A	15.404 What happens if BIA identifies additional property of a decedent after the probate decision is issued?	New section.
N/A	15.405 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?	New section.

In 43 CFR part 30:

Current §	New §	Summary of changes
30.100 How do I use this part?	30.100 How do I use this part?	Updates citations (no substantive change).
30.101 What definitions do I need to know?	30.101 What definitions do I need to know?	Deletes definitions of ''BLM'' and ''de novo review'' because they are no longer used. Revises the definitions of ''ADM'' to delete reference to de novo review, ''decision'' to clarify that there is a single probate decision, ''Indian probate Judge'' to reflect that the judges exercise delegated authority, and ''summary probate proceeding'' to reflect the new approach to these proceedings. Adds definitions for ''co-owner,'' ''distribution order,'' ''home agency,'' ''joint tenancy,'' ''lineal descendant,'' ''order,'' ''Petition to Complete Purchase at Probate,'' and ''tenants in common.''

Current §	New §	Summary of changes
30.114 Will I receive notice of the probate proceeding?	30.114 Will I receive notice of the probate proceeding?	Deletes provisions in current paragraph (b) regarding requesting a formal probate proceeding in lieu of a summary probate proceeding because, with the proposed revisions to the summary probate proceeding elsewhere in the proposed rule, this provision is no longer applicable.
30.123 Will the judge determine matters of status and nationality?	30.123 Will the judge determine matters of status and nationality?	Adds ''if relevant'' so that a judge is not required to determine the status of eligible heirs or devisees as Indian if their status is not relevant in the probate case.
30.124 When may a judge make a finding of death?	30.124 When may a judge make a finding of death?	Revises to list specific evidence that will support a presumption that an heir, devisee, or person for whom a probate case has been opened has died and the date of death. Also establishes what evidence will rebut the presumption.
30.125 May a judge reopen a probate case to correct errors and omissions?	30.129 May a judge reopen a probate case to correct errors and omissions?	Redesignated to follow other section on correcting errors in ''Judicial Authority'' subpart. No substantive change.
N/A	30.125 May a judge order that a property interest be partitioned as a result of a devise?	New section.
30.235 What will the judge's decision in a formal probate proceeding contain?	30.235 What will the judge's decision in a formal probate proceeding contain?	Adds ''if relevant'' so that a judge's decision need not include the status of eligible heirs or devisees as Indian if their status is not relevant in the probate case.
N/A	30.250 May a correction order be issued to correct typographical and other non-substantive errors?	New section.
30.126 What happens if property was omitted from the inventory of the estate?	30.251 What happens if BIA identifies additional property of a decedent after a decision is issued?	Clarifies what information BIA must provide to OHA in support of the petition to add the property, and provides that the judge will issue a distribution order of the additional property.
30.127 What happens if property was improperly included in the inventory?	30.252 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?	Clarifies what information BIA must provide to OHA in support of the petition to remove the property, and provides that the judge will issue a distribution order that addresses any modifications to the distribution of the decedent's property resulting from the correction of the inventory.
N/A	30.253 What happens if a request for reconsideration of a distribution order is timely made?	New section. Adds a process to allow interested parties to seek reconsideration of the distribution order.
Subpart G—Purchase at Probate	Subpart M—Purchase at Probate	Revises this subpart overall to streamline the process for purchasing decedent's interests at probate using the statutory authority in the American Indian Probate Reform Act.
30.160 What may be purchased at probate?	30.400 What may be purchased at probate?	Adds a provision regarding purchase of minerals-only interests at probate. Deletes provision regarding timing of requesting a purchase at probate (addressed in proposed § 30.404).
30.161 Who may purchase at probate?	30.401 Who may purchase at probate?	No substantive change.
30.162 Does property purchased at probate remain in trust or restricted status?	30.402 Does property purchased at probate remain in trust or restricted status?	No change.
30.163 Is consent required for a purchase at probate?	30.403 Is consent required for a purchase at probate?	Adds that, to purchase any interest included in an approved consolidation agreement, the consent of the recipient of the consolidated interest is required. Adds new paragraphs (b) through (d), establishing procedures for heirs and devisees to consent to a purchase at probate, that consent will not be presumed, and that consent may be withdrawn. Adds to the conditions in which a Tribe does not need consent to purchase that the interest is not part of an approved consolidation agreement.
30.164 What must I do to purchase at probate?	30.404 How do I initiate a purchase at probate? 30.405 When may I initiate a purchase at probate?	Changes the deadline for filing a purchase request from before issuance of the final probate decision or order to instead before the end of the first probate hearing.
N/A	30.406 May I withdraw my request to purchase at probate?	New section.
N/A	30.407 How will OHA address requests to purchase at probate?	New section.
30.165 Who will OHA notify of a request to purchase at probate? 30.166 What will the notice of the request to purchase at probate include?	30.408 What will OHA include in the probate decision or reconsideration order when a purchase at probate is pending?	Revisions to incorporate the purchase at probate process into the final probate decision or reconsideration order, since that final decision and order are provided to the heirs or devisees, BIA, and anyone who has submitted a request to purchase.
N/A	30.409 How will a pending purchase at probate request affect how the decedent's property is distributed?	New section.
N/A	30.410 How will the purchase at probate process continue after the decision or reconsideration order is issued?	New section.
30.167 How does OHA decide whether to approve a purchase at probate?	30.411 How will the interests to be purchased at probate be valued? 30.416 How does OHA decide whether a bid is successful?	Adds that BIA will obtain the appraisal or other fair market valuation and that any appraisal/valuation must be made on the basis of the fair market value as of the decedent's date of death. Adds that the appraisal/valuation must state or include a certification that it is assessing the fair market value of the real property interest. Clarifies that OHA may hold a hearing and that the applicable heir, devisee, or surviving spouse may choose which bid to accept if multiple bids are submitted.
30.168 How will the judge allocate the proceeds from a sale?	(see 30.419, listed below)	Combines information on allocating proceeds with information on OHA issuing the order approving the sale.

Current §	New §	Summary of changes
30.169 What may I do if I do not agree with the appraised market value?	30.415 What may I do if I do not agree with the determination of fair market value in the Order to Submit Bids?	Expands who may object to a fair market value determination to include any party who may be affected by the determination. Combines time for filing an objection (30 days) and filing supporting documentation (15 days) into a deadline of 45 days for both. Requires objecting party to provide copies of the objection and supporting documents to parties who have an interest in the purchase of the property. Provides that the judge may issue a Modified Order to Submit Bids.
30.170 What may I do if I disagree with the judge's determination to approve a purchase at probate?	30.423 What may I do if I disagree with the judge's determination to approve or deny a purchase at probate.	Replaces process for objecting to the judge with a process for appealing to IBIA.
30.171 What happens when the judge grants a request to purchase at probate?	30.412 What will OHA do when it receives BIA's notification that an appraisal/valuation has been completed? 30.417 How does the judge notify the parties whether there was a successful bid?	Clarifies that OHA issues an Order to Submit Bids to all potential bidders, and that this occurs after the fair market value has been determined.
N/A	30.413 Who are potential bidders?	New section.
N/A	30.414 What will be contained in the Order to Submit Bids?	New section.
30.172 When must the successful bidder pay for the interest purchased?	30.418 When must the successful bidder pay for the interest purchased?	No substantive change.
30.173 What happens after the successful bidder submits payment?	30.419 What happens after the successful bidder submits payment?	Adds information on allocation of the proceeds of the sale.
30.174 What happens if the successful bidder does not pay within 30 days?	30.420 What happens if the successful bidder does not pay within 30 days?	No substantive change.
30.175 When does a purchased interest vest in the purchaser?	30.421 When does a purchased interest vest in the purchaser?	No substantive change.
N/A	30.422 What will happen to any lease income received or accrued from purchased land interests before the purchased interest vests in the purchaser?	New section.
N/A	30.424 When will the order approving or denying the purchase at probate become final?	New section.
Subpart H—Renunciation of Interest	Subpart H—Renunciation of Interest	See below for specific sections.
30.180 May I give up an inherited interest in trust or restricted property or trust personalty?	30.180 May I give up an inherited interest in trust or restricted property or trust personalty?	Adds clarification that entities may renounce.
30.181 How do I renounce an inherited interest?	30.181 When may I renounce a devised or inherited interest? 30.186 How do I renounce an inherited interest?	Splits into two sections. Expands when someone may renounce to allow renunciation 30 days after the probate decision is mailed, before the entry of an order on rehearing, or within 30 days after mailing of the distribution for additional property.
	30.188 What steps will the judge take if I designate a recipient?	Expands the manner in which someone may renounce to allow acknowledgment before either a notary or a judge, so that someone may renounce in person at a hearing.
N/A	30.182 Who may renounce an inherited interest on behalf of an heir or devisee who dies before the hearing?	New section. Specifies who may renounce on behalf of an heir or devisee who dies before the hearing.
30.182 Who may receive a renounced interest in trust or restricted land? 30.183 Who may receive a renounced interest of less than 5 percent in trust or restricted land?	30.183 Who may receive a renounced interest in trust or restricted land if the land will pass pursuant to a valid will? 30.184 Who will receive a renounced interest in trust or restricted land if the land will pass by intestate succession?	Reorganizes these sections to distinguish based on whether the decedent had a will or not. No substantive change.
30.184 Who may receive a renounced interest in trust personalty?	30.185 Who may receive a renounced interest in trust personalty?	Deletes paragraph (c) of the current section, which says the following, because it is not directly relevant to the probate process: ''The Secretary will directly disburse and distribute trust personalty transferred by renunciation to a person or entity other than those listed in paragraph (b) of this section.''
30.185 May my designated recipient refuse to accept the interest?	30.189 May my designated recipient refuse to accept the interest?	Adds a provision allowing the designated recipient the opportunity to refuse the interest.
30.186 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?	30.190 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?	No change.
30.187 May I revoke my renunciation?	30.191 May I revoke my renunciation?	Revised when a written renunciation becomes irrevocable to when the applicable order distributing the property becomes final, rather than when the judge enters the final order in the probate proceeding.
30.188 Does a renounced interest vest in the person who renounced it?	30.187 What happens if I do not designate any eligible individual or entity to receive the renounced interest? 30.192 Does a renounced interest vest in the person who renounced it?	Reorganizes to split into two sections. No substantive change.
Subpart I—Summary Probate Proceedings	Subpart I—Summary Probate Proceedings	See specific sections below.

Current §	New §	Summary of changes
30.200 What is a summary probate proceeding?	30.200 What is a summary probate proceeding?	Deletes that the supervising judge may determine whether the proceeding is conducted by a judge or ADM because this is an internal procedure. Changes the qualification for summary probate proceedings from funds-only estates with a value of $5,000 or less to funds-only estates with a value of $300 or less. Specifies what funds are considered in determining the value of the estate.
30.201 What does a notice of a summary probate proceeding contain?	30.206 What notice of the summary probate decision will the judge or ADM provide?	Changes the notice provided to be notice of the summary probate decision and right to challenge the decision because the proposed rule eliminates the option for a hearing and claims renunciations from the summary probate proceeding. Deletes reference to renunciations because the option to renounce will now occur after the summary probate decision is issued.
30.202 May I file a claim or renounce or disclaim an interest in the estate in a summary probate proceeding?	30.201 May I file a claim in a summary probate proceeding?	Revises to disallow claims in summary probate proceedings because the estate value is only $300 or less.
N/A	30.202 What will happen when OHA receives the summary probate file?	New section. Provides that OHA determines the distribution of estates under summary probate proceedings based on the information included in the probate file.
N/A	30.203 What will happen if the funds in the estate are insufficient to provide each heir or devisee at least one cent?	New section. Clarifies that if the funds in the estate are insufficient to provide all heirs or devisees with one cent, then the oldest heir or devisee receives all the funds.
30.203 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?	30.204 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?	Revises to eliminate the option for requesting the summary probate be conducted as a formal probate proceeding because the estate value is so small.
30.204 What must a summary probate decision contain?	30.205 What must a summary probate decision contain?	Reorganizes. Deletes reference to a proposed decision, because the judge decides the case without first releasing a proposed decision. Deletes references to claims. Adds that determination of ''Indian'' status is necessary only if relevant. Allows renunciation for 30 days after the mailing date of the decision (or within 30 days of an order on review, if applicable). Adds a statement that a formal probate proceeding will be initiated if BIA later identifies trust or restricted land that should have been included in the estate.
30.205 How do I seek review of a summary probate proceeding?	30.207 How do I seek review of a summary probate proceeding?	Deletes reference to ''de novo'' review. Clarifies that BIA may also seek review.
30.206 What happens after I file a request for de novo review?	30.208 What happens after I file a request for review?	Lengthens the time OHA has to notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the request for review from 10 days to 30 days of receipt of the request for review. No longer requires a hearing on review. Clarifies that the judge may issue an order affirming, modifying, or vacating the summary probate decision. Lists who the judge must distribute the final order to and what it must include. Allows appeal to the IBIA.
30.207 What happens if nobody files for de novo review?	30.209 What will the judge or ADM do with the official record of the summary probate case?	Provides that OHA transmits the official record back to the agency originating the probate and lists what will be included in the record. Deletes provision requiring OHA to send copies to other affected agencies. (Section specifying that the order becomes final after 30 days is in proposed § 30.206(b)).
Subpart J—Formal Probate Proceedings	Subpart J—Formal Probate Proceedings	See affected sections below.
30.210 How will I receive personal notice of the formal probate proceeding?	30.210 How will I receive personal notice of the formal probate proceeding?	Reorganizes to group all mailed (personal) notice into one section and all public notice into a separate section.
30.211 Will the notice be published in a newspaper?	30.211 How will OHA provide public notice of the formal probate proceeding?	Clarifies that the will and codicils will be mailed with the notice of the proceeding. (Section 30.114 lists who receives mailed notice of the hearing). Allows the posted notice that supplements the mailed notice to contain information for more than one hearing and specifies the minimum information that must be included for each. Adds requirement for OHA to post notice of all hearings on its website. Adds that the judge may cause the notice to be published in a local newspaper or other publication to give judge discretion to post notice in places other than the OHA website (including in a newspaper, if appropriate), for the purpose of increasing the chances of reaching individuals or entities with an interest in a probate case. Adds a provision for physical posting at the decedent's home agency. Clarifies that a posting in the vicinity of the designated place of hearing will occur only if OHA designates a specific hearing location and reduces the number of conspicuous places for posting from five to one. Adds that if physical posting at the agency office is not possible because the agency office is closed or inaccessible, then the notice must be physically posted at a conspicuous place near that agency.
30.214 What must a notice of hearing contain?	30.214 What must a notice of hearing contain?	Adds to paragraph (g) a specification that the notice of possibilities of purchase and sale of trust or restricted property will be ''in accordance with Federal law or Secretarially approved Tribal probate codes.''
30.238 May I file a petition for rehearing if I disagree with the judge's decision in a formal probate hearing?	30.238 May I file a petition for rehearing if I disagree with the judge's decision in a formal probate hearing?	Specifies that you must be an interested party to seek a rehearing and the basis for your request must be to correct a substantive error. Expands on what issues may be raised and what evidence may be relied upon in rehearing.
30.239 Does any distribution of the estate occur while a petition for rehearing is pending?	30.239 Does any distribution of the estate occur while a petition for rehearing is pending?	No change.

Current §	New §	Summary of changes
30.240 How will the judge decide a petition for rehearing?	30.240 How will the judge decide a petition for rehearing?	Clarifies that the judge will consider the petition for rehearing as a petition for reopening if not timely filed. Adds provision allowing the judge to summarily deny the petition based on certain deficiencies.
30.241 May I submit another petition for rehearing?	30.241 May I submit another petition for rehearing?	No substantive change. Moves information regarding the judge's jurisdiction to § 30.242.
30.242 When does the judge's order on a petition for rehearing become final?	30.242 When does the judge's order on a petition for rehearing become final?	Includes information on when the jurisdiction of the judge terminates.
30.243 May a closed probate case be reopened?	30.243 May a closed probate case be reopened?	Deletes the chart and states by whom and the circumstances in which a closed probate case may be reopened.
	30.244 When must a petition for reopening be filed?	Splits provisions regarding deadlines for filing petitions to reopening to proposed § 30.244 to simplify the deadline to one year after discovery of the error.
	30.245 What legal standard will be applied to reopen a case?	Clarifies that the 3-year threshold is important only with regard to the heightened legal standard that is applied to the petition to reopen after 3 years.
	30.246 What must be included in a petition for reopening?	Expands on what information must be included in a petition for reopening to justify reopening.
N/A	20.247 What is not appropriate for a petition for reopening?	New section. Clarifies what issues or objections a petition may not raise and what evidence a petition may not rely upon for a reopening, to encourage parties to address issues and bring evidence during the initial probate proceeding.
30.244 How will the judge decide my petition for reopening?	30.248 How will the judge decide my petition for reopening?	Adds provision allowing the judge to summarily deny the petition based on certain deficiencies.
30.245 What happens if the judge reopens the case?	30.249 What happens when the judge issues an order on reopening?	Combines two sections. No substantive change.
30.246 When will the decision on reopening become final?		
Subpart K—Miscellaneous	Subpart N—Miscellaneous	See affected sections below.
30.250 When does the anti-lapse provision apply?	30.500 When does the anti-lapse provision apply?	Redesignated. No change.
N/A	30.501 When is joint tenancy presumed?	New section. Establishes that joint tenancy will be presumed where a testator devises the same interests to more than one person without specifying otherwise.
N/A	30.502 How does a judge resolve conflicts between the anti-lapse provision and presumption of joint tenancy?	New section. Clarifies that the judge will give priority to the presumption of joint tenancy, such that the share of the deceased devisee will go to the surviving devisees (rather than to the deceased devisee's descendants).
30.251 What happens if an heir or devisee participates in the killing of the decedent?	30.503 What happens if an heir or devisee participates in the killing of the decedent?	Redesignated. No change.
30.252 May a judge allow fees for attorneys representing interested parties?	30.504 May a judge allow fees for attorneys representing interested parties?	Redesignated. No change.
30.253 How must minors or other legal incompetents be represented?	30.505 How must minors or other legal incompetents be represented?	Redesignated. No change.
30.254 What happens when a person dies without a valid will and has no heirs?	30.506 When a decedent died intestate without heirs, what law applies to trust or restricted property?	Deletes chart. Reorganizes based on whether the decedent died before or after the date of AIPRA's enactment. Adds detail as to how interests will be distributed under the statute in each case, rather than just citing the statutory provisions.
N/A	30.507 How will trust personalty be distributed if a decedent died intestate on or after June 20, 2006, and the Act does not specify how the trust personalty should be distributed?	New section. Specifies how trust personalty is distributed in the circumstance in which AIPRA applies but fails to state how trust personalty is distributed: If the decedent has no surviving spouse or eligible heirs or trust or restricted property over which one and only one Tribe has jurisdiction.

V. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule affects only individuals' estates and does not affect small entities.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rulemaking under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more because this rule addresses only the transfer through probate of individuals' property held in trust or restricted status.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only probates of individuals' trust or restricted property.

(c) Does not have significant adverse effects on competition, employment,

investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects only affects only probates of individuals' trust or restricted property.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rulemaking, if adopted, does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only the probate of individuals' trust or restricted property. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because the rule affects the probate of trust or restricted property held by individuals, many or most of whom are likely Tribal members. The Department therefore conducted Tribal consultation on this rule and has included responses to Tribal input in Section III. Proposed Rule Comments and Responses to Comments.

I. Paperwork Reduction Act

This rule does not contain any new collection of information that requires approval from the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection requirements associated with compiling the probate file for an estate and assigned the information collection requirements OMB Control Number 1076–0169 (expires 11/30/2021). We estimate the annual burden associated with this information collection to be 617,486 hours per year. 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.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because these are ''regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' 43 CFR 46.210(i). We have also determined that the rulemaking does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects

25 CFR Part 15

Estates, Indians—law.

43 CFR Part 30

Administrative practice and procedure, Claims, Estates, Indians, Lawyers.

For the reasons given in the preamble, the Department of the Interior amends part 15 of title 25 and part 30 of title 43 of the Code of Federal Regulations as follows:

Title 25—Indians

Chapter I—Bureau of Indian Affairs, Department of the Interior

PART 15—PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE OSAGE NATION AND THE FIVE CIVILIZED TRIBES

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

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410, 2201 et seq.; 44 U.S.C. 3101 *et seq.*

Subpart C—Preparing the Probate File

■ 2. Revise § 15.202 to read as follows:

§ 15.202 What items must the agency include in the probate file?

(a) We will include the items listed in this section in the probate file, except as specified in paragraph (b) of this section.

(1) The evidence of death of the decedent as provided under § 15.104.

(2) A completed ''Data for Heirship Findings and Family History Form'' or successor form, certified by BIA, with the enrollment or other identifying number shown for each potential heir or devisee.

(3) Information provided by potential heirs, devisees, or the Tribes on:

(i) Whether the heirs and devisees meet the definition of ''Indian'' for probate purposes, including enrollment or eligibility for enrollment in a Tribe; or

(ii) Whether the potential heirs or devisees are within two degrees of consanguinity of an ''Indian.''

(4) If an individual qualifies as an Indian only because of ownership of a trust or restricted interest in land, the date on which the individual became the owner of the trust or restricted interest.

(5) A certified inventory of trust or restricted land, including:

(i) Accurate and adequate descriptions of all land; and

(ii) Identification of any interests that represent less than 5 percent of the undivided interests in a parcel.

(6) A statement showing the balance and the source of funds in the decedent's IIM account on the date of death.

(7) A statement showing all receipts and sources of income to and disbursements, if any, from the decedent's IIM account after the date of death.

(8) Originals or copies of all wills, codicils, and revocations that have been provided to us.

(9) A copy of any statement or document concerning any wills, codicils, or revocations the BIA returned to the testator.

(10) Any statement renouncing an interest in the estate that has been submitted to us, and the information necessary to identify any person receiving a renounced interest.

(11) Claims of creditors that have been submitted to us under §§ 15.302 through 15.305, including documentation required by § 15.305.

(12) Documentation of any payments made on requests filed under the provisions of § 15.301.

(13) All the documents acquired under § 15.105.

(14) The record of each Tribal or individual request to purchase a trust or restricted land interest at probate.

(15) The record of any individual request for a consolidation agreement, including a description, such as an Individual/Tribal Interest Report, of any lands not part of the decedent's estate that are proposed for inclusion in the consolidation agreement.

(16) Valuation reports for those interests to which the special circumstances listed in 43 CFR 30.264 apply.

(b) If the estate includes only cash and the total value of the estate does not exceed $300 on the date of death, including funds deposited and accruing on or before the date of death, then we will include only the following the probate file.

(1) The evidence of death of the decedent as provided under § 15.104.

(2) A completed ''Data for Heirship Findings and Family History Form'' or successor form, certified by BIA as an accurate summary of the information available to BIA that is relevant to the probate of the estate (this form should be completed with information provided by potential heirs, devisees, or Tribes to the greatest extent possible, but BIA is not required to obtain documentation in addition to that provided by those entities).

(3) A statement showing the balance and the source of funds in the decedent's IIM account on the date of death.

(4) Certification that the decedent's estate does not contain any interests in trust or restricted land.

(5) Originals or copies of all wills, codicils, and revocations that have been provided to BIA.

(6) A copy of any statement or document concerning any wills, codicils, or revocations the BIA returned to the testator.

(7) Documentation of any payments made on requests filed under the provisions of § 15.301.

(8) All the documents acquired under § 15.105.

Subpart D—Obtaining Emergency Assistance and Filing Claims

■ 3. In § 15.301, revise the section heading and paragraphs (a) and (c) to read as follows:

§ 15.301 May funds for funeral services be paid from the decedent's IIM account?

(a) Before the probate case is submitted to OHA, you may request an amount of no more than $5,000 from the decedent's IIM account if:

(1) You are responsible for making the funeral arrangements on behalf of the family of a decedent who has an IIM account;

(2) You have not received sufficient funds from the decedent's Tribe to pay the entire cost of the funeral arrangements; and

(3) You have an immediate need to pay for funeral arrangements before burial.

* * * * *

(c) In response to a request submitted under paragraph (a) of this section, we may approve, without the need for an order from OHA, costs of no more than $5,000 from the date of death IIM account balance that are reasonable and necessary for the burial services, taking into consideration:

(1) The availability of non-trust funds, including availability of any Tribal contribution; and

(2) Any other relevant factors.

* * * * *

Subpart E—Probate Processing and Distributions

■ 4. Add §§ 15.404 and 15.405 to read as follows:

§ 15.404 What happens if BIA identifies additional property of a decedent after the probate decision is issued?

If, after OHA issues the probate decision, BIA identifies additional trust or restricted property of a decedent that it had not already identified at the time of the decision, then BIA will submit a petition to OHA for an order directing distribution of the additional property.

(a) The petition must identify the additional property and the source of that property (*e.g.,* inheritance or approval of a deed) and must include the following:

(1) A certified inventory describing the additional trust or restricted land, if applicable, or, if the additional property is trust personalty, documents verifying the balance and source of the additional trust personalty, and a statement that the inventory lists only the property to be added;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which the property was inherited by the decedent, if applicable;

(3) A statement identifying each newly added share of any allotment that increases the decedent's total share of the ownership interest of the allotment to 5 percent or more;

(4) A copy of BIA's notification to the Tribes with jurisdiction over the interests of the list of the additional interests that represent less than 5 percent of the entire undivided ownership of each parcel (after being added to the decedent's estate) under § 15.401(b); and

(5) A certification that all interested parties have been associated to the case and their names and addresses are current.

(b) BIA may submit the petition at any time after issuance of the decision.

(c) BIA must send a copy of the petition and all supporting documentation to each interested party at the time of filing and include certification of service.

§ 15.405 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?

If, after issuance of a decision, BIA identifies certain trust or restricted property or an interest therein that was incorrectly included in a decedent's inventory, then BIA will submit a petition to OHA for an order notifying all heirs or devisees of the correction and addressing any changes in distribution of property resulting from the correction.

(a) The petition must identify the property that it removed from the estate and explain why the property should not have been included, and must include the following:

(1) A newly issued certified inventory describing the trust or restricted land remaining in decedent's estate, if applicable;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which BIA discovered that the property was incorrectly included in the decedent's estate, if applicable;

(3) A statement identifying each property in the decedent's estate that decreased to a total share of the

ownership of the allotment to less than 5 percent as a result of the removal of property from the estate; and

(4) A certification that all interested parties have been associated to the case and their names and addresses are current.

(b) BIA may submit the petition at any time after issuance of the decision.

(c) BIA must send a copy of the petition and all supporting documentation to each interested party at the time of filing and include certification of service.

Title 43—Public Lands: Interior

PART 30—INDIAN PROBATE HEARINGS PROCEDURES

■ 5. The authority citation for part 30 continues to read as follows:

Authority: 5 U.S.C. 301, 503; 25 U.S.C. 9, 372–74, 410, 2201 *et seq.;* 43 U.S.C. 1201, 1457.

Subpart A—Scope of Part; Definitions

■ 6. In § 30.100, revise paragraphs (a)(5) and (7) through (9) and (c)(2) and (3) to read as follows:

§ 30.100 How do I use this part?

(a) * * *

For provisions relating to . . .	Consult . . .
* * * * * * *	
(5) Formal probate proceedings before an administrative law judge or Indian probate judge	§§ 30.210 through 30.253.
* * * * * * *	
(7) Purchases at probate	§§ 30.400 through 30.424.
(8) Renunciation of interests	§§ 30.180 through 30.192.
(9) Summary probate proceedings	§§ 30.200 through 30.209.
* * * * * * *	

* * * * *

(c) * * *

(2) §§ 30.400 through 30.424 (purchases at probate);

(3) §§ 30.183 through 30.188, except for §§ 30.186(a), (b)(2), and (d) and 30.187;

* * * * *

■ 7. Amend § 30.101 by:

■ a. Revising the definition of ''Attorney decision maker (ADM)'';

■ b. Removing the definition of ''BLM'';

■ c. Adding in alphabetical order a definition for ''Co-owner''

■ d. Removing the definition of ''Decision or order (or decision and order)'';

■ e. Adding in alphabetical order a definition for ''Decision'';

■ f. Removing the definition of ''De novo review'';

■ g. Adding in alphabetical order definitions for ''Distribution order'' and ''Home agency'';

■ h. Revising the definition of ''Indian probate judge (IPJ)'';

■ i. Adding in alphabetical order definitions for ''Joint tenancy'', ''Lineal descendant'', ''Order'', and ''Petition to Complete Purchase at Probate'';

■ j. Revising the definition of ''Summary probate proceeding''; and

■ k. Adding in alphabetical order a definition for ''Tenants in common''.

The revisions and additions read as follows:

§ 30.101 What definitions do I need to know?

* * * * *

Attorney decision maker (ADM) means an attorney with OHA who conducts summary probate proceedings.

* * * * *

Co-owner means any person who owns an undivided trust or restricted interest in the same parcel in which the decedent owns an interest.

* * * * *

Decision means a written document issued by a judge in a formal probate proceeding or by a judge or ADM in a summary probate proceeding making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty.

* * * * *

Distribution order means the OHA order distributing additional property that has been added to an estate under § 30.251.

* * * * *

Home agency means the agency that serves the Tribe in which the decedent is a member or where the decedent's IIM account originated.

* * * * *

Indian probate judge (IPJ) means an attorney with OHA, to whom the Secretary has delegated the authority to hear and decide Indian probate cases, pursuant to 25 U.S.C. 372–2.

* * * * *

Joint tenancy means ownership by two or more persons of the same property, where the individuals, who are called joint tenants, share equal, undivided ownership of the property and have a right of survivorship such that upon the death of a joint tenant, the property descends to the other joint tenants by operation of law.

* * * * *

Lineal descendent means a blood relative of a person in that person's direct line of descent.

* * * * *

Order means any written direction or determination, other than a decision, issued by a judge in a probate case, including a distribution order, an order on rehearing, an order on reopening, or a reconsideration order.

* * * * *

Petition to Complete Purchase at Probate means a petition BIA files with an appraisal or valuation to request that OHA complete the purchase at probate process.

* * * * *

Summary probate proceeding means the consideration of a probate file without a hearing. A summary probate proceeding may be conducted if the estate involves only an IIM account that did not exceed $300 in value on the date of the death of the decedent.

* * * * *

Tenants in common means two or more people who share ownership rights in a property, but whose ownership rights are divisible from each other and, when a tenant in common dies, the property descends to that tenant's heirs or devisees rather than to the other tenant or tenants.

* * * * *

Subpart B—Commencement of Probate Proceedings

■ 8. Revise § 30.114 to read as follows:

§ 30.114 Will I receive notice of the probate proceeding?

If the case is designated as a formal probate proceeding, OHA will send a notice of hearing to:

(a) Potential heirs and devisees named in the probate file;

(b) Those creditors whose claims are included in the probate file; and

(c) Other interested parties identified by OHA

Subpart C—Judicial Authority and Duties

■ 9. In § 30.123, revise paragraph (a)(1) to read as follows:

§ 30.123 Will the judge determine matters of status and nationality?

(a) * * *

(1) If relevant, the status of eligible heirs or devisees as Indians;

* * * * *

■ 10. Revise § 30.124 to read as follows:

§ 30.124 When may a judge presume the death of an heir, devisee, or person for whom a probate case has been opened?

(a) When a person cannot be proven dead but evidence of death is needed, a judge may presume that an heir, devisee, or person for whom a probate case has been opened has died at a certain time if any of the following evidence is submitted:

(1) A certified copy of an official report or finding by an agency or department of the United States, State, or Tribe that a missing person is dead or presumed to be dead. The judge will use the date of death found by the agency or department, if such a finding was made. If no such finding was made, unless other evidence is submitted showing an actual date of death, the judge will use the date on which the person was reported missing as the date of death.

(2) A certified copy of an order from a court of competent jurisdiction that a missing person is dead or presumed to be dead. The judge will use the date of death found by the court, if such a finding was made. If no such finding was made, unless other evidence is submitted showing an actual date of death, the judge will use the date on which the person was reported missing as the date of death.

(3) Signed affidavits or sworn testimony by those in a position to know that facts and other records show that the person has been absent from his or her residence for no apparent reason, or has no identifiable place of residence and cannot be located, and has not been heard from for at least 6 years. If there is no evidence available that the person continued to live after the date of disappearance or the date of last contact if the person has no identifiable place of residence, the judge will use the date the person disappeared or the date of last contact as the date of death.

(4) When a person has been missing for less than 6 years but may be presumed dead due to an identified incident, such as drowning, fire, or accident, signed affidavits or sworn testimony from individuals who know the circumstances surrounding the occurrence leading to the person's disappearance. The best evidence is statements from individuals who witnessed the occurrence or saw the missing person at the scene of the occurrence shortly before it happened. If there is no evidence available that the person continued to live after the date of the identified incident, the judge will use the date of the identified incident as the date of death.

(5) When a person cannot be located by BIA or known surviving family members and was born at least 100 years before the submission of a probate case to OHA, certification from BIA or signed affidavits or sworn testimony by those in a position to know the approximate date of birth. If there is no evidence available that the person continued to live after reaching the age of 100, the judge will use the date that is 100 years after the date of birth as the date of death.

(b) A presumption of death made based on paragraph (a) of this section can be rebutted by evidence that establishes that the person is still alive or explains the individual's absence in a manner consistent with continued life rather than death.

§ 30.125 [Redesignated as § 30.129]

■ 11. Redesignate § 30.125 as § 30.129.

■ 12. Add a new § 30.125 to read as follows:

§ 30.125 May a judge order that a property interest be partitioned as a result of a devise?

(a) A judge may order a property interest to be partitioned if:

(1) A will attempts to divide an allotment into two or more distinct portions and devises at least one of those portions;

(2) The decedent was the sole owner of the allotment;

(3) The allotment is held entirely in trust or restricted status; and

(4) The devise describes the portions of the allotment in a manner that allows the judge to readily ascertain which portion of the allotment descends to each intended devisee.

(b) If the requirements of paragraph (a) of this section are not met, the judge may find that a devise of a portion of an undivided allotment fails.

§§ 30.126 and 30.127 [Removed and Reserved]

■ 13. Remove and reserve §§ 30.126 and 30.127.

Subpart G [Removed and Reserved]

■ 14. Remove and reserve subpart G, consisting of §§ 30.160 through 30.175.

■ 15. Revise subpart H to read as follows:

Subpart H—Renunciation of Interest

Sec.

Subpart H—Renunciation of Interest

§ 30.180 May I give up an inherited interest in trust or restricted property or trust personalty?

You may renounce an inherited or devised interest in trust or restricted property, including a life estate, or in trust personalty if:

(a) You are 18 years or older and not under a legal disability; or

(b) You are an entity.

§ 30.181 When may I renounce a devised or inherited interest?

(a) If the judge has not yet issued a decision, you may renounce a devised or inherited interest at any time before the issuance of the decision.

(b) If the judge has issued a decision, you may renounce a devised or

inherited interest in any property distributed by the decision:

(1) Within 30 days from the mailing date of the decision; or

(2) Within 30 days of the order on review, in a summary probate proceeding in which a request for review has been filed; or

(3) Before the entry of an order on rehearing, in a formal probate proceeding in which a petition for rehearing is pending.

(c) You may renounce a devised or inherited interest that is added to the decedent's estate after the decision is issued pursuant to § 30.251 within 30 days of mailing the distribution order.

(d) Once the order on rehearing is issued, you may not renounce a devised or inherited interest that was distributed by the decision.

§ 30.182 Who may renounce an inherited interest on behalf of an heir or devisee who dies before the hearing?

If an individual heir or devisee dies before the hearing, a renunciation may be made on his or her behalf by any of the following, if the judge makes a determination that the renunciation is in the best interest of the parties:

(a) An individual appointed by a probate court to act on behalf of his or her private (*i.e.,* non-Federal-trust) estate, including but not limited to a personal representative, administrator, or executor; or

(b) Someone appointed by the judge with the express approval of all the heirs or devisees of the deceased heir or devisee.

§ 30.183 Who may receive a renounced interest in trust or restricted land if the land will descend pursuant to a valid will?

A devisee may renounce an interest in trust or restricted land in favor of any one or more of the following:

(a) A lineal descendant of the testator;

(b) A co-owner;

(c) The Tribe with jurisdiction over the interest; or

(d) Any Indian.

§ 30.184 Who may receive a renounced interest in trust or restricted land if the land will descend by intestate succession?

(a) If the interest in trust or restricted land represents 5 percent or more of the entire undivided ownership of the parcel, you may renounce that interest in favor of one or more of the following:

(1) Eligible heirs of the decedent; or

(2) The Tribe with jurisdiction over the interest.

(b) If the interest in the trust or restricted land represents less than 5 percent of the entire undivided ownership of the parcel, you may renounce that interest in favor of only one person or entity listed in paragraph (a) of this section, or to one Indian person related to you by blood.

§ 30.185 Who may receive a renounced interest in trust personalty?

You may renounce an interest in trust personalty in favor of any person or entity.

§ 30.186 How do I renounce an inherited interest?

To renounce an interest under § 30.180, you must file with the judge a written declaration or Tribal resolution specifying the interest to be renounced. The declaration must be signed by you and acknowledged before a notary or judge. The Tribal resolution must be approved by appropriate Tribal authorities.

(a) In your declaration, you may retain a life estate in a specified interest in trust or restricted land and renounce the remainder interest, or you may renounce the complete interest.

(b) If you renounce an interest in trust or restricted land, you may either:

(1) Designate an eligible person or entity meeting the requirements of § 30.182 or § 30.183 as the recipient; or

(2) Renounce without making a designation.

(c) If a distribution order to add property to the decedent's estate is issued, you may renounce an inherited interest in the property to be added by notifying the judge in writing of your intent to renounce the interest within 30 days of the mailing date of the distribution order.

§ 30.187 What happens if I do not designate any eligible individual or entity to receive the renounced interest?

If you do not designate any individual or entity to receive the renounced interest, or if you designate an individual or entity who is not eligible to receive the renounced interest, the interest will descend to the decedent's heirs or devisees as if you predeceased the decedent.

§ 30.188 What steps will the judge take if I designate a recipient?

If you choose to renounce your interests in favor of a designated recipient, the judge will determine whether the designated recipient is eligible to receive the interest. If the designated recipient is eligible, the judge must notify the designated recipient of the renunciation.

§ 30.189 May my designated recipient refuse to accept the interest?

Yes. Your designated recipient may refuse to accept the interest, in which case the renounced interest will descend to the devisees or heirs of the decedent as if you had predeceased the decedent. When the judge notifies the designated recipient of the renunciation, the judge will specify a deadline for the recipient to file a written refusal to accept the interest. If no written refusal is received before the deadline, the interest will descend to the designated recipient.

§ 30.190 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?

Any renunciation filed and included as part of a probate decision or order issued before October 27, 2004, the effective date of the American Indian Probate Reform Act of 2004, remains valid.

§ 30.191 May I revoke my renunciation?

A written renunciation is irrevocable when the applicable order distributing the renounced property becomes final.

§ 30.192 Does a renounced interest vest in the person who renounced it?

No. An interest in trust or restricted property renounced under this subpart is not considered to have vested in the renouncing heir or devisee, and the renunciation is not considered a transfer by gift of the property renounced.

■ 16. Revise subpart I to read as follows:

Subpart I—Summary Probate Proceedings

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Subpart I—Summary Probate Proceedings

§ 30.200 What is a summary probate proceeding?

(a) A summary probate proceeding is the disposition of a probate case without a formal hearing, which is conducted on the basis of the probate file received from the agency. A summary probate

proceeding may be conducted by a judge or an ADM.

(b) A decedent's estate may be processed summarily if the estate involves only funds in an IIM account and the total value of the estate does not exceed $300 on the decedent's date of death, including:

(1) Funds deposited into the IIM account on or before the date of death; and

(2) Funds accrued on or before the date of death.

§ 30.201 May I file a claim in a summary probate proceeding?

No. Claims may not be filed in summary probate proceedings.

§ 30.202 What will happen when OHA receives the summary probate file?

When OHA receives a summary probate file from BIA under 25 CFR 15.202(b), OHA will determine the distribution of the estate based on the information included in the probate file and issue a summary probate decision directing distribution of the estate.

§ 30.203 What will happen if the funds in the estate are insufficient to provide each heir or devisee at least one cent?

If the funds in the estate are insufficient to provide each of the heirs or devisees at least one cent, all of the funds will be paid to the oldest heir or devisee, whichever is applicable.

§ 30.204 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?

No. Formal probate proceedings are available only for estates that contain trust or restricted land or contain trust personalty in an amount greater than $300.

§ 30.205 What must a summary probate decision contain?

The written decision in a summary probate proceeding must be in the form of findings of fact and conclusions of law, with an order for distribution. Each decision must include the following:

(a) The name, birth date, and relationship to the decedent of each heir or devisee;

(b) A statement as to whether the heir or devisee is eligible to hold property in trust status and, if relevant, a statement of whether the heir or devisee is ''Indian'' for purposes of the Act;

(c) If the case involves a will, a statement approving or disapproving the will, interpreting provisions of an approved will as necessary, and describing the share each devisee is to receive under an approved will;

(d) In intestate cases, citation to the law of descent and distribution under which the summary probate decision is made, and description of the share each heir is to receive;

(e) A statement advising all interested parties, other than potential claimants, that they have a right to seek review under § 30.207 and that, if they fail to do so, the summary probate decision will become final 30 days after it is mailed;

(f) Notice to the heirs or devisees that each may renounce his or her right to inherit the funds in favor of one or more individuals or entities. The heir or devisee will be ordered to submit the renunciation within 30 days of the mailing date of the decision or within 30 days of an order on review if a request for review is filed by any party;

(g) A statement that the findings in a summary probate decision may not be used to determine the decedent's heirs or devisees for distribution of any trust or restricted land that may be added to the decedent's estate at a later time. If BIA identifies trust or restricted land in the decedent's estate after the completion of the summary probate process, BIA should file a petition for reopening and include all documents required for a formal probate proceeding pursuant to 25 CFR 15.202(a); and

(h) The signature of the judge or ADM and date of the probate decision.

§ 30.206 What notice of the summary probate decision will the judge or ADM provide?

When the judge or ADM issues a decision in a summary probate proceeding, the judge or ADM must mail or deliver a notice of the decision, together with a copy of the decision, to each affected agency and to each interested party.

(a) The notice must include a statement that interested parties who are adversely affected have a right to file a request for review with the judge or ADM within 30 days of the mailing date of the decision.

(b) The decision will become final at the end of the 30-day period, unless a timely request is filed.

§ 30.207 How do I seek review of a summary probate proceeding?

(a) If you are adversely affected by the written decision in a summary probate proceeding, you may seek review of the summary probate decision. To do this, you must file a request with the OHA office that issued the summary probate decision within 30 days after the date the summary probate decision was mailed. BIA may also seek review within the same deadline.

(b) The request for review must be in writing and signed, and must contain the following information:

(1) The name of the decedent;

(2) A description of your relationship to the decedent;

(3) An explanation of what errors you allege were made in the summary probate decision; and

(4) An explanation of how you are adversely affected by the decision.

§ 30.208 What happens after I file a request for review?

(a) Within 30 days of receiving a request for review, OHA will notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the request.

(b) A judge will review the merits of the case, consider any allegations of errors in the summary probate decision, conduct a hearing if necessary or appropriate to address the issues raised in the request, and issue an order affirming, modifying, or vacating the summary probate decision.

(c) The judge must distribute the final order on the request to review to each affected agency and to each interested party. The order must include a notice stating that interested parties who are adversely affected, or BIA, have a right to appeal the final order to the Board within 30 days of the date on which the final order was mailed, and giving the Board's address.

§ 30.209 What will the judge or ADM do with the official record of the summary probate case?

The judge or ADM will transfer the official record of the summary probate case to the agency originating the probate, by sending all original hard copies, and transmitting all digital files, that are designated by OHA as part of the official record, including:

(a) The decision, order, and the notices thereof;

(b) A copy of the notice of hearing on review with proof of mailing, if applicable;

(c) The record of the evidence received at the hearing on review, if a hearing was held, including any transcript made of the testimony;

(d) Any wills, codicils and revocations;

(e) Any pleadings and briefs filed;

(f) Interlocutory orders;

(g) Copies of all proposed or accepted settlement agreements, consolidation agreements, and renunciations and acceptances of renunciations; and

(h) Any other documents deemed material by the judge.

Subpart J—Formal Probate Proceedings

■ 17. Revise §§ 30.210 and 30.211 to read as follows:

§ 30.210 How will I receive personal notice of the formal probate proceeding?

(a) You will receive personal notice of the formal probate proceeding hearing described in § 30.114 by first class mail that includes:

(1) The most recent will submitted with the probate case and any codicils to that will; and

(2) A certificate of mailing with the mailing date signed by the person who mailed the notice.

(b) The notice will be mailed to you at least 21 days before the date of the hearing.

(c) A presumption of actual notice exists for any person to whom OHA sent a notice under this section unless the notice is returned by the Postal Service as undeliverable to the addressee.

§ 30.211 How will OHA provide public notice of the formal probate proceeding?

(a) In addition to the mailed notice in § 30.210, OHA will also arrange for the posting of notice of probate hearings for formal probate proceedings at least 21 days before the date of the hearing.

(b) The notice may contain information for more than one hearing and will specify the names of the decedents, the probate case numbers of the cases, the dates of the decedents' deaths, the dates of the most recent wills filed with the probate cases, and the dates, times, and places of the hearings.

(c) OHA will post the notice on its website at the following link: *https://www.doi.gov/oha/organization/Ph.D.*

(d) The judge may also cause notice to be published in a local newspaper or other publication if the judge determines that additional notice is appropriate.

(e) Unless one of the circumstances listed in paragraph (e) of this section is present, OHA will also arrange for the physical posting of the notice in each of the following locations:

(1) The home agency;

(2) The agency with jurisdiction over each parcel of trust or restricted property in the estate, if different from the home agency;

(3) A conspicuous place in the vicinity of the designated place of hearing, if the hearing is designated for a location other than the agency listed in paragraph (d)(1) or (2) of this section; and

(4) Additional locations if the judge determines that further posting is appropriate.

(f) OHA may proceed with the hearing without physical posting of the notice at an agency office if the notice is posted in a conspicuous place near that agency office and physical posting at the agency office was not possible due to the agency office being closed or inaccessible.

■ 18. In § 30.214, revise the introductory text and paragraph (g) to read as follows:

§ 30.214 What must a notice of hearing contain?

The notice of hearing under § 30.114 must:

* * * * *

(g) In estates for decedents whose date of death is on or after June 20, 2006, include notice of the possibilities of purchase and sale of trust or restricted property in accordance with Federal law or Secretarially approved Tribal probate codes by heirs, devisees, co-owners, a Tribe or the Secretary; and

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■ 19. In § 30.235, revise paragraph (a)(2) to read as follows:

§ 30.235 What will the judge's decision in a formal probate proceeding contain?

* * * * *

(a) * * *

(2) If relevant, state whether the heir or devisee is Indian or non-Indian;

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■ 20. Revise §§ 30.238 through 30.246 to read as follows:

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§ 30.238 May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?

(a) A petition for rehearing seeking to correct a substantive error may be filed by the BIA or by an interested party who is adversely affected by the decision.

(b) A petition for rehearing must be filed with the judge within 30 days after the date on which the decision was mailed under § 30.237.

(c) A petition for rehearing must allege an error of fact or law in the decision and must state specifically and concisely the grounds on which the petition is based. The petition may be supported with newly discovered evidence or evidence that was not available at the time of the hearing.

(d) If you are an interested party and you received proper notice of the hearing:

(1) You, or BIA on your behalf, may raise an issue on rehearing only if you raised it at or before the hearing, whether or not you attended the hearing. Any issue you raise for the first time on rehearing may be denied solely because you failed to timely raise the issue; and

(2) You may only use evidence on rehearing that was submitted at or before the hearing, if that evidence was available or discoverable to you at that time. Any new evidence you submit on rehearing may be disregarded by the judge, if it was available or discoverable to you at the time the hearing was held.

(e) If the petition is based on newly discovered evidence or evidence that was unavailable at the time of the hearing, it must:

(1) Be accompanied by documentation of that evidence, including, but not limited to, one or more affidavits of a witness stating fully the content of the new evidence; and

(2) State the reasons for failure to discover and present that evidence at the hearings held before issuance of the decision.

(f) OHA will send to BIA a notice of receipt of a petition for rehearing as soon as practicable, ordering that the decedent's estate not be distributed during the pendency of the petition for rehearing. OHA will also forward a copy of the petition and any documents filed with the petition to the interested parties and affected agencies.

§ 30.239 Does any distribution of the estate occur while a petition for rehearing is pending?

The agencies must not initiate payment of claims or distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

§ 30.240 How will the judge decide a petition for rehearing?

(a) The judge may consider a petition as a petition for reopening if the petition for rehearing is not timely filed.

(b) The judge may summarily deny the petition based on the deficiencies of the petition. A summary denial is an order in which the judge denies the petition without deciding the merits of the issues raised in the petition and is warranted if:

(1) The petition alleges mere disagreement with a decision;

(2) The petition is based on newly discovered evidence and fails to meet the requirements of § 30.238(e); or

(3) The petition is based solely on issues or evidence described in § 30.238(d)(1) or (2).

(c) If the petition fails to show proper grounds for rehearing, the judge will issue an order denying the petition for rehearing and including the reasons for denials.

(d) If the petition shows proper grounds for rehearing, the judge must:

(1) Cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate may be affected if the petition is granted;

(2) Allow all persons served a reasonable, specified time in which to respond to the petition for rehearing; and

(3) Consider with or without a hearing, the issues raised in the petition.

(e) The judge may affirm, modify, or vacate the former decision.

(f) On entry of a final order, including a summary denial, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include a notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the date on which the order was mailed, and giving the Board's address.

§ 30.241 May I submit another petition for rehearing?

No. Successive petitions for rehearing may not be filed by the same party or BIA in the same probate case.

§ 30.242 When does the judge's order on a petition for rehearing become final?

The order on a petition for rehearing will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part and § 4.320 of this chapter. The jurisdiction of the judge terminates when he or she issues an order finally disposing of a petition for rehearing, except for the reopening of a case under this part.

§ 30.243 May a closed probate case be reopened?

A closed probate case may be reopened if, the decision or order issued in the probate case contains an error of fact or law (including, but not limited to, a missing or improperly included heir or devisee, a found will, or an error in the distribution of property), and the error is discovered more than 30 days after the mailing date of a decision.

(a) Any interested party or BIA may seek correction of the error of fact or law by filing a petition for reopening with the judge.

(b) Reopening may also be initiated on a judge's own motion.

§ 30.244 When must a petition for reopening be filed?

(a) A petition for reopening to correct an error of fact or law in a decision or post-decision order may be filed at any time, but if a petition for reopening is filed by an interested party, or by BIA on behalf of an interested party, it must be filed within 1 year after the interested party's discovery of the alleged error.

(b) If a petition for reopening to correct an error of fact or law in the original decision is filed before the deadline to file a petition for rehearing has passed, it will be treated as a petition for rehearing.

§ 30.245 What legal standard will be applied to reopen a case?

(a) If a petition for reopening is filed within 3 years or less of the date of the decision or order, the judge may reopen the case to correct an error of fact or law in the decision or order.

(b) When a petition for reopening is filed more than 3 years after the date of the decision or order, the judge may reopen the case if the judge finds that the need to correct the error outweighs the interests of the public and heirs or devisees in the finality of the probate proceeding.

§ 30.246 What must be included in a petition for reopening?

(a) A petition for reopening must:

(1) State specifically and concisely the grounds on which the petition is based; and

(2) Include all relevant evidence in the form of documents and/or sworn affidavits supporting any allegations and relief requested in the petition.

(b) A petition filed by an interested party or by BIA on behalf of an interested party must also:

(1) State the date the interested party discovered the alleged error;

(2) Include all relevant evidence in the form of documents and/or sworn affidavits, concerning when and how the interested party discovered the alleged error;

(c) A petition filed more than 3 years after the date of the decision or order must show that the need to correct the error outweighs the interests of the public and heirs or devisees in the finality of the probate proceeding, which may be shown by addressing the following factors in the petition, as applicable:

(1) The nature of the error;

(2) The passage of time;

(3) Whether the interested party exercised due diligence in pursuing his or her rights;

(4) Whether the interested party's ancestor exercised due diligence in pursuing his or her rights and whether a failure to exercise should be imputed to the interested party;

(5) The availability of witnesses and documents;

(6) The general interest in administrative finality;

(7) The number of other estates that would be affected by the reopening, if known; and

(8) Whether the property that was in the estate is still available for redistribution if the case is reopened, if known.

■ 21. Add §§ 30.247 through 30.249 to read as follows:

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30.247 What is not appropriate for a petition for reopening?

30.248 How will the judge decide my petition for reopening?

30.249 What happens when the judge issues an order on reopening?

* * * * *

§ 30.247 What is not appropriate for a petition for reopening?

A petition for reopening may not:

(a) Raise issues or objections that were already addressed in a prior rehearing or reopening order;

(b) Raise issues or objections when the interested party had the opportunity to raise them earlier because they received proper notice of the hearing or summary decision; or

(c) Submit evidence that was available or discoverable at the time the decision was issued, or available during the rehearing period. The requirements at § 30.238(e) concerning presentation of new evidence on rehearing also apply to the presentation of new evidence on reopening.

§ 30.248 How will the judge decide my petition for reopening?

(a) The judge may summarily deny the petition for reopening based on deficiencies in the petition. A summary denial is an order in which the judge denies the petition without deciding the merits of the allegations in the petition and is warranted if:

(1) The petition alleges mere disagreement with a decision;

(2) The petition raises issues or objections that were previously addressed in a rehearing order or reopening order;

(3) The petition raises only issues or objections by or on behalf of an

interested party for the first time on reopening and that interested party received proper notice of the hearing or summary decision;

(4) The petition is based on newly discovered evidence and fails to meet the requirements of § 30.238(e); or

(5) The petition is based solely on issues or evidence described in § 30.245(c).

(b) If a summary denial is not warranted, the judge will review the merits of the petition to determine if the petition asserts proper grounds for reopening.

(1) If the petition fails to assert proper grounds for reopening, then the judge will issue an order denying the petition for reopening and addressing the merits of the petition.

(2) If the petition asserts proper grounds for reopening, the judge will:

(i) Cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate may be affected if the petition is granted;

(ii) Allow all persons served a reasonable, specified time in which to respond to the petition for reopening by filling responses, cross-petitions, or briefs;

(iii) Suspend further distribution of the estate or income during the reopening proceedings, if appropriate, by order to the affected agencies;

(iv) Consider, with or without a hearing, the issues raised in the petition; and

(v) Affirm, modify, or vacate the decision or order.

(c) On entry of a final order, including a summary denial, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include a notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the mailing date, and giving the Board's address.

§ 30.249 What happens when the judge issues an order on reopening?

(a) Copies of the judge's order on reopening must be mailed to the petitioner, the affected agencies, and all interested parties.

(b) The judge must submit the record made on a reopening petition to the designated LTRO.

(c) The order on reopening will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part.

Subpart K—[Redesignated as Subpart N]

■ 22. Redesignate subpart K, consisting of §§ 30.250 through 30.254, as subpart N and revise the heading to read as follows:

Subpart N—Miscellaneous

§§ 30.250 and 30.251 through 30.254 [Redesignated as §§ 30.500 and 30.503 through 30.506]

■ 23. In newly redesignated subpart N, redesignate §§ 30.250 and 30.251 through 30.254 as §§ 30.500 and 30.503 through 30.506, respectively.

Subpart J—Formal Probate Proceedings

■ 24. Add new §§ 30.250 through 30.253 to read as follows:

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§ 30.250 May a correction order be issued to correct typographical and other non-substantive errors?

If, after issuance of a decision or other probate order, it appears that the decision or other probate order contains non-substantive errors, the judge may issue a correction order to correct them. Errors are non-substantive if they are merely typographical, clerical, or their correction would not change the distribution of a decedent's property.

(a) A judge may issue a correction order for the purpose of correcting non-substantive errors on the judge's own motion. A request for correction order may also be filed by BIA or an interested party at any time.

(b) Copies of the correction order will be sent to BIA and all interested parties.

(c) The correction order is not subject to appeal to the Board.

§ 30.251 What happens if BIA identifies additional property of a decedent after the probate decision is issued?

If, after issuance of a decision, BIA identifies additional trust or restricted property of a decedent that it had not already identified at the time of the decision, then BIA will submit a petition to OHA for an order directing distribution of the additional property.

(a) OHA will accept the petition at any time after issuance of the decision.

(b) The judge will review the petition to ensure that the petition identifies the additional property and the source of that property (*e.g.,* inheritance or approval of a deed) and includes the following:

(1) A certified inventory describing the additional trust or restricted land, if applicable, or, if the additional property is trust personalty, documents verifying the balance and source of the additional trust personalty, and a statement that the inventory lists only the property to be added;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which the property was inherited by the decedent, if applicable;

(3) A statement identifying each newly added share of any allotment that increases the decedent's total share of the ownership interest of the allotment to 5 percent or more;

(4) A copy of BIA's notification to the Tribes with jurisdiction over the interests of the list of the additional interests that represent less than 5 percent of the entire undivided ownership of each parcel (after being added to the decedent's estate) under 25 CFR 15.401(b); and

(5) A certification that all interested parties have been associated to the case and their names and addresses are current.

(c) The judge may, at the judge's discretion, either:

(1) Deny the request for good cause; or

(2) Address the request with or without a hearing.

(d) If the judge does not deny the petition, the judge will issue an order that directs distribution of the additional property. The order may direct that the additional property be distributed in the same manner as property already addressed in the decision, or the order may direct that the additional property be distributed in a different manner than property already addressed in the decision.

(e) The judge must furnish copies of the distribution order to the agency and to all interested parties who share in the estate. The distribution order will notify all heirs or devisees, including any surviving spouse, of the right to seek reconsideration to:

(1) Object to the findings and conclusions of the distribution order;

(2) Renounce their interest(s) in any of the additional property;

(3) Include the additional property in an existing or new consolidation agreement;

(4) Allege an error in BIA's inventory of additional property under § 30.128; or

(5) File a request to purchase the additional property at probate.

(f) The distribution order will also instruct the heirs or devisees that they must notify OHA in writing of their request for reconsideration of the distribution order within 30 days of the mailing of the distribution order, and that their right to seek reconsideration will be waived if they fail to notify OHA in writing by the deadline. For purposes of filing the request for reconsideration, the written submission will be considered to be filed with OHA on the date it is postmarked or faxed to OHA.

(g) If OHA does not receive a timely request for reconsideration, the distribution order will become final on the 45th day after the mailing date. An untimely filed request for reconsideration will not be considered by OHA and will not disturb the finality of the distribution order.

§ 30.252 What happens if BIA identifies that property was incorrectly included in a decedent's inventory?

If, after issuance of a decision, BIA identifies certain trust or restricted property or an interest therein that was incorrectly included in a decedent's inventory, then BIA will submit a petition to OHA for an order notifying all heirs or devisees of the correction and addressing any changes in distribution of property resulting from the correction.

(a) OHA will accept the petition at any time after issuance of the decision.

(b) The judge will review the petition to ensure that it identifies the property that BIA removed from the estate, explains why the property should not have been included, and includes the following:

(1) A newly issued certified inventory describing the trust or restricted land remaining in decedent's estate, if applicable;

(2) A copy of the decision, or modification or distribution order and corresponding inventory issued in the probate case from which BIA discovered that the property was incorrectly included in the decedent's estate, if applicable;

(3) A statement identifying each property in the decedent's estate that decreased to a total share of the ownership of the allotment to less than 5 percent as a result of the removal of property from the estate; and

(4) A certification that all interested parties have been associated to the case and their names and addresses are current.

(c) The judge may, at the judge's discretion, either:

(1) Deny the request for good cause; or

(2) Address the request with or without a hearing.

(d) If the judge does not deny the petition, the judge will issue an order that addresses any modifications to the distribution of the decedent's property resulting from the correction of the inventory. The order may find that the correction of the inventory does not modify the distribution of any remaining property in the estate.

(e) The judge must furnish copies of the distribution order to the agency and to all interested parties who share in the estate. The distribution order will inform all heirs or devisees, including any surviving spouse, of the right to seek reconsideration to:

(1) Object to the findings and conclusions of the distribution order; or

(2) Allege an error in BIA's inventory under § 30.128.

(f) The distribution order will also instruct the heirs or devisees that they must notify OHA in writing of their objection to the distribution order within 30 days of the mailing of the distribution order, and that their right to seek reconsideration will be waived if they fail to notify OHA in writing by the deadline. For purposes of filing the request for reconsideration, the written submission will be considered to be filed with OHA on the date it is postmarked or faxed to OHA.

(g) If OHA does not receive a timely request for reconsideration, the distribution order will become final on the 45th day after the mailing date. An untimely filed request for reconsideration will not be considered by OHA and will not disturb the finality of the distribution order.

§ 30.253 What happens if a request for reconsideration of a distribution order is timely made?

(a) If an heir, devisee, BIA or Tribe files a timely request for reconsideration, OHA will:

(1) Send to BIA a notice of receipt of a petition for reconsideration as soon as practicable, ordering that the newly added property not be distributed or incorrectly included property not be removed, as applicable, during the pendency of the petition for reconsideration; and

(2) Forward a copy of the petition and any documents filed with the petition to the interested parties and affected agencies.

(b) The agencies must not distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

(c) If proper grounds for reconsideration are not shown, the judge will issue an order denying the petition for reconsideration and including the reasons for the denial.

(d) If proper grounds for reconsideration are shown, the judge must:

(1) Allow all persons served a reasonable, specified time in which to submit answers or legal briefs in response to the petition; and

(2) Consider, with or without a hearing, the issues raised in the petition, including requests to renounce, requests to purchase newly added properties at probate, and requests to include newly added property in an existing or new consolidation agreement.

(e) The judge will not reconsider findings made in the decision; the judge will only reconsider findings made in the distribution order regarding the distribution of the additional property or modification to distribution resulting from the inventory correction, as applicable.

(f) If an interested party raises an inventory dispute in the petition for reconsideration, the judge may order that the distribution order is vacated and remand the BIA's petition to the BIA under § 30.128 to resolve the inventory dispute.

(g) The judge will issue a final order on reconsideration which may affirm, modify, or vacate the distribution order.

(h) On entry of a final order on reconsideration, the judge must distribute the order to the petitioner, the agencies, and the interested parties. The order must include notice stating that interested parties who are adversely affected, or BIA, have the right to appeal the final order to the Board, within 30 days of the date on which the order was mailed, and giving the Board's address.

(i) Neither BIA nor any interested party may file successive petitions for reconsideration.

(j) The order on a petition for reconsideration will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part and § 4.320 of this chapter.

Subpart K—[Reserved]

■ 25. Add reserved subpart K.

■ 26. Add subpart M to read as follows:

Subpart M—Purchase at Probate

Sec.

Subpart M—Purchase at Probate

§ 30.400 What may be purchased at probate?

(a) The judge may allow an eligible purchaser to purchase at probate all or part of the trust or restricted land in the estate of a person who died on or after June 20, 2006. Any interest in trust or restricted land, including a life estate that is part of the estate (*i.e.,* a life estate owned by the decedent but measured by the life of someone who survives the decedent), may be purchased at probate, except as provided in paragraph (b) of this section.

(b) Purchase of minerals-only real property interests (*i.e.,* an allotment that does not include a surface interest) may be considered for purchase at probate only if sufficient evidence of the fair market value of the real property interest is submitted. No interest in a minerals-only property may be purchased at probate on the basis of the value of the minerals themselves.

§ 30.401 Who may purchase at probate?

An eligible purchaser at probate is any of the following:

(a) Any devisee or eligible heir who is receiving an interest in the same parcel of land by devise or descent in the probate proceeding;

(b) Any co-owner;

(c) The Indian Tribe with jurisdiction over the parcel containing the interest; or

(d) The Secretary on behalf of the Tribe.

§ 30.402 Does property purchased at probate remain in trust or restricted status?

Yes. The property interests purchased at probate must remain in trust or restricted status.

§ 30.403 Is consent required for a purchase at probate?

(a) Except as provided in paragraphs (b) and (c) of this section, to purchase at probate a decedent's interest in trust or restricted property, the eligible purchaser must have the consent of:

(1) The heir or devisee of the share to be purchased;

(2) Any surviving spouse whose share is to be purchased and who receives a life estate under 25 U.S.C. 2206(a)(2)(A) or (D); or

(3) Any recipient of an interest received under an approved consolidation agreement whose share is to be purchased.

(b) If consent is required from an heir or devisee for a purchase at probate, the consent may be given either:

(1) During a hearing as part of the record; or

(2) In writing to OHA.

(c) An heir or devisee's failure to attend a hearing or respond to an order will not be presumed to constitute consent.

(d) An heir or devisee may withdraw consent at any time before the purchase is final.

(1) To notify OHA, the heir or devisee must state, either on record at the probate hearing, or in writing to OHA, that the heir or devisee is not willing to consent to sell the property under any circumstances and/or is not willing to consider any bids to purchase the property interest.

(2) When OHA receives such notice, it will deny the request to purchase the property interest to which the notice applies.

(e) If you are the Tribe with jurisdiction over the parcel containing the interest, you do not need the consent of those listed under paragraph (a) of this section if the following five conditions are met:

(1) The interest will descend by intestate succession;

(2) The judge determines based on the Department's records that the decedent's interest at the time of death was less than 5 percent of the entire undivided ownership of the parcel of land;

(3) The heir or surviving spouse was not residing on the property at the time of the decedent's death;

(4) The heir or surviving spouse is not a member of your Tribe or eligible to become a member; and

(5) The interest is not included in an approved consolidation agreement.

(f) BIA may purchase an interest in trust or restricted land on behalf of the Tribe with jurisdiction over the parcel containing the interest if BIA obtains consent under paragraph (a) of this section or the conditions in paragraph (c) of this section are met.

§ 30.404 How do I initiate a purchase at probate?

Any eligible purchaser may initiate a purchase at probate by submitting a written request to OHA to purchase at probate.

§ 30.405 When may I initiate a purchase at probate?

(a) To initiate a purchase at probate during the initial probate proceeding, the eligible purchaser must submit the written request before the completion of the first probate hearing.

(b) If a property interest the eligible purchaser would like to purchase has been added to the decedent's estate under § 30.251, the purchaser must submit the written request within 30 days of the mailing of the distribution order issued under § 30.251(d).

§ 30.406 May I withdraw my request to purchase at probate?

At any point before the purchase is complete, a purchaser may withdraw a request to purchase at probate. In order to withdraw a request to purchase, the requester must file with OHA a written statement that the request is withdrawn. The requester is not required to provide reasons or justification for withdrawal of the request.

§ 30.407 How will OHA address requests to purchase at probate?

The judge has discretion to deny a request to purchase at probate in the decision or at any time thereafter. If one or more requests to purchase at probate

are timely filed, OHA will address those requests in the probate decision (or reconsideration order if the request to purchase is for property that has been added to the decedent's estate under § 30.251) and either deny the requests at that time or provide instructions for continuing the purchase at probate process.

§ 30.408 What will OHA include in the probate decision or reconsideration order when a purchase at probate request is pending?

(a) If a purchase at probate request is pending at the time the probate decision (or reconsideration order under § 30.251) is issued, and is not denied in the decision (or reconsideration order), the decision (or reconsideration order) will include the following to address the request:

(1) A list of all requests to purchase at probate that have been submitted;

(2) Notification to the parties as to whether consent of the applicable heirs or devisees is required to approve the requested purchase; and

(3) Direction to BIA to obtain an appraisal or valuation for each interest for which a purchase at probate request has been submitted.

(b) If the purchase of the interest requires consent of the applicable heirs or devisees, the probate decision or reconsideration order will also:

(1) Direct the heirs or devisees to submit written notification within 30 days of the mailing date of the decision or reconsideration order that the heirs or devisees would consider selling the interest to an eligible purchaser during the probate process if a bid is made for fair market value or greater;

(2) Inform the heirs or devisees that OHA may consider failure to provide such written notification as a refusal to consent to sell the property during probate, and may rely on such refusal to deny the request to purchase at probate; and

(3) Direct BIA to postpone seeking an appraisal/valuation of that property until BIA receives future notice from OHA that at least one heir or devisee has filed the written notification that the heir or devisee would consider selling the interest.

§ 30.409 How will a pending purchase at probate request affect how the decedent's property is distributed?

When the decision (or distribution order following a reconsideration order under § 30.251) becomes final, BIA may distribute the estate as stated in the decision or distribution order. The decision or distribution order will identify any property interest that is the subject of a pending request for purchase at probate, and that the property interest will be conveyed with an encumbrance, which will remain on the property interest until the request is fully addressed. The encumbrance does not affect distribution of trust personalty.

§ 30.410 How will the purchase at probate process continue after the decision or reconsideration order is issued?

After a decision or reconsideration order is issued:

(a) If consent is required for the purchase of an interest, and an heir or devisee does not submit written notification that he or she would consider selling the interest by the deadline OHA established, the request to purchase the applicable property interest(s) is denied by operation of law. In such cases, OHA will notify the BIA that it may remove the encumbrance remaining on the applicable property interest(s).

(b) If the heirs or devisees submit the written notification that they would consider selling the interest by the deadline OHA established, then OHA will notify BIA that it may obtain an appraisal/valuation of the property.

(c) In any other instances in which a purchase request is denied, BIA may remove any encumbrance remaining on the applicable property interest(s).

§ 30.411 How will the interests to be purchased at probate be valued?

(a) For each parcel for which a request to purchase has been submitted, BIA will obtain appraisal(s) or other fair market valuation(s) in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) or other approved valuation methods under 25 U.S.C. 2214.

(b) Any appraisal/valuation must be made on the basis of the fair market value of the parcel as of the date of the decedent's death.

(c) No valuation document filed by the BIA, aside from an appraisal, will be used to determine the fair market value of trust land during a purchase at probate unless the document clearly states that it assesses the fair market value of the real property interest or is accompanied by a certification that it does so.

§ 30.412 What will OHA do when it receives BIA's notification that an appraisal/valuation has been completed?

When OHA receives BIA's notification that an appraisal/valuation has been completed and BIA files a Petition to Complete Purchase at Probate, OHA will issue an Order to Submit Bids to all potential bidders to submit bids for property interests with pending purchase at probate requests.

(a) Potential bidders may submit bids even if they have not previously submitted a request to purchase at probate.

(b) OHA will identify the individuals/entities who are eligible to submit bids for each property interest available for purchase at probate.

§ 30.413 Who are potential bidders?

(a) The Tribe will be the only potential bidder and no other bids will be accepted if:

(1) The Tribe with jurisdiction over the property submits the only request to purchase within the deadline; and

(2) The requirements of § 30.403(c) (*i.e.,* consent of the heir is not required) are met.

(b) In other situations, potential bidders may include:

(1) Any eligible purchaser who has satisfied the requirements of §§ 30.404 and 30.405;

(2) Eligible heirs;

(3) Eligible devisees;

(4) The Indian Tribe with jurisdiction over the property interest; and

(5) Co-owners who have previously notified BIA in writing that they wish to receive probate notices concerning that allotment.

§ 30.414 What will be contained in the Order to Submit Bids?

For each property for which a request to purchase at probate is pending, the Order to Submit Bids will include:

(a) A finding of the fair market value of the interest to be sold, determined in accord with the appraisal/valuation provided by the BIA under § 30.411;

(b) Information concerning where a copy of the appraisal/valuation may be viewed;

(c) Direction to potential bidders to submit bids to purchase the property that are equal to or greater than the fair market value;

(d) A deadline by which OHA must receive bids from all potential bidders; and

(e) A statement that if no bids are submitted by the deadline, the request to purchase will be denied.

§ 30.415 What may I do if I do not agree with the determination of fair market value in the Order to Submit Bids?

(a) You may object to the determination of fair market value stated in the Order to Submit Bids if:

(1) You are the heir, devisee, or surviving spouse whose interest is to be sold;

(2) You filed a written request to purchase; or

(3) Any potential bidder or other party who may be affected by the determination of the fair market value.

(b) To object to the determination of fair market value:

(1) You must file a written objection with OHA no later than 45 days after the mailing date of the Order to Submit Bids.

(2) The objection must:

(i) State the reasons for the objection; and

(ii) Include any supporting documentation showing why the fair market value should be modified.

(3) You must provide copies of the written objection and any supporting documentation to all parties who have an interest in the purchase of the property.

(c) Any party who may be affected by the determination of the fair market value may file a response to the written objection with OHA no later than 45 days after the date the written objection was served on the interested parties. Any document supporting the party's response must be submitted with the response.

(d) The judge will consider any timely submitted written objection and responses, and will determine whether to modify the finding of fair market value, with or without a valuation hearing. OHA will issue a Modified Order to Submit Bids that addresses the objection and responses.

(e) If you were directed to submit a bid, you may preserve your right to submit a bid by filing the written objection instead of a bid.

§ 30.416 How does OHA decide whether a bid is successful?

OHA will decide that a bid is successful if it meets the following requirements.

(a) The bid is equal to or greater than the fair market value of the interest and was timely filed.

(b) In cases in which consent of an heir, devisee, or surviving spouse is required for the purchase, the applicable heir devisee, or surviving spouse accepts a bid.

(1) OHA may hold a hearing for the purpose of determining whether the applicable heir, devisee, or surviving spouse accepts a bid.

(2) If multiple bids are submitted, the applicable heir, devisee, or surviving spouse may choose which bid to accept.

(3) If the applicable heir, devisee, or surviving spouse does not accept any bid for his or her property interest, the request to purchase that property interest at probate will be denied.

§ 30.417 How does the judge notify the parties whether there was a successful bid?

(a) When a judge determines that a bid is successful, the judge will issue a Notice of Successful Bid to all bidders, OST, the BIA agency that prepared the probate file, and the BIA agency having jurisdiction over the interest sold. The Notice of Successful Bid will include the following information:

(1) The parcel and interest sold;

(2) The identity of the successful bidder;

(3) The amount of the successful bid; and

(4) Instructions to the successful bidder to submit payment for the interest.

(b) If no successful bids are received, the judge will issue an order denying the request to purchase the property.

§ 30.418 When must the successful bidder pay for the interest purchased?

The successful bidder must make payment, according to the instructions in the Notice of Successful Bid, of the full amount of the purchase price no later than 30 days after the mailing date of the Notice of Successful Bid.

§ 30.419 What happens after the successful bidder submits payment?

When the judge is notified by BIA that BIA has received payment, the judge will issue an order:

(a) Approving the sale and stating that title must transfer as of the date the order becomes final; and

(b) For the sale of an interest subject to a life estate, directing allocation of the proceeds of the sale and accrued income among the holder of the life estate and the holders of any remainder interests using 25 CFR part 179.

§ 30.420 What happens if the successful bidder does not submit payment within 30 days?

(a) If the successful bidder fails to pay the full amount of the bid within 30 days, the judge will issue an order denying the request to purchase or the bid (whichever is applicable) and the interest in the trust or restricted property will be distributed as determined by the judge in the decision or distribution order.

(b) The time for payment may not be extended.

(c) Any partial payment received will be returned.

§ 30.421 When does a purchased interest vest in the purchaser?

If the request to purchase (or a bid submitted by a potential bidder) is approved, the purchased interest vests in the purchaser on the date OHA's order approving the sale becomes final.

§ 30.422 What will happen to any lease income received or accrued from purchased land interests before the purchased interest vests in the purchaser?

Any lease income received or accrued from a property interest before the date the purchased interest vests in the purchaser will be paid to the heir(s), devisee(s), or surviving spouse from whom purchase of the interest was made based on the fractional ownership interests in the parcel as determined in the decision or distribution order.

§ 30.423 What may I do if I disagree with the judge's determination to approve or deny a purchase at probate?

If you are an interested party who is adversely affected by the judge's order to approve or deny a purchase at probate, you may file an appeal to the Board within 30 days after the mailing date of OHA's order approving or denying the purchase at probate.

§ 30.424 When will the order approving or denying the purchase at probate become final?

The order to approve or deny the purchase at probate becomes final at the end of the 30-day appeal period, unless a timely appeal is filed.

Subpart N—Miscellaneous

■ 27. Add §§ 30.501 and 30.502 to read as follows:

§ 30.501 When is joint tenancy presumed?

A judge will presume that a testator intended to devise interests in joint tenancy when:

(a) A testator devises trust or restricted interests in the same parcel of land to more than one person; and

(b) The will does not contain clear and express language stating that the devisees receive the interests as tenants in common.

§ 30.502 How does a judge resolve conflicts between the anti-lapse provision and the presumption of joint tenancy?

If the presumption of joint tenancy and anti-lapse provisions conflict, then the judge will give priority to the presumption of joint tenancy and the share of the deceased devisee will descend to the surviving devisees.

■ 28. Revise newly redesignated § 30.506 to read as follows:

§ 30.506 When a decedent died intestate without heirs, what law applies to trust or restricted property?

The law that applies to trust or restricted property when a decedent died intestate without heirs depends upon whether the decedent died before June 20, 2006 or on or after June 20, 2006.

(a) When the judge determines that a decedent died before June 20, 2006, intestate without heirs, the judge will apply 25 U.S.C. 373a or 25 U.S.C. 373b to address distribution of trust or restricted property in the decedent's estate. If it is necessary to determine the value of an interest in land located on the public domain, to properly apply 25 U.S.C. 373b, the judge will determine fair market value based on an appraisal or other valuation method developed by the Secretary under 25 U.S.C. 2214. If the interest in land located on the public domain is valued at more than $50,000, the judge's decision concerning distribution of that interest will be a recommended decision only.

(b) When the judge determines that a decedent died intestate on or after June 20, 2006, without surviving lineal descendants, parents, or siblings who are eligible heirs, the judge will apply provisions of the Act to determine distribution of trust or restricted land in the decedent's estate.

(1) If the decedent died without surviving lineal descendants, parents, or siblings who are eligible heirs, and the decedent owned at least 5 percent of an allotment, that interest will be distributed either to the Indian Tribe with jurisdiction over the interest or, if there is no Indian Tribe with jurisdiction, then split equally among the co-owners as of the decedent's date of death, subject to the exceptions and limitations detailed in 25 U.S.C. 2206(a)(2)(B)–(C).

(2) If the decedent died without surviving lineal descendants who are eligible heirs, and the decedent owned less than 5 percent of an allotment, that interest will be distributed either to the Indian Tribe with jurisdiction over the interest or, if there is no Indian Tribe with jurisdiction, then split equally among the co-owners as of the decedent's date of death, subject to the exceptions and limitations concerning small fractional interests detailed in 25 U.S.C. 2206(a)(2)(D).

(3) For either paragraph (b)(1) or (2) of this section, the judge will also determine whether the decedent had a surviving spouse, and whether the surviving spouse is entitled to a life estate.

■ 29. Add § 30.507 to read as follows:

§ 30.507 How will trust personalty be distributed if decedent died intestate on or after June 20, 2006, and the Act does not specify how the trust personalty should be distributed?

When the judge determines that a decedent died intestate on or after June 20, 2006, without a surviving spouse or eligible heirs under the Act, and without trust or restricted land over which one, and only one, Indian Tribe has jurisdiction, the judge will direct distribution of trust personalty, including trust funds that were on deposit in the decedent's IIM account or owing to the decedent as of the decedent's date of death, as follows:

(a) To the decedent's surviving children, grandchildren, great-grandchildren, parents, or siblings who are not eligible heirs under the Act, in the order set forth in 25 U.S.C. 2206(a)(2)(B).

(b) If trust personalty does not descend under paragraph (a) of this section, then to the decedent's surviving nieces and nephews, in equal shares.

(c) If trust personalty does not descend under paragraph (b) of this section, then to the Indian Tribe in which the decedent was enrolled at the time the decedent died.

(d) If trust personalty does not descend under paragraph (c) of this section, then:

(1) To the Indian Tribe in which the decedent's biological parents were enrolled, if both were enrolled in the same Tribe;

(2) To the Indian Tribes in which the decedent's biological parents were enrolled, in equal shares, if each of the decedent's biological parents was enrolled in a different Tribe; or

(3) If only one biological parent was enrolled in an Indian Tribe, to the Indian Tribe in which that biological parent was enrolled.

(e) If trust personalty does not descend under paragraph (d) of this section, then:

(1) To the Indian Tribe in which the decedent's biological grandparents were enrolled; if all enrolled biological grandparents were enrolled in the same Tribe;

(2) To the Indian Tribes in which the decedent's biological grandparents were enrolled, in equal shares, if two or more of the decedent's biological grandparents were enrolled in different Tribes; or

(3) If only one biological grandparent was enrolled in an Indian Tribe, to the Indian Tribe in which that biological grandparent was enrolled.

(f) If trust personalty does not descend under paragraph (e) of this section, then to an Indian Tribe selected by the judge, in consideration of the following factors:

(1) The origin of the funds in the decedent's IIM account;

(2) The Tribal designator contained in the owner identification number or IIM account number assigned to the decedent by BIA; and

(3) The geographic origin of the decedent's Indian ancestors.

This action is taken pursuant to delegated authority.

Bryan Newland,

Assistant Secretary—Indian Affairs.

Eric Werwa,

Deputy Assistant Secretary—Policy and Environmental Management Exercising the delegated authority of the AS–PMB.

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Part IV

Department of Energy

10 CFR Parts 429 and 431
Energy Conservation Program: Test Procedure for Circulator Pumps; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2016–BT–TP–0033]

RIN 1904–AD77

Energy Conservation Program: Test Procedure for Circulator Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (''DOE'') proposes to establish definitions, a test procedure, sampling and rating requirements, and enforcement provisions for circulator pumps. Currently, circulator pumps are not subject to DOE test procedures or energy conservation standards. DOE proposes a test procedure for measuring the circulator energy index for circulator pumps. The proposed test method references the relevant industry test standard. The proposed definitions and test procedures are based on the recommendations of the Circulator Pump Working Group, which was established under the Appliance Standards Rulemaking Federal Advisory Committee. DOE is seeking comment from interested parties on the proposal.

DATES: DOE will accept comments, data, and information regarding this proposal no later than February 18, 2022. See section V ''Public Participation,'' for details. DOE will hold a webinar on Wednesday, February 2, 2022, from 12:30 p.m. to 3:30 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. If no participants register for the webinar, it will be cancelled.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2016–BT–TP–0033, by any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email:* to *CirculatorPumps2016TP0033@ee.doe.gov.* Include docket number EERE–2016–BT–TP–0033 in the subject line of the message.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section V of this document.

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 coronavirus 2019 (''COVID–19'') pandemic. DOE is currently suspending receipt of public comments via postal mail and hand delivery/courier. 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.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts (if a public meeting is held), 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, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *www.regulations.gov/docket/EERE-2016-BT-STD-0004.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC, 20585–0121. Telephone: (202) 586–9870. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC, 20585–0121. Telephone: 202–586–2588. Email: *Amelia.Whiting@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.*

SUPPLEMENTARY INFORMATION: DOE proposes to incorporate by reference the following industry standard into part 431:

Hydraulic Institute (''HI'') 40.6–2021, (''HI 40.6–2021'') ''Methods for Rotodynamic Pump Efficiency Testing''.

Copies of HI 40.6–2021 can be obtained from: the Hydraulic Institute at 6 Campus Drive, First Floor North, Parsippany, NJ 07054–4406, (973) 267–9700, or by visiting: *www.Pumps.org.*

For a further discussion of this standard, see section IV.M. of this document.

Table of Contents

I. Authority and Background

Pumps are included in the list of ''covered equipment'' for which DOE is authorized to establish test procedures and energy conservation standards. (42 U.S.C. 6311(1)(A)) Circulator pumps, which are the subject of this notice of proposed rulemaking (''NOPR''), are a category of pumps. Circulator pumps generally are designed to circulate water in commercial and residential applications. Circulator pumps do not include dedicated-purpose pool pumps, for which test procedures and energy conservation standards are established in title 10 of the Code of Federal Regulations (''CFR'') part 431 subpart Y. Currently, circulator pumps are not subject to DOE test procedures or energy conservation standards. The following sections discuss DOE's authority to establish test procedures for circulator pumps and relevant background information regarding DOE's consideration of test procedures for this equipment.

A. Authority

The Energy Policy and Conservation Act, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part C [2] of EPCA, added by Public Law 95–619, Title IV, section 441(a) (42 U.S.C. 6311–6317 as codified), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. This equipment includes pumps, the subject of this document. (42 U.S.C. 6311(1)(A))

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316).

The Federal testing requirements consist of test procedures that manufacturers of covered equipment must use as the basis for: (1) Certifying to DOE that their equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6316(a); 42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that equipment (42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered equipment established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6316(a) and 42 U.S.C. 6316(b); 42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6316(b)(2)(D))

Under 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment. EPCA requires that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which reflect energy efficiency, energy use or estimated annual operating cost of a given type of covered equipment during a representative average use cycle and requires that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

Before prescribing any final test procedures, the Secretary must publish proposed test procedures in the **Federal Register** and afford interested persons an opportunity (of not less than 45 days' duration) to present oral and written data, views, and arguments on the proposed test procedures. (42 U.S.C. 6314(b))

DOE is publishing this NOPR in accordance with the statutory authority in EPCA.

B. Background

As stated, EPCA includes ''pumps'' among the industrial equipment listed as ''covered equipment'' for the purpose of Part A–1, although EPCA does not define the term ''pump.'' (42 U.S.C. 6311(1)(A)) In a final rule published January 25, 2016, DOE established a definition for ''pump,'' associated definitions, and test procedures for certain pumps. 81 FR 4086 (''January 2016 TP final rule''). ''Pump'' is defined as equipment designed to move liquids (which may include entrained gases, free solids, and totally dissolved solids) by physical or mechanical action and includes a bare pump and, if included by the manufacturer at the time of sale, mechanical equipment, driver, and controls. 10 CFR 431.462. Circulator pumps fall within the scope of this definition.

While DOE has defined ''pump'' broadly, the test procedure established in the January 2016 TP final rule is applicable only to certain categories of clean water pumps,[3] specifically those that are end suction close-coupled; end suction frame mounted/own bearings; in-line (''IL''); radially split, multi-stage, vertical, in-line diffuser casing; and submersible turbine (''ST'') pumps with the following characteristics:

- 25 gallons per minute (''gpm'') and greater (at best efficiency point (''BEP'') at full impeller diameter);

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

[2] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[3] A ''clean water pump'' is a pump that is designed for use in pumping water with a maximum non-absorbent free solid content of 0.016 pounds per cubic foot, and with a maximum dissolved solid content of 3.1 pounds per cubic foot, provided that the total gas content of the water does not exceed the saturation volume, and disregarding any additives necessary to prevent the water from freezing at a minimum of 14 °F. 10 CFR 431.462.

- 459 feet of head maximum (at BEP at full impeller diameter and the number of stages specified for testing);
- design temperature range from 14 to 248 °F;
- designed to operate with either (1) a 2- or 4-pole induction motor, or (2) a non-induction motor with a speed of rotation operating range that includes speeds of rotation between 2,880 and 4,320 revolutions per minute (''rpm'') and/or 1,440 and 2,160 rpm, and in either case, the driver and impeller must rotate at the same speed;
- 6-inch or smaller bowl diameter for ST pumps;
- A specific speed less than or equal to 5,000 for ESCC and ESFM pumps;
- Except for: Fire pumps, self-priming pumps, prime-assist pumps, magnet driven pumps, pumps designed to be used in a nuclear facility subject to 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities''; and pumps meeting the design and construction requirements set forth in any relevant military specifications. [4] 10 CFR 431.464(a)(1). The pump categories subject to the current test procedures are referred to as ''general pumps'' in this document. As stated, circulator pumps are not general pumps.

DOE also published a final rule establishing energy conservation standards applicable to certain classes of general pumps. 81 FR 4368 (Jan. 26, 2016) (''January 2016 ECS final rule''); *see also,* 10 CFR 431.465.

The January 2016 TP final rule and the January 2016 ECS final rule implemented the recommendations of the Commercial and Industrial Pump Working Group (''CIPWG'') established through the Appliance Standards Rulemaking Federal Advisory Committee (''ASRAC'') to negotiate standards and a test procedure for general pumps. (Docket No. EERE–2013–BT–NOC–0039) The CIPWG approved a term sheet containing recommendations to DOE on appropriate standard levels for general pumps, as well as recommendations addressing issues related to the metric and test procedure for general pumps (''CIPWG recommendations''). (Docket No. EERE–2013–BT–NOC–0039, No. 92) Subsequently, ASRAC approved the CIPWG recommendations. The CIPWG recommendations included initiation of a separate rulemaking for circulator pumps. (Docket No. EERE–2013–BT–NOC–0039, No. 92, Recommendation #5A at p. 2)

On February 3, 2016, DOE issued a notice of intent to establish the circulator pumps working group to negotiate a notice of proposed rulemaking (''NOPR'') for energy conservation standards for circulator pumps to negotiate, if possible, Federal standards and a test procedure for circulator pumps and to announce the first public meeting. 81 FR 5658. The members of the Circulator Pump Working Group (''CPWG'') were selected to ensure a broad and balanced array of interested parties and expertise, including representatives from efficiency advocacy organizations and manufacturers. Additionally, one member from ASRAC and one DOE representative were part of the CPWG. Table I.1 lists the 15 members of the CPWG and their affiliations.

TABLE I.1—ASRAC CIRCULATOR PUMP WORKING GROUP MEMBERS AND AFFILIATIONS

Member	Affiliation
Charles White ..	Plumbing-Heating-Cooling Contractors Association.
Gabor Lechner	Armstrong Pumps, Inc.
Gary Fernstrom	California Investor-Owned Utilities.
Joanna Mauer	Appliance Standards Awareness Project.
Joe Hagerman	U.S. Department of Energy.
Laura Petrillo-Groh.	Air-Conditioning, Heating, and Refrigeration Institute.
Lauren Urbanek	Natural Resources Defense Council.
Mark Chaffee ...	TACO, Inc.
Mark Handzel ..	Xylem Inc.
Peter Gaydon ..	Hydraulic Institute.
Richard Gussert.	Grundfos Americas Corporation.
David Bortolon	Wilo Inc.
Russell Pate	Rheem Manufacturing Company.
Don Lanser	Nidec Motor Corporation.
Tom Eckman ...	Northwest Power and Conservation Council (ASRAC member).

The CPWG commenced negotiations at an open meeting on March 29, 2016, and held six additional meetings to discuss scope, metrics, and the test procedure. The CPWG concluded its negotiations for test procedure topics on September 7, 2016, with a consensus vote to approve a term sheet containing recommendations to DOE on scope, definitions, metric, and the basis of the test procedure (''September 2016 CPWG Recommendations''). The September 2016 CPWG Recommendations are available in the CPWG docket. (Docket No. EERE–2016–BT–STD–0004, No. 58)

The CPWG continued to meet to address potential energy conservation standards for circulator pumps. Those meetings began on November 3–4, 2016 and concluded on November 30, 2016, with approval of a second term sheet (''November 2016 CPWG Recommendations'') containing CPWG recommendations related to energy conservation standards, applicable test procedure, labeling and certification requirements for circulator pumps. (Docket No. EERE–2016–BT–STD–0004, No. 98) ASRAC subsequently voted unanimously to approve the September and November 2016 CPWG Recommendations during a December meeting. (Docket No. EERE–2013–BT–NOC–0005, No. 91 at p. 2) [5]

In a letter dated June 9, 2017, Hydraulic Institute (''HI'') expressed its support for the process that DOE initiated regarding circulator pumps and encouraged the publishing of a NOPR and a final rule by the end of 2017. (Docket No. EERE–2016–BT–STD–0004, HI, No.103 at p. 1) In response to an early assessment review RFI published September 28, 2020 regarding the existing test procedures for general pumps (85 FR 60734, ''September 2020 Early Assessment RFI''), HI commented that it continues to support the recommendations from the CPWG. (Docket No. EERE–2020–BT–TP–0032, HI, No. 6 at p. 1) NEEA also referenced the September 2016 CPWG Recommendations and recommended that DOE adopt test procedures for circulator pumps in the pumps rulemaking or a separate rulemaking. (Docket No. EERE–2020–BT–TP–0032, NEEA, No. 8 at p. 8)

On May 7, 2021, DOE published a request for information related to test procedures and energy conservation standards for circulator pumps and small vertical in-line pumps. 86 FR 24516 (''May 2021 RFI''). DOE received a number of comments in response to the May 2021 RFI. Table I.2 lists the commenters along with each commenter's abbreviated name used throughout this NOPR. Discussion of the

[4] *E.g.,* MIL–P–17639F, ''Pumps, Centrifugal, Miscellaneous Service, Naval Shipboard Use'' (as amended); MIL–P–17881D, ''Pumps, Centrifugal, Boiler Feed, (Multi-Stage)'' (as amended); MIL–P–17840C, ''Pumps, Centrifugal, Close-Coupled, Navy Standard (For Surface Ship Application)'' (as amended); MIL–P–18682D, ''Pump, Centrifugal, Main Condenser Circulating, Naval Shipboard'' (as amended); and MIL–P–18472G, ''Pumps, Centrifugal, Condensate, Feed Booster, Waste Heat Boiler, And Distilling Plant'' (as amended). Military specifications and standards are available at *http://everyspec.com/MIL-SPECS.*

[5] All references in this document to the approved recommendations included in 2016 Term Sheets are noted with the recommendation number and a citation to the appropriate document in the CPWG docket (*e.g.,* Docket No. EERE–2016–BT–STD–0004, No. #, Recommendation #X at p. Y). References to discussions or suggestions of the CPWG not found in the 2016 Term Sheets include a citation to meeting transcripts and the commenter, if applicable (*e.g.,* Docket No. EERE–2016–BT–STD–0004, [Organization], No. X at p. Y).

relevant comments, and DOE's responses, are provided in the appropriate sections of this document. A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record. [6]

TABLE I.2—WRITTEN COMMENTS RECEIVED IN RESPONSE TO MAY 2021 RFI

Commenter(s)	Reference in this NOPR	Commenter type
Hydraulic Institute	HI	Trade Association.
People's Republic of China	China	Country.
Grundfos Americas Corporation	Grundfos	Manufacturer.
Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Natural Resources Defense Council.	Advocates	Efficiency Organization.
Northwest Energy Efficiency Alliance	NEEA	Efficiency Organization.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison; collectively, the California Investor-Owned Utilities.	CA IOUs	Utility.
Anonymous Commenter	N/A	Anonymous [7].

The comments in response to the RFI expressed support for considering small vertical in-line pumps in the commercial and industrial pumps rulemaking rather than in the circulator pump rulemaking. (HI, No. 112 at p. 3; Grundfos, No. 113 at p. 2; CA IOUs, No. 116 at p. 6; NEEA, No. 115 at p. 4). As such, the scope of this NOPR is limited to circulator pumps.

II. Synopsis of the Notice of Proposed Rulemaking

In this NOPR, DOE proposes to establish in subpart Y to 10 CFR part 431 a test procedure that includes methods to (1) measure the performance of the covered equipment and (2) use the measured results to calculate a circulator energy index (''CEI'') to represent the weighted average electric input power to the driver over a specified load profile, normalized with respect to a circulator pump serving the same hydraulic load that has a specified minimum performance level.[8] The proposed test procedure and metric are similar in concept to the test procedure and metric established in subpart Y to 10 CFR part 431 for general pumps.

DOE's proposed test method for circulator pumps includes measurements of head, flow rate, and driver power input, all of which are required to calculate CEI, as well as other quantities to characterize the rated circulator pump performance (*e.g.,* pump power output (hydraulic horsepower), speed, wire-to-water efficiency). For consistent and uniform measurement of these values, DOE proposes to incorporate the test methods established in HI 40.6–2021, ''Methods for Rotodynamic Pump Efficiency Testing,'' with certain exceptions. DOE reviewed the relevant sections of HI 40.6–2021 and determined that HI 40.6–2021, in conjunction with the additional test methods and calculations proposed in this test procedure, would produce test results that reflect the energy efficiency, energy use, or estimated operating costs of a circulator pump during a representative average use cycle. (42 U.S.C. 6314(a)(2)) DOE also reviewed the burdens associated with conducting the proposed circulator pump test procedure, including HI 40.6–2021, and, based on the results of such analysis, found that the proposed test procedure would not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) DOE's analysis of the burdens associated with the proposed test procedure is presented in section III.H.1 of this document.

DOE also considered HI 41.5–2021, ''Hydraulic Institute Program Guideline for Circulator Pump Energy Rating Program,'' which defines the requirements to participate in and list circulator pumps in the Hydraulic Institute Energy Rating Program and which references HI 40.6–2021 while providing additional instructions for testing circulator pumps to determine an Energy Rating value. In response to the May 2021 RFI, HI recommended that DOE incorporate by reference HI 41.5 as the test procedure. (HI, No. 112 at p. 2) DOE has tentatively determined not to directly incorporate HI 41.5–2021. Unlike HI 40.6–2021, which is an industry test standard, HI 41.5–2021 is a guideline for participation in an industry program, and includes many provisions not relevant to DOE. DOE has preliminarily determined that its proposed test methods and calculations that supplement the proposed incorporation by reference of HI 40.6–2021, as discussed in sections III.D and III.E.2.c, are consistent with HI 41.5–2021.

This NOPR also proposes requirements regarding the sampling plan and representations for circulator pumps at subpart B of part 429 of Title 10 of the Code of Federal Regulations. The sampling plan requirements are similar to those established for general pumps. DOE also proposes provisions regarding allowable representations of energy consumption, energy efficiency, and other relevant metrics manufacturers may make regarding circulator pump performance (as discussed in section III.G of this document).

Were the proposed test procedure and associated provisions made final, manufacturers would not be required to test according to the DOE test procedure until such time as compliance is required with energy conservation standards for circulator pumps, should DOE establish such standards. Were DOE to establish test procedures as proposed, manufacturers choosing to make voluntary representations would be required to test the subject pump according to the established test procedure, and any such representations would have to fairly disclose the results of such testing.

III. Discussion

In this TP NOPR, DOE proposes to establish in subpart Y of part 431 test procedures and related definitions for circulator pumps, amend 10 CFR 429.59 to establish sampling plans for this equipment, and establish enforcement provisions for this equipment in 10 CFR 429.110 and 10 CFR 429.134. The

[6] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop test procedures for circulator pumps. (Docket No. EERE–2016–BT–STD–0004, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[7] The Anonymous comment did not substantively address the subject of this rulemaking.

[8] The performance of a comparable pump that has a specified minimum performance level is referred to as the circulator energy rating (''CER'').

proposed amendments are summarized in Table III.1.

TABLE III.1—SUMMARY OF PROPOSALS IN THIS TP NOPR, THEIR LOCATION WITHIN THE CODE OF FEDERAL REGULATIONS, AND THE APPLICABLE PREAMBLE DISCUSSION

Topic	Location in CFR	Summary of proposals	Applicable preamble discussion
Definitions	10 CFR 431.462	Define circulator pump as well as varieties of circulator pumps and circulator pump controls.	Sections III.B.2, III.B.3, III.B.4, III.B.5, III.B.7, III.AIII.D.1.
Test Procedure	10 CFR 431.464 & Appendix D.	Establish CEI as the metric for circulator pumps, incorporate by reference HI 40.6–2021, and provide additional instructions for determining the CEI (and other applicable performance characteristics) for circulator pumps.	Sections III.C, III.D, and III.E.
Sampling Plan	10 CFR 429.59	Specify the minimum number of circulator pumps to be tested to rate a basic model and determination of representative values.	Section III.F.
Enforcement Provisions	10 CFR 429.110 & 10 CFR 429.134.	Establish a method for determining compliance of circulator pump basic models.	Section III.F.

The following sections discuss DOE's specific proposals regarding circulator pumps. Section III.B presents DOE's proposals related to definitions for categorizing and testing of circulator pumps. Sections III.C, III.D, III.E, and III.F discuss the proposed metric, test procedure, and certification and enforcement provisions for tested circulator pump models. Section III.G discusses representations of energy use and energy efficiency for circulator pumps.

A. General Comments

In response to the May 2021 RFI, the Advocates urged DOE to adopt test procedures for circulator pumps based on the September and November 2016 CPWG Recommendations. (Advocates, No. 114 at p. 1) Grundfos supported the regulation of circulator products. (Grundfos, No. 113 at p. 1) The CA IOUs stated that other than the test procedure update to HI 41.5–2021 (discussed in section III.E.1 of this NOPR), they supported the adoption of the September and November 2016 CPWG Recommendations, including the provisions for circulator pump definitions, control type definitions, reference curve, weighting points, and the definition of CEI. (CA IOUs, No. 116 at p. 5) NEEA supported the September and November 2016 CPWG Recommendations with a few minor modifications based on additional information or lessons learned from years of experience implementing its circulator pump energy efficiency program. (NEEA, No. 115 at p.2) NEEA also commented that it has been working with HI and manufacturers to test and rate circulator pumps using HI's voluntary rating standard developed based on the CPWG term sheet. (*Id.*)

B. Scope and Definitions

As discussed, in the January 2016 TP final rule, DOE adopted a definition for ''pump,'' as well as definitions for other pump component- and configuration-related definitions. 81 FR 4086, 4090–94 (Jan. 25, 2016); *see also* 10 CFR 431.462. DOE recognized circulator pumps as a category of pumps, but DOE did not define ''circulator pump''. 81 FR 4086, 4097.

In this NOPR, DOE is proposing a definition of circulator pump, associated definitions for categories of circulator pumps, as well as related definitions for control varieties of circulator pumps (see sections III.B.2, III.B.4, III.B.5 and III.D.1 of this NOPR). These definitions are necessary to establish the scope of applicability of the proposed circulator pump test procedure. The scope of the proposed test procedure is discussed in section III.B.6 of this document.

1. CPWG Recommendations

As discussed in the May 2021 RFI, the September 2016 Circulator Pump Recommendations addressed the scope of a circulator pumps rulemaking. Specifically, the CPWG recommended that the scope of a circulator pumps test procedure and energy conservation standards cover clean water pumps (as defined at 10 CFR 431.462) distributed in commerce with or without a volute [9] and that are one of the following categories: Wet rotor circulator pumps, dry rotor close-coupled circulator pumps, and dry rotor mechanically-coupled circulator pumps. The CPWG also recommended that the scope exclude submersible pumps and header pumps. 86 FR 24516, 24520; (Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendations #1A, 2A and 2B at p. 1–2) The CPWG also recommended the following definitions relevant to scope:

Wet rotor circulator pump means a single stage, rotodynamic, close-coupled, wet rotor pump. Examples include, but are not limited to, pumps generally referred to in industry as CP1.

Dry rotor, two-piece circulator pump means a single stage, rotodynamic, single-axis flow, close-coupled, dry rotor pump that:

(1) Has a hydraulic power less than or equal to five horsepower at best efficiency point at full impeller diameter,

(2) is distributed in commerce with a horizontal motor, and

(3) discharges the pumped liquid through a volute in a plane perpendicular to the shaft. Examples include, but are not limited to, pumps generally referred to in industry as CP2.

Dry rotor, three-piece circulator pump means a single stage, rotodynamic, single-axis flow, mechanically-coupled, dry rotor pump that:

(1) Has a hydraulic power less than or equal to five horsepower at best efficiency point at full impeller diameter,

(2) is distributed in commerce with a horizontal motor, and

(3) discharges the pumped liquid through a volute in a plane perpendicular to the shaft. Examples include, but are not limited to, pumps generally referred to in industry as CP3.

Horizontal motor means a motor that requires the motor shaft to be in a horizontal position to function as designed under typical operating conditions, as specified in manufacturer literature.

[9] Volutes are also sometimes referred to as a ''housing'' or ''casing.''

Submersible pump means a pump that is designed to be operated with the motor and bare pump fully submerged in the pumped liquid.

Header pump means a pump that consists of a circulator-less-volute intended to be installed in an original equipment manufacturer (''OEM'') piece of equipment that serves as the volute. (Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendations #2B, 3A, and 3B at p. 2–3); 86 FR 24516, 24520.

DOE notes that generally these definitions rely on terms previously defined in the January 2016 TP final rule, including ''close-coupled pump,'' ''mechanically-coupled pump,'' ''dry rotor pump,'' ''single axis flow pump,'' and ''rotodynamic pump.'' 81 FR 4086, 4146–4147; 10 CFR 431.462. In addition, the recommended definition for submersible pump is the same as that already defined in a 2017 test procedure final rule for dedicated-purpose pool pumps (''August 2017 DPPP TP final rule''). 82 FR 36858, 36922 (August 7, 2017);10 CFR 431.462.

DOE discusses the proposed definitions of wet rotor circulator pump; dry rotor, two-piece circulator pump; dry rotor, three-piece circulator pump; and horizontal motor in section III.B.3, header pump in section III.B.4, and submersible pump in section III.B.6 of this NOPR.

2. Definition of Circulator Pump

Circulator pumps are a subset of small, IL pumps that are designed to provide a small amount of head to overcome pipe friction losses in a water circulation system for hydronic heating or cooling and potable hot water recirculation. During the CPWG meetings, the CPWG discussed the applications and utilities that circulator pumps serve and the distinctions in the designs of circulator pump varieties.

In defining circulator pump, the CPWG reviewed the descriptions established in the standard American National Standards Institute (''ANSI'')/HI 1.1–1.2–2014 standard (''ANSI/HI 1.1–1.2–2014''), ''Rotodynamic Centrifugal Pumps for Nomenclature and Definitions.'' (Docket No. EERE–2016–BT–STD–0004, No. 64 at pp.41–43) Section 1.1.3.3.5 of ANSI/HI 1.1–1.2–2014 characterizes circulator pumps based on the following four unique features: (1) Rotating assemblies that must be horizontally mounted; (2) being fully supported in-line by the system piping; (3) utilizing special-purpose motors unique to this pump type; and (4) having a motor shaft power that does not exceed 3.75 kilowatts (''kW'') (5 horsepower (''hp'')).

Sections 1.1.3.3.5.1–2 of ANSI/HI 1.1–1.2–2014 provide definitions for three unique types of circulator pumps. These three unique circulator pump varieties are based on two main characteristics: (1) Whether the motor is isolated from or immersed in the pumped liquid, and (2) how the impeller and motor are connected. Regarding the first characteristic, a circulator pump may be wet rotor, meaning that the motor rotor is immersed in the pumped liquid during operation; or dry rotor, meaning that the pump is not immersed in the pumped liquid. Dry rotor pumps typically include a mechanical seal that isolates the motor rotor from the pumped liquid.

The second characteristic, which pertains to how the impeller and motor are connected, further subdivides wet rotor and dry rotor circulator pumps into close-coupled or mechanically-coupled varieties. A close-coupled pump has a motor and impeller that share a common shaft, while a mechanically-coupled pump features an impeller that has its own shaft that is connected by mechanical means to the motor shaft.

Based on these differentiating features, Sections 1.1.3.3.5.1–2 of ANSI/HI 1.1–1.2–2014 defines the following circulator pump varieties:

- Close-coupled circulator pumps (CP1 and CP2)—Close-coupled circulator pumps may have driver elements that are immersed in the pumped fluid (CP1) or isolated by a mechanical seal (CP2). The rotating assembly shares a common shaft; the bearing(s) of the rotating assembly absorb all pump hydraulic loads (axial and radial). The driver is aligned and assembled directly to the pump unit with machined fits.
- Flexibly-coupled circulator pumps (CP3)—In flexibly-coupledcirculator pumps, the pump has a shaft supported by its own bearings that absorb all pump hydraulic loads (axial and radial). The driver is aligned and assembled directly to the pump unit with machined fits, typically with a resilient mount to damped vibration. The pump and driver shafts are flexibly coupled via flexible element drive couplings.[10]

Consistent with the ANSI/HI 1.1–1.2–2014 classification, the CPWG discussed defining three varieties of circulator pumps: (1) Wet rotor circulator pumps, (2) dry rotor close-coupled circulator pumps, and (3) dry rotor mechanically-coupled circulator pumps. (Docket No. EERE–2016–BT–STD–0004, No. 64 at pp.41–43)

The specific definitions for wet rotor circulator pumps and dry rotor circulator pumps are discussed in the following sections.

The CPWG also discussed the applicability of the recommended test procedure and standards to circulator pumps distributed in commerce without a volute. As discussed in more detail in section III.B.4, the CPWG discussed how some circulator pumps are distributed in commerce without a volute, either as a replacement for an existing circulator pump that has failed or to be newly installed with a paired volute in the field. (Docket No. EERE–2016–BT–STD–0004, No. 74 at pp. 383–407). In section III.E.2.b, DOE proposes specific instructions regarding how to test a ''circulator-less-volute.''

To specify that the recommended circulator pump test procedure and standards are intended to apply to circulator pumps, with or without a volute, the CPWG recommended adding such language to the recommended circulator pump definition. (Docket No. EERE–2016–BT–STD–0004, No. 66 at pp. 156–164). The CPWG also recommended to define circulator pump as being comprised of the following pump categories distributed in commerce with or without a volute: Wet rotor circulator pumps, dry rotor close-coupled circulator pumps, and dry rotor mechanically-coupled circulator pumps. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #1A at p. 1)

DOE notes that the terminology in the CPWG recommended definition for circulator pump does not match the terminology in the CPWG recommended definitions for the circulator pump categories. Specifically, the recommended circulator pump definition includes ''dry rotor close-coupled circulator pumps'' and ''dry rotor mechanically-coupled circulator pumps,'' while the recommended defined terms are ''dry rotor, two-piece circulator pump'' and ''dry rotor, three-piece circulator pumps.'' (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #1A, 3A, and 3B at pp. 1–3) Those defined terms reference close-coupling and mechanical-coupling, respectively. DOE notes that HI 41.5–2021 defines circulator pump in section 41.5.1.5.1 as a wet rotor circulator pump (CP1); a dry rotor, two-piece circulator pump (CP2); or a dry rotor three-piece circulator pump (CP3). Based on their use in the industry test procedure, DOE understands that ''two-piece'' and ''three-piece'' are the preferred industry terms over the terms ''close-coupled'' and ''mechanically-

[10] ''Flexibly-coupled'' is a more specific use of the term ''mechanically-coupled''. Consistent with 10 CFR 431.462 and CPWG recommendations, DOE uses the term ''mechanically-coupled'' throughout the remainder of this notice.

coupled,'' and has proposed the use of the industry terms.

DOE is proposing a definition of circulator pump at 10 CFR 431.462 consistent with the definition recommended by the CPWG. Specifically, DOE proposes the following definition for circulator pump:

Circulator pump is a pump that is either a wet rotor circulator pump; a dry rotor, two-piece circulator pump; or a dry rotor, three-piece circulator pump. A circulator pump may be distributed in commerce with or without a volute.

DOE requests comment on the proposed definition for circulator pump.

The definitions of the pump categories that comprise the scope of ''circulator pump'' are addressed in the following section. In response to the May 2021 RFI, China asserted that the range and definition of circulator pumps is not clear and that schematic diagrams should be provided for each product on the basis of their text description. (China, No. 111 at p. 3) DOE believes that the proposed definition of circulator pump, in combination with the proposed definitions of the three primary kinds of circulator pumps in the following section, sufficiently address the range of circulator pumps, and that schematic diagrams would not provide additional benefit.

3. Definition of Circulator Pump Varieties

In the May 2021 RFI, DOE requested comment on the CPWG's recommended definitions for wet rotor circulator pump; dry rotor, two-piece circulator pump; dry rotor, three-piece circulator pump; and horizontal motor, including whether any changes in the market since the CPWG's recommendations would affect the recommended definitions and scope. 86 FR 24516, 24520–24521.

HI, Grundfos, and the CA IOUs generally agreed with the CPWG's recommended definitions for these varieties of circulator pumps. (HI, No. 112 at p. 2; Grundfos, No. 113 at p. 1; CA IOUs, No. 116 at p. 5) Other comments expressed support for the CPWG recommendations generally, as discussed in section III.A of this document.

As discussed previously, the CPWG recommended definitions for wet rotor circulator pump; dry rotor, two-piece circulator pump; and dry rotor, three-piece circulator pump were based on review of the descriptions of circulator pump categories established in the standard ANSI/HI 1.1–1.2–2014. DOE notes that the updated version of this industry standard, ANSI/HI 14.1–14.2–2019, ''Rotodynamic Pumps for Nomenclature and Definitions,'' has revised the descriptions of circulator pump categories to be identical to the CPWG recommended definitions, and section 41.5.1.5.1 of HI 41.5–2021 also includes definitions identical to the CPWG recommended definitions. DOE has reviewed the CPWG recommended definitions and has tentatively determined that these definitions appropriately distinguish the varieties of circulator pumps available on the market and as originally described in the industry standard ANSI/HI 1.1–1.2–2014.

Based on the discussion in the prior paragraphs, DOE proposes to adopt definitions for wet rotor circulator pump; dry rotor, two-piece circulator pump; and dry rotor, three-piece circulator pump at 10 CFR 431.462 as recommended by the CPWG and supported by stakeholder comments.

DOE currently defines a ''horizontal motor'' as a motor that requires the motor shaft to be in a horizontal position to function as designed, as specified in the manufacturer literature. 10 CFR 431.462. The definition of ''horizontal motor'' is used in 10 CFR 431.462 to exclude certain pumps from the IL pump category.[11] The definition of ''horizontal motor'' recommended by the CPWG includes the additional phrase ''under typical operating conditions'' to qualify ''function as designed.'' The CPWG discussed that this qualifier was added to address the potential that a motor would not be covered as a horizontal motor if a manufacturer were to advertise its circulator pump as being able to be installed in a non-horizontal orientation under certain conditions, such as high operating pressure (*i.e.,* conditions other than typical conditions). (Docket No. EERE–2016–BT–STD–0004, No. 64 at pp. 75–83) The CPWG discussed that the requirement to consider motor installation in the context of typical operating conditions, as specified in the manufacturer literature, would address this potential. (Docket No. EERE–2016–BT–STD–0004, No. 66 at pp. 55–57) 86 FR 24516, 24520. DOE did not receive any comments on the definition of horizontal motor in response to the May 2021 RFI.

DOE has reviewed the horizontal motor definitions and has tentatively concluded that the existing definition of horizontal motor in 10 CFR 431.462 could benefit from additional specificity. However, DOE does not believe the term ''typical operating conditions'' recommended by the CPWG provides sufficient specificity, as the term could refer to any conditions specified in the manufacturer's manual. In order to address the concern that a pump with a horizontal motor would be considered an IL pump instead of a circulator pump if the motor must be non-horizontal under non-typical conditions such as high operating pressure, DOE instead proposes the following definition of horizontal motor, consistent with the intent of the CPWG:

Horizontal motor means a motor, for which the motor shaft position when functioning under operating conditions specified in manufacturer literature, includes a horizontal position.

DOE has tentatively concluded that this proposed update to the horizontal motor definition would provide additional specificity, but would not in practice change the pumps currently excluded from the IL pump definition (and now proposed to be included in the circulator pump definition) through use of the term.

DOE requests comment on the proposed definition for horizontal motor, including whether it meets the intent of the CPWG or whether it would include other motors not intended to be captured in the definition.

4. Definition of Circulator-Less-Volute and Header Pump

In the May 2021 RFI, DOE discussed that some circulator pumps are distributed in commerce as a complete assembly with a motor, impeller, and volute, while other circulator pumps are distributed in commerce with a motor and impeller, but without a volute (herein referred to as ''circulators-less-volute''). Some circulators-less-volute are solely intended to be installed in other equipment, such as a boiler, using a cast piece in the other piece of equipment as the volute, while others can be installed as a replacement for a failed circulator pump in an existing system or newly installed with a paired volute in the field. 86 FR 24516, 24521; (Docket No. EERE–2016–BT–STD–0004, No. 47 at pp. 371–372; Docket No. EERE–2016–BT–STD–0004, No. 70 at p. 99) As discussed in the May 2021 RFI, CPWG asserted that circulator pumps distributed in commerce without volutes meet the definition of pump, and that not subjecting such equipment to test procedures and standards would represent a significant loophole. 86 FR 24516, 24521; (Docket No. EERE–2016–

[11] The definition of IL pumps includes the following sentence: ''Such pumps do not include pumps that are mechanically coupled or close-coupled, have a pump power output that is less than or equal to 5 hp at BEP at full impeller diameter, and are distributed in commerce with a horizontal motor.'' 10 CFR 431.462.

BT–STD–0004, No. 70 at pp. 89–91; No. 74 at pp.383–403) The CPWG also discussed that including circulators-less-volute within the scope of DOE regulation is consistent with the treatment of circulator pumps under the European Union's regulations [12] which applies to circulator pumps ''with or without housing.'' (Docket No. EERE–2016–BT–STD–0004, No. 74 at pp. 373–376)

As noted in the May 2021 RFI, the CPWG also discussed that circulators-less-volute that are solely intended to be installed in other equipment use the other equipment as the volute, and do not have a matching volute that is separately distributed in commerce and, therefore, would not pose the same loophole risk. According to the CPWG, such pumps would also be difficult to test and rate. Specifically, the CPWG discussed that circulator pump manufacturers would not have access to or design authority for the volute design. In addition, the circulator pump could not be tested as a standalone circulator pump because the volute would be unable to be removed from the other equipment, and no paired volute would be distributed in commerce with which the header pump could be tested. According to the CPWG, such equipment would potentially require extensive and burdensome equipment to test appropriately. As such, the CPWG recommended excluding circulator pumps that are distributed in commerce exclusively to be incorporated into other OEM equipment, such as boilers or pool heaters. (Docket No. EERE–2016–BT–STD–0004, No. 74 at pp. 413–416) 86 FR 24516, 24521.

As stated in the May 2021 RFI, the CPWG suggested referring to circulator-less-volute that are intended solely for installation in another piece of equipment and do not have a paired volute that is distributed in commerce as ''header pumps.'' (Docket No. EERE–2016–BT–STD–0004, No. 74 at pp. 384–386). The CPWG recommended defining ''header pump'' as a pump that consists of a circulator-less-volute intended to be installed in an OEM piece of equipment that serves as the volute, and to exclude them from the recommended circulator pump test procedure and standards. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #2B at p. 2); 86 FR 24516, 24521. The CPWG also recommended that for header pumps distributed in commerce with regulated equipment, DOE should consider modifying the test procedure and metric for such regulated equipment during the next round of applicable rulemakings to account for the energy use of header pumps in a modified metric. For header pumps distributed in commerce with non-regulated equipment, the CPWG recommended that DOE should consider test procedures and standards for such pumps or equipment at a later date. (Docket No. EERE–2016–BT–STD–0004, No. 58 Non-Binding Recommendation to the Secretary #2 at p. 10)

In the May 2021 RFI, DOE requested comment on the definition of header pump. 86 FR 24516, 24521. HI agreed with the CPWG recommended definition of ''header pump,'' stating that no substantive changes have occurred in the market, and that such pumps should be excluded from regulation. (HI, No. 112 at p. 2) NEEA supported the recommended definition of ''header pump'' and the recommended exclusion of them, noting that they are challenging to test. NEEA also commented that DOE should monitor the market for header pumps and make sure it does not become a loophole after regulation. (NEEA, No. 115 at p. 3) Grundfos stated that no change to the definition is warranted, but that header pumps should be regulated in the same way that circulators-less-volute are regulated; *i.e.,* by requiring a reference volute for testing, as is required in the EU, in order to avoid creating a loophole. (Grundfos, No. 113 at p. 1–2). China stated that the test method for header pumps has not been provided and that DOE should define the test method for these pumps. (China, No. 111 at p. 3)

DOE notes that HI 41.5–2021 does not address either header pumps or circulators-less-volute. DOE tentatively agrees that a circulator-less-volute designed solely for use as a component in a separate piece of equipment should be distinguished from circulators-less-volute generally for the purpose of the proposed test procedure for the reasons discussed by the CPWG. As discussed in section III.E.2.b, the CPWG recommended specific test procedure provisions for circulators-less-volute that are not designed solely for installation in a separate piece of equipment (*i.e.,* a header pump). (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #12 at p. 2) To provide a distinction between a circulator-less-volute and a header pump, DOE proposes additional detail within the definition of header pump recommended by the CPWG and to add a definition of circulator-less-volute to be mutually exclusive from the definition of a header pump. These definitions proposed by DOE are as follows:

Header pump means a circulator pump distributed in commerce without a volute and for which a paired volute is not distributed in commerce. Whether a paired volute is distributed in commerce will be determined based on published data, marketing literature, and other publicly available information.

Circulator-less-volute means a circulator pump distributed in commerce without a volute and for which a paired volute is also distributed in commerce. Whether a paired volute is distributed in commerce will be determined based on published data, marketing literature, and other publicly available information.

DOE requests comment on the proposed definitions of header pump and circulator-less-volute.

DOE acknowledges that EU Regulation No 622/2012 includes provisions to test circulator pumps integrated in products dismantled from the product and measured with a reference pump housing, which means ''a pump housing supplied by the manufacturer with inlet and outlet ports on the same axis and designed to be connected to the pipework of a heating system or secondary circuit of a cooling distribution system.'' [13] As stated previously, the CPWG discussed that there would be no available paired volutes with which to test a header pump, and as such testing such pumps would require extensive and potentially burdensome equipment to test appropriately. In its comments recommending that use of a reference volute should be required for testing header pumps, Grundfos has not sufficiently addressed these testing concerns for header pumps raised by the CPWG. In addition, DOE tentatively concludes that requiring testing of header pumps using a reference volute may result in a rating that is not representative of its energy use in the equipment for which it is designed, and that assessing header pump energy use within broader equipment categories in which they are embedded, such as boilers, may be more appropriate. As such, DOE is not proposing to include header pumps in the scope of this test procedure, and accordingly is not proposing a test method for header pumps.

[12] See EC No 622/2012; *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0622.*

[13] European Commission Regulation No 622/2012 of 11 July 2012 amending Regulation (EC) No 641/2009 with regard to ecodesign requirements for glandless standalone circulators and glandless circulators integrated in products. *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R0622. Accessed 2021–09–21.*

5. Definition of On-Demand Circulator Pumps

In the May 2021 RFI, DOE stated that on-demand circulator pumps are designed to maintain hot water supply within a temperature range by activating in response to a signal, such as user presence. The CPWG recommended a definition for ''on-demand circulator pumps'' to be incorporated as necessary. (Docket No. EERE–2016–BT–STD–0004, No. 98 Non-Binding Recommendation #1 at pp. 4–5) 86 FR 24516, 24521. Discussion during CPWG meetings suggested that the purpose of recommending a definition for on-demand circulator pumps would be to allow for the possibility of considering them as a separate equipment class with a different standard level, while still applying the metric and test procedure to them. (Docket No. EERE–2016–BT–STD–0004–0069, p. 199) The CPWG recommended defintion for ''on-demand circulator pumps'' is as follows:

''On-demand circulator pump'' means a circulator pump that is distributed in commerce with an integral control that:

- Initiates water circulation based on receiving a signal from the action of a user [of a fixture or appliance] or sensing the presence of a user of a fixture and cannot initiate water circulation based on other inputs, such as water temperature or a pre-set schedule.
- Automatically terminates water circulation once hot water has reached the pump or desired fixture.
- Does not allow the pump to operate when the temperature in the pipe exceeds 104 °F or for more than 5 minutes continuously.

(Docket No. EERE–2016–BT–STD–0004, No. 98 Non-Binding Recommendation #1 at pp. 4–5); 86 FR 24516, 24521.

In addition, the CPWG recommended that an on-demand circulator pump must not be capable of operating without the control without physically destructive modification of the unit, such as any modification that would violate the product's standards listing. (Docket No. EERE–2016–BT–STD–0004, No. 98 Non-Binding Recommendation #1 at p. 5); 86 FR 24516, 24521.

DOE requested comment regarding the CPWG-recommended definition of ''on-demand circulator pump'' and whether it is appropriate to retain on-demand circulator pumps within the scope of future analysis. 86 FR 24516, 24521.

HI agreed with the recommended definition of on-demand circulator pumps and stated that the CPWG intention of defining them was for the purpose of possible exclusion from standards due to limited run hours. (HI, No. 112 at p. 3) Grundfos commented that on-demand products should be regulated as circulator pumps because they are built with standard circulator pumps that incorporate additional features, and that having them unregulated would create a loophole allowing less-efficient induction-based products to remain on the market. (Grundfos, No. 113 at p. 1–2) NEEA agreed with the recommended definition of on-demand circulator pumps, but did not agree that they should be treated separately by DOE regulations. NEEA commented that these pumps can save energy by reducing run time, and that these savings are not addressed in the recommended test method. NEEA recommended that in a future rulemaking, DOE consider the potential energy savings from domestic hot water run-hour controls and consider providing a ratings credit for circulator pumps equipped with efficient temperature, on-demand, timer, or learning run-hour controls. (NEEA, No. 115 at p. 4).

DOE notes that HI 41.5–2021 does not address or refer to on-demand circulator pumps. The CPWG discussed that on-demand controls do not reduce the speed of the pump, but rather reduce the hours of use. Pumps with on-demand controls could also have speed controls, which the recommended metric would capture. (Docket No. EERE–2016–BT–STD–0004–0069, p. 172–173) In addition, CPWG members discussed that the extent to which time-based controls are used is unknown (*Id.* at p. 176), and that rather than attempting to capture it in the metric, utility programs could consider prescriptive rebates associated with these controls. (*Id.* at p. 178) In addition, CPWG members suggested that legionella concerns would limit the application of on-demand controls.[14] (*Id.* at p. 195–196)

DOE proposes to define on-demand circulator pump at 10 CFR 431.462 as recommended by the CPWG. DOE believes that the recommended added specification that the on-demand circulator pump must not be capable of operating without the control without physically destructive modification of the unit, such as any modification that would violate the product's standards listing, is already encompassed by the provision in the recommended definition that the control be ''integral'' and by the definition of ''integral'' in 10 CFR 431.462: a part of the device that cannot be removed without compromising the device's function or destroying the physical integrity of the unit.

DOE is not proposing to exclude on-demand circulator pumps from the scope of the test procedure. At this time, DOE has not considered developing a credit for these controls, as was suggested in comments. DOE notes that if on-demand circulator pumps are equipped with other controls that reduce speed as defined in section III.D.1, they may be tested according to the relevant test methods rather than using the no controls test. DOE will consider whether standards are appropriate for this equipment in a future energy conservation standards rulemaking.

DOE requests comment on its proposal to include on-demand circulator pumps within the scope of this test procedure. DOE also requests data and information that would justify a CEI credit for on-demand circulator pumps.

6. Applicability of Test Procedure Based on Pump Configuration

In addition to recommending specific definitions, the CPWG also discussed and provided recommendations pertinent to the scope of applicability of the recommended circulator pumps test procedure. The CPWG recommended that the scope of the recommended test procedure would be limited to wet rotor circulator pumps, dry rotor close-coupled circulator pumps, and dry rotor mechanically-coupled circulator pumps, as discussed in section III.B.2. (Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendation #1A, at p. 1) The CPWG also recommended to limit the scope of the circulator pump rulemaking to clean water pumps only and to exclude header pumps and submersible pumps. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #2A and 2B at p. 2)

In the January 2016 TP final rule, DOE established a definition for ''clean water pump.'' 81 FR 4046, 4100 (Jan. 25, 2016). DOE noted that several common pumps would not meet the definition of clean water pumps, as they are not designed for pumping clean water, including wastewater, sump, slurry, or solids handling pumps; pumps designed for pumping hydrocarbon product fluids; chemical process pumps; and sanitary pumps. *Id.* at 4100. The CPWG reviewed this definition and, to be consistent with the general pumps rulemaking, recommended to limit the scope of the circulator pump

[14] As discussed in the transcript, situations where water is stagnant and the temperature drops can result in growth of legionella.

rulemaking to clean water pumps only, whereby clean water pump means a pump that is designed for use in pumping water with a maximum non-absorbent free solid content of 0.016 pounds per cubic foot (0.25 kilograms per cubic meter), and with a maximum dissolved solid content of 3.1 pounds per cubic foot (50 kilograms per cubic meter), provided that the total gas content of the water does not exceed the saturation volume, and disregarding any additives necessary to prevent the water from freezing at a minimum of 14 °F (−10 °C), as defined at 10 CFR 431.462. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #2A at p. 2) The CPWG discussed how this was important to ensure certain small, chemical process pumps would be excluded based on the fact that they are not designed to pump clean water. (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 36–42)

DOE did not receive any comments on the May 2021 RFI related to the CPWG recommendation to limit scope of the circulator pump rulemaking to clean water pumps. DOE agrees with the CPWG that limiting the scope of the circulator pump rulemaking to clean water pumps, consistent with the scope of general pumps in 10 CFR 431.464, is appropriate. Regulation of chemical process pumps would require many other considerations beyond that for clean water pumps, and DOE believes that excluding small chemical process pumps from the scope of regulation would not create any loophole risks to the clean water circulator pump market. DOE proposes to apply the existing clean water pump definition to circulator pumps, thus limiting the scope of applicability of the proposed circulator pumps test procedure to circulator pumps that meet the definition of clean water pump.

Regarding the exclusion of submersible pumps, the CPWG discussed a variety of close-coupled, wet rotor pumps that are typically used for decorative water features in swimming pools and ponds. (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 47–63 and No. 47, pp. 523–525) The CPWG discussed how these decorative water feature pumps might otherwise meet the definition of a wet rotor circulator pump (see section III.B.2); however, these pumps are unique from traditional wet rotor circulator pumps, in that they are submersible pumps and, as such, are intended to be operated with the entire pump and motor assembly fully submerged in the pumped liquid. Therefore, the CPWG recommended to exclude submersible pumps from the scope of applicability of any circulator pump test procedure and standards. (Docket No. EERE–2016–BT–STD–0004, No. 74 at pp. 299–303)

In response to the May 2021 RFI, HI agreed with the scope agreed to by the CPWG. (HI, No. 112 at p. 3)

DOE agrees with the CPWG that submersible decorative water feature pumps are similar in design to wet rotor circulator pumps in that they are wet rotor, rotodynamic pumps, but that they are intended to be operated with the entire pump and motor assembly fully submerged in the pumped liquid, which presents additional considerations for any test procedure and energy conservation standards. Given that these decorative water feature pumps are submersible, DOE does not believe that if unregulated they would pose any loophole risk to the clean water circulator pump market. Therefore, DOE proposes to exclude submersible pumps from the scope of applicability of the circulator pump test procedure. DOE notes that the definition of submersible pump recommended by the CPWG is identical to the definition that currently exists in 10 CFR 431.462, as adopted in the August 2017 DPPP TP final rule. 82 FR 36858, 36922. As such, DOE is not proposing amendments to that definition.

As discussed in section III.B.4, DOE tentatively agrees with the recommended exclusion of header pumps and tentatively agrees with the inclusion of circulators-less volute. Also, as discussed in section III.B.5, DOE proposes to include on-demand circulator pumps within the scope of this test procedure. In summary, DOE proposes that the test procedure would be applicable to circulator pumps (as defined in section III.B.2) that are clean water pumps, including circulators-less-volute and on-demand circulator pumps, and excluding header pumps and submersible pumps. The specific test methods proposed for circulator pumps are discussed in more detail in section III.D of this document.

DOE requests comment on the proposed scope of applicability of the circulator pump test procedure to circulator pumps that are clean water pumps, and the exclusion of header pumps and submersible pumps from the scope of the proposed test procedure.

7. Basic Model

In the course of regulating consumer products and commercial and industrial equipment, DOE has developed the concept of a ''basic model'' to determine the specific product or equipment configuration(s) to which the regulations would apply. For the purposes of applying the proposed circulator pump regulations, DOE is also proposing to rely on the definition of ''basic model'' as currently defined at 10 CFR 431.462. Application of the current definition of ''basic model'' would allow manufacturers of circulator pumps to group similar models within a basic model to minimize testing burden, while ensuring that key variables that differentiate circulator pump energy performance or utility are maintained as separate basic models. As proposed, manufacturers would be required to test only a representative number of units of a basic model in lieu of testing every model they manufacture. As proposed, individual models of circulator pumps would be permitted to be grouped under a single basic model so long as all grouped models have the same representative energy performance, which is representative of the least efficient or most consumptive unit.

Specifically, for pumps, DOE's existing definition of basic model is as follows:

Basic model means all units of a given class of pump manufactured by one manufacturer, having the same primary energy source, and having essentially identical electrical, physical, and functional (or hydraulic) characteristics that affect energy consumption, energy efficiency, water consumption, or water efficiency; and, in addition, for pumps that are subject to the standards specified in 10 CFR 431.465(b), the following provisions also apply:

(1) All variations in numbers of stages of bare RSV and ST pumps must be considered a single basic model;

(2) Pump models for which the bare pump differs in impeller diameter, or impeller trim, may be considered a single basic model; and

(3) Pump models for which the bare pump differs in number of stages or impeller diameter and which are sold with motors (or motors and controls) of varying horsepower may only be considered a single basic model if:

(i) For ESCC, ESFM, IL, and RSV pumps, each motor offered in the basic model has a nominal full load motor efficiency rated at the Federal minimum (see the current table for NEMA Design B motors at § 431.25) or the same number of bands above the Federal minimum for each respective motor horsepower (see Table 3 of appendix A to subpart Y of this part); or

(ii) For ST pumps, each motor offered in the basic model has a full load motor efficiency at the default nominal full load submersible motor efficiency shown in Table 2 of appendix A to subpart Y of this part or the same number of bands above the default nominal full load submersible motor efficiency for each respective motor horsepower (see Table 3 of appendix A to subpart Y of this part).

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DOE has reviewed this definition and has tentatively determined that the general definition is appropriate for circulator pumps. DOE understands that, like dedicated purpose pool pumps, circulator pumps are exclusively single-stage pumps and, therefore, the provision regarding variation in number of stages would not be applicable. Furthermore, DOE understands that, like each dedicated purpose pool pump motor model, each circulator pump model is offered with only one impeller diameter, unlike general pumps for which a given pump model may be sold with many different impeller diameters that are customized for each application. Therefore, DOE believes that the provision for grouping individual pumps that vary only in impeller diameter, or impeller trim, would also not be applicable to circulator pumps; any variation in impeller trim would constitute a separate basic model for circulator pumps. Finally, as neither the multistage nor impeller trim specifications for basic model designation apply to circulator pumps, the provision regarding variation in motor horsepower resulting from variation in either of those characteristics would also not apply to circulator pumps. Therefore, only the general provisions of the basic model definition would be applicable to circulator pumps and no additional provisions specific to circulator pumps would be necessary.

DOE requests comment on the proposed applicability of the definition of ''basic model'' at 10 CFR 431.462 to circulator pumps and any characteristics unique to circulator pumps that may necessitate modifications to that definition.

C. Rating Metric

As discussed in the May 2021 RFI, the CPWG focused on defining a performance-based metric that was similar to the PEI metric established for the January 2016 TP final rule. (Docket No. EERE–2016–BT–STD–0004, No. 64 at pp. 246–247) The CPWG recommended using the PEI_{CIRC} metric, which would be defined as the pump energy rating (''PER'') for the rated circulator pump model (''PER_{CIRC}''), divided by the PER for a circulator pump that is minimally compliant with energy conservation standards serving the same hydraulic load (''$PER_{CIRC,STD}$''). (Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendation #5 at p. 4); 86 FR 24516, 24522.

The equation for PEI_{CIRC} as recommended by the CPWG is shown in the equation (1):

$$PEI_{CIRC} = \left[\frac{PER_{CIRC}}{PER_{CIRC,STD}}\right] \quad \textbf{(1)}$$

Where:

PER_{CIRC} = circulator pump energy rating (hp); and

$PER_{CIRC,STD}$ = pump energy rating for a minimally compliant circulator pump serving the same hydraulic load.

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #5 at p. 4); 86 FR 24516, 24522.

As stated in the May 2021 RFI, PER_{CIRC} would be determined as the weighted average input power to the circulator pump motor or controls, if available, to a given circulator pump over a number of specified load points. Due to differences in the various control varieties available with circulator pumps, the CPWG recommended that each circulator pump control variety have unique weights and test points that are used in determining PER_{CIRC}.[15] (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #6A and #6B at pp. 4–6) 86 FR 24516, 24522. The test points, weights, and test methods necessary for calculating PER_{CIRC} for pressure controls, temperature controls, manual speed controls, external input signal controls, and circulator pumps with no control (*i.e.,* without external input signal, manual, pressure, or temperature control)[16] are described in section III.D. 86 FR 24516, 24522.

As recommended by the CPWG, $PER_{CIRC,STD}$ would be determined similarly for all circulator pumps, regardless of control variety. $PER_{CIRC,STD}$ would represent the weighted average input power to a minimally compliant circulator pump serving the same hydraulic load. As such, $PER_{CIRC,STD}$ would essentially define the minimally compliant circulator pump performance, such that the energy conservation standard level would always be defined as 1.00, and lower numbers would represent better performance. The CPWG discussed the derivation of $PER_{CIRC,STD}$ in the Working Group negotiations and, ultimately, recommended a standard level that is nominally equivalent to a single-speed circulator pump equipped with an electrically commutated motor. (Docket No. EERE–2016–BT–STD–0004, No. 102 at pp. 53–56; Docket No. EERE–2016–BT–STD–0004, No. 98 Recommendations #1 and 2A–D at pp. 1–4); 86 FR 24516, 24522.

The CPWG specified a method for determining $PER_{CIRC,STD}$ with procedures to determine the minimally compliant overall efficiency at the various test points based on the hydraulic performance of the rated circulator pump. (Docket No. EERE–2016–BT–STD–0004, No. 98 Recommendations #1 and 2A–D at pp. 1–4); 86 FR 24516, 24522. As discussed, $PER_{CIRC,STD}$ would represent the energy efficiency of a circulator pump that is minimally compliant with the applicable energy conservation standard, should DOE establish such a standard. Were DOE to conduct a rulemaking to propose energy conservation standards for circulator pumps, DOE would discuss in detail the derivation of $PER_{CIRC,STD,}$ as well as an analysis as required by EPCA to evaluate any such standard level to determine the level designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified, as required under EPCA.[17] DOE notes that the recommended method for determining $PER_{CIRC,STD}$ relies on the

[15] In order to determine weighted average input power, input power must be measured at multiple test points, and each test point must be weighted. The test points and weights for each test method are discussed in section III.D.

[16] In this document, circulator pumps with ''no controls'' are also inclusive of other potential control varieties that are not one of the specifically identified circulator pump control varieties. Any circulator pump without one of the defined control varieties would be treated as a circulator pump with no controls, regardless of whether it is a single-speed circulator pump or has a control variety not defined in this test procedure. See section III.D.7 of this document.

[17] For more information on any energy conservation standard rulemaking for circulator pumps see Docket No. EERE–2016–BT–STD–0004.

hydraulic horsepower of the rated circulator pump. DOE discusses measurement of this parameter in section III.G.

DOE requested comment on the CPWG recommendation to adopt PEI_{CIRC} as the metric to characterize the energy use of certain circulator pumps and on the recommended equation for $PEI_{CIRC,}$ including whether anything in the technology or market has changed since publication of the 2016 Term Sheets that would lead to this metric no longer being appropriate. 86 FR 24516, 24522.

In response, HI and Grundfos recommended changing the metric nomenclature from PEI_{CIRC} to CEI (Circulator Energy Index) to avoid confusion and/or differentiate coverage from the general pump rule. (HI, No. 112 at p. 3; Grundfos, No. 113 at p. 2) HI similarly recommended corresponding changes to PER_{CIRC} to CER (Circulatory Energy Rating). (HI, No. 112 at p. 3). As stated in section III.E.1, the Advocates and NEEA supported adopting HI 41.5–2021, the industry rating guideline, that includes the updated metric nomenclature discussed by HI in its comments. (Advocates, No. 114 at p. 1; NEEA, No. 115 at p. 4–5). The CA IOUs also supported modifying the term sheet to adopt HI 41.5–2021, and supported adopting term sheet provisions including the definition of CEI. (CA IOUs, No. 116 at p. 2, 5)

DOE agrees with the CPWG that the recommended PEI_{CIRC} metric, as shown in equation (1), will reasonably reflect the energy use of circulator pumps over a representative average use cycle. DOE also agrees with commenters that changing the name of the metric to CEI will reduce possibility for confusion. As such, DOE proposes to adopt the CEI metric as the performance-based metric for representing the energy performance of circulator pumps, as defined in equation (2), and consistent with section 41.5.3.2 of HI 41.5–2021. DOE notes that while HI 41.5–2021 defines the denominator as CER_{REF}, DOE believes that the terminology CER_{STD} is more reflective of the Federal energy conservation standards. Any standards considered for any circulator pumps for which the CEI is applicable would use this metric as a basis for the standard level.

$$CEI = \left[\frac{\text{CER}}{CER_{STD}}\right] \quad \textbf{(2)}$$

Where:

CER = circulator energy rating (hp); and

CER_{STD} = circulator energy rating for a minimally compliant circulator pump serving the same hydraulic load.

DOE requests comment on its proposal to adopt CEI as the metric to characterize the energy use of certain circulator pumps and on the proposed equation for CEI.

D. Test Methods for Different Circulator Pump Categories and Control Varieties

Many circulator pumps are sold with a variable speed drive and controls (*i.e.,* logic or user interface) with various control strategies that reduce the required power input at a given flow rate to save energy. The primary varieties of control recommended by the CPWG include manual speed controls, pressure controls, temperature controls, and external input signal controls. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #4 at p. 4) In order for the test procedure to produce results that reflect variations in energy consumption associated with the various control strategies that could be implemented in a circulator pump, the CPWG recommended that DOE establish different test methods for each control variety in the circulator test procedure. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #6A and #6B at pp. 4–6)

Manual speed controls are controls in which the speed of the motor is adjusted manually, typically at the time of installation, to match the system head and flow requirements of the installation.

Pressure controls are controls that use a variable speed drive to automatically adjust the speed of the motor based on the pressure in the system at any given time according to a fixed constant or proportional (*i.e.,* sloped) control curve.[18] Models with pressure controls typically provide several fixed control curve options available to accommodate different systems with varying pressure drops across different zones. These controls are typically installed in multi-zone hydronic heating applications to vary the speed of the circulator pump, based on the number of zones open, in order to achieve the appropriate flow rate through each zone.

Adaptive pressure controls are a specific variety of pressure controls that use pressure sensors to continually evaluate the head and flow requirements in the system and adjust the sensitivity of the control response [19] to specifically suit the system's head and flow requirements. In addition to being designed to operate in multi-zone systems, adaptive pressure controls may also have the ability to operate in a single zone system, such as a domestic hot water recirculation system, to adjust for any oversizing that might have occurred in the design and pump selection process. As such, adaptive pressure controls have the potential to save more energy than conventional (*i.e.* non-adaptive) pressure-based controls.

Temperature controls are controls that use a variable speed drive to automatically adjust the speed of the pump continuously over the operating speed range to respond to a change in temperature in the system. These controls may be installed in single- or multi-zone systems and adjust the circulator pump's operating speed to provide the optimum flow rate based on the heat load in each zone. Specifically, temperature controls are typically designed to achieve a fixed temperature drop through the system and will adjust the speed of the pump to increase or decrease the flow rate to precisely match the required thermal load (*i.e.,* to maintain the target temperature drop). Unlike pressure controls, there are no minimum head requirements inherent to the temperature control, so temperature controls have the potential to use the least amount of energy to serve a given load.

Finally, external input signal control refers to a system in which the speed of the circulator pump is controlled by control logic that is external to the circulator pump. This could be the case

[18] Constant pressure control curves supply the same non-zero head pressure regardless of flow. Proportional pressure control curves reduce head in response to a reduction in flow, but maintain a minimum head pressure at zero flow.

[19] In adaptive pressure controls, the sensitivity of the control response is adjusted by changing the slope of the control curve.

in circulator pumps that are, for example, designed to be installed in conjunction with a boiler and are controlled by the boiler's firing controls, as opposed their own internal control logic.

Section III.D.1 discusses DOE's proposed definitions for each of these circulator pump control varieties.

Section III.D.2 discusses the proposed reference system curve that serves as a basis for rating each variety of circulator pump controls.

Sections III.D.3 through III.D.7 discuss the specific test provisions being proposed for pressure controls, temperature controls, manual speed controls, external input signal controls, and no controls,[20] respectively.

In response to the May 2021 RFI, several stakeholders commented about components of CEI that differ by control type method. China stated that DOE should offer the specific data or calculation method for CER_{STD} and have executive consultation among World Trade Organization members before the procedure is officially published and implemented. China also commented that the weighted average input power for CEI is set differently than the international general rules, and requested that DOE offer scientific evidence for the weight assignment. (China, No. 111 at p. 3) Grundfos stated that the weights used in determining CEI should be aligned across control modes to simplify testing and that the baseline calculation method should match the control method weights. (Grundfos, No. 113 at p. 3) The CA IOUs supported the weighting points provided in the CPWG term sheets. (CA IOUs, No. 116 at p. 5)

In response to China and Grundfos, DOE discusses the weighting assignments in the individual test methods within this section. In general, the CPWG recommended unique weights for most control varieties, which were understood to be representative of their operation in the field. (See sections III.D.3, III.D.4, III.D.5, and III.D.6. of this NOPR)

HI 41.5–2021 section 41.5.3 specifies rating the most consumptive and least consumptive of the control curves that are available on a circulator pump as shipped. The industry test standard provides an example stating that if pressure control is the most consumptive option and multiple pressure control curve settings are provided, the circulator pump would be tested and rated per the pressure control test method, but with the most and least consumptive control curves. DOE notes that this example does not seem consistent with the preceding text, and that in the HI Energy Rating portal for circulator pumps,[21] the most consumptive rating is always based on full speed (no controls), while the least consumptive rating is based on one of the control varieties on-board, if any.

In response to the May 2021 RFI, HI stated that for clarity, and to align with the CPWG negotiated intent (referencing page 473 of the CPWG transcript from July 13, 2016), DOE should implement the least consumptive control mode CEI for the regulatory rating. (HI, No. 112 at p. 2)

NEEA commented that in the context of the CPWG recommendation, they would expect most manufacturers to rate with the least consumptive control curve available, which would encourage manufacturers to produce circulator pumps with efficient controls and would enable utilities to identify equipment with efficient control options. NEEA also suggested that DOE also allow circulator pumps with multiple control options to be rated with the most consumptive control curve available, consistent with HI 41.5–2021. NEEA stated that allowing circulator pumps to have multiple ratings would encourage adoption of energy efficient options and technologies beyond the minimum threshold, while holding all manufacturers to a consistent standard of performance and providing information for consumers to fully understand the energy consumption of the equipment. (NEEA, No. 115 at p. 5)

The CPWG did not make a specific recommendation on how to select which control mode to use for a rating other than that for pressure controls, a manufacturer should be able to choose the tested control curve, when multiple options are available, but should report the control curve used and method of adjustment (*e.g.,* whether the rating was achieved through automatic speed adjustment, manual speed adjustment or through simulated pressure signal) to DOE with certification reporting. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7)

If given the option to choose a control variety for rating, DOE expects that most manufacturers would choose the least consumptive control curve. DOE reviewed the transcript cited by HI and did not identify justification that the intent of the CPWG was to recommend testing the least consumptive control mode. DOE believes that proposing a least consumptive approach, as suggested by HI, could require manufacturers to conduct multiple tests to identify the least consumptive control curve, which may cause additional burden. DOE does not think it is likely that a requirement to identify the least consumptive control curve would provide additional benefits to manufacturers (beyond that from an allowance to choose a control curve to test) such as an incentive to develop energy efficient control strategies. DOE proposes the approach presented in the CPWG recommendation, which would allow manufacturers to select the control variety used for testing if multiple control varieties are available on the circulator pump. In response to NEEA's recommendation to also allow ratings with the most consumptive control curve available, DOE proposes in this NOPR that manufacturers may select multiple control varieties with which to test their circulator pumps. DOE will address certification reporting requirements in any future energy conservation standard rulemaking.[22]

DOE requests comment on the proposal to allow manufacturers to select the control variety used for testing if the circulator pump model is distributed in commerce with multiple control varieties. DOE specifically requests comment on whether DOE should instead require manufacturers to test a circulator pump model that offers multiple control varieties with the least consumptive control variety. DOE also requests comment on the burden that would be associated with such an approach.

1. Definitions Related to Circulator Pump Control Varieties

As stated in the May 2021 RFI, the CPWG recommended definitions for the following control varieties for circulator pumps: Manual speed control, pressure control, temperature control, and external input signal control. 86 FR 24516, 24523. The definitions of these pump control varieties recommended by the CPWG are as follows:

- *Manual speed control* means a control (variable speed drive and user interface) that adjusts the speed of a driver based on manual user input.
- *Pressure control* means a control (variable speed drive and integrated logic) that automatically adjusts the speed of the driver in response to pressure.

[20] In this document, circulator pumps with ''no controls'' are also inclusive of other potential control varieties that are not one of the specifically identified control varieties. See section III.D.7 of this document.

[21] The HI Energy Rating portal is available at *er.pumps.org/circulator/ratings.*

[22] For more information on any energy conservation standard rulemaking for circulator pumps see Docket No. EERE–2016–BT–STD–0004.

• *Temperature control* means a control (variable speed drive and integrated logic) that automatically adjusts the speed of the driver continuously over the driver operating speed range in response to temperature.

• *External input signal control* means a variable speed drive that adjusts the speed of the driver in response to an input signal from an external logic and/or user interface.

(Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendation #4 at p. 4) 86 FR 24516, 24523.

DOE requested comment on the recommended definitions for manual speed control, pressure control, temperature control, and external input signal control. 86 FR 24516, 24523.

In response to the May 2020 RFI, HI agreed with the current scope and definition recommended by the CPWG and noted that the definitions have not been changed in the adoption of HI 41.5–2021. (HI, No. 112 at p. 4). Grundfos and the CA IOUs also agreed with these definitions for control methods (Grundfos, No. 113 at p. 3; CA IOUs, No. 116 at p. 5) As stated previously, NEEA and the Advocates in general supported the term sheet recommendations. (Advocates, No. 114. at p. 1; NEEA, No. 115 at p. 2) DOE notes that HI 41.5–2021 section 41.5.1.5.1 includes definitions for manual speed control, pressure control, temperature control, and external input signal control that are identical to the CPWG recommendations.

DOE has reviewed these definitions recommended by the CPWG and believes that the definitions appropriately describe the characteristics of the relevant circulator pump controls. Furthermore, DOE believes these definitions appropriately identify each type of control for the purpose of determining the applicable test method based on the characteristics of a circulator pump's control variety. Therefore, consistent with CPWG recommendations and continued stakeholder support, DOE proposes to define external input signal control, manual speed control, pressure control, and temperature control as recommended by the CPWG and consistent with HI 41.5–2021.

In the May 2021 RFI, DOE noted that the CPWG did not recommend a definition for adaptive pressure controls, although it did recommend a separate test procedure for them, because, as discussed by the CPWG, adaptive pressure controls are able to adjust the slope of the control curve to fit the system needs through an ongoing learning process inherent in the software. (Docket No. EERE–2016–BT–STD–0004, No. 72 at pp. 45–46) 86 FR 24516, 24523.

DOE requested comment on a possible definition for adaptive pressure control. 86 FR 24516, 24523. Grundfos generally objected to addressing adaptive pressure control in the DOE test procedure. (Grundfos, No. 113 at p. 3; see discussion in section III.D.3), but did not comment specifically on the definition.

DOE notes that HI 41.5–2021 section 41.5.1.5.1 includes the following definition for adaptive pressure control: ''a pressure control that adjusts the control curve automatically based on the conditions of use.'' DOE believes that this definition would benefit from additional clarity regarding the conditions to which the control responds; specifically, DOE proposes to define adaptive pressure control as follows:

Adaptive pressure control means a pressure control that continuously senses the head requirements in the system in which it is installed and adjusts the control curve of the pump accordingly.

DOE requests comment on its proposed definition of adaptive pressure control.

In the May 2021 RFI, DOE requested comment on whether any additional control variety is now currently on the market and if it should be considered in this rulemaking. 86 FR 24516, 24523. In response, HI stated that it is not aware of any additional control methods. (HI, No. 112 at p. 4) NEEA recommended that in a future rulemaking, DOE consider the potential energy savings from domestic hot water controls, especially temperature-based controls. NEEA suggested that DOE consider providing a CEI credit for circulator pumps equipped with efficient temperature, on-demand, timer, or learning run-hour controls. (NEEA, No. 115 at p. 4)

DOE acknowledges that additional controls exist for circulator pumps that reduce run-time rather than reduce speed. DOE proposes to limit the promulgation of test methods in this rulemaking to those control varieties recommended by the CPWG, which include only controls that reduce speed, and may consider additional control varieties in future rulemakings. DOE discusses the concept of applying ''credits'' for on-demand controls in section III.B.5 of this document.

2. Reference System Curve

The May 2021 RFI stated that all recommended test methods for circulator pump control varieties, which involve variable speed control of the circulator pump, specify test points with respect to a representative system curve. That is, for circulator pumps with manual speed controls, pressure controls, temperature controls, or external input signal controls, a reference system curve is implemented to be representative of the speed reduction that is possible in a typical system to provide representative results. For circulator pumps with no controls, no reference system is required as measurements are taken at various test points along a pump curve at maximum speed only. 86 FR 24516, 24523.

Such a reference system curve describes the relationship between the head and the flow at each test point in a typical system. Additionally, a reference system curve that is representative of a typical system in which circulator pumps are installed may also allow for the differentiation of control varieties to be reflected in the resulting ratings. 86 FR 24516, 24523. The CPWG recommended that DOE incorporate a quadratic reference system curve, which intersects the BEP and has a static offset of 20 percent of BEP head, as shown in equation (3). (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #8 at pp. 6–7) 86 FR 24516, 24523.

$$H = \left[0.8 * \left(\frac{Q}{Q_{100\%}}\right)^2 + 0.2\right] * \mathrm{H}_{100\%} \quad \textbf{(3)}$$

Where:

H = the pump total head (ft),

Q = the flow rate (gpm),

$Q_{100\%}$ = flow rate at 100 percent of BEP flow (gpm), and

$H_{100\%}$ = pump total head at 100 percent of BEP flow (ft).

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #8 at pp. 6–7); 86 FR 24516, 24523.

In the May 2021 RFI, DOE requested comment on whether the CPWG-recommended reference system curve shape, including the static offset, is reasonable for circulator pumps. 86 FR 24516, 24523. HI, Grundfos, and the CA IOUs agreed with the recommended reference curve. (HI, No. 112 at p. 4; Grundfos, No. 113 at p. 3; CA IOUs, No. 116 at p. 5).

DOE notes that the reference curve in equation (3) is consistent with HI 41.5–2021, which includes this reference curve in each of the individual control test methods (sections 41.5.3.4.2 #3d, 41.5.3.4.3 #2, 41.5.3.4.4.1 #2, 41.5.3.4.4.2 #2, and 41.5.3.4.5 #2d). DOE has tentatively determined that the reference curve established for general pumps would provide representative results for circulator pumps. As such, DOE proposes to adopt the reference curve as shown in equation (3).

3. Pressure Control

As described in the May 2021 RFI, pressure controls are a variety of circulator pump control in which the variable speed drive is automatically adjusted based on the pressure in the system. For example, such controls are common in multi-zone hydronic heating applications where the flow and speed are adjusted in response to zones opening or closing. CPWG recommended that for all circulator pumps distributed in commerce with pressure controls, the PER_{CIRC} should be calculated as the weighted average input power at 25, 50, 75, and 100 percent of BEP flow with unique weights shown in equation (4):

$$PER_{CIRC} = \sum_{i} \omega_i \left(P_{in,i} \right) \quad \textbf{(4)}$$

Where:

PER_{CIRC} = circulator pump energy rating (hp);

w_i = weight of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively;

$P_{in,i}$ = power input to the driver at each test point i (hp); and

i = test point(s), defined as 25, 50, 75, and 100 percent of the flow at BEP.

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #6A at pp. 4–5 and #7 at p.6); 86 FR 24516, 24523–24524.

The CPWG recommended the weights of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively, based on subcommittee review of other relevant test methods that document the typical load profile of hydronic heating and/or cooling applications, including AHRI 550/590–2011 ''Performance Rating Of Water-Chilling and Heat Pump Water-Heating Packages Using the Vapor Compression Cycle,'' ASHRAE 103 ''Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers, and EN 16297–1:2012 ''Pumps. Rotodynamic pumps. Glandless circulators. General requirements and procedures for testing and calculation of energy efficiency index (EEI),'' as well as the fact that pumps with pressure controls will unlikely operate near BEP flow because systems are sized to be able to meet the full demand of the design day, which occurs only on rare occasion.[23]

In addition to the test point flow rates, the test method for pressure controls must also specify the head values (or range of head values) for evaluation. For pressure controls, the head values associated with the specified flow rates are determined by the control curve of the pressure control being evaluated. Traditional pressure controls typically follow a fixed, linear control curve that can represent maintenance of constant pressure at a variety of different flow rates, or can reduce the pressure as the flow is reduced. Often, a single circulator pump will be equipped with a number of different pressure control options, as illustrated in Figure III.1.

The CPWG recommended testing circulator pumps with pressure controls using automatic speed adjustment based on the factory selected control setting, manual speed adjustment, or simulated pressure signal to trace a factory selected control curve setting that will achieve the test point flow rates with a head at or above the reference system curve. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7) To test circulator pumps with pressure controls under this recommendation, manufacturers would select a pressure-based control curve for the purpose of the test procedure, provided that all of the head values that result from that are at or above the reference system curve discussed in section III.D.2. For example, Figure III.1 depicts three fixed pressure control options (low, medium, and high), but only the highest pressure control option results in head values that are all at or above the reference system curve. Under the CPWG's recommendation, the speed of the pump would be adjusted according to the selected control curve using one of three methods: Manual speed adjustment, simulated pressure signal, or automatic adjustment.

[23] This discussion took place during a CPWG subcommittee meeting, so there is no transcript in the docket. This presentation includes the results from the subcommittee: *https://www.regulations.gov/document/EERE-2016-BT-STD-0004-0027.*

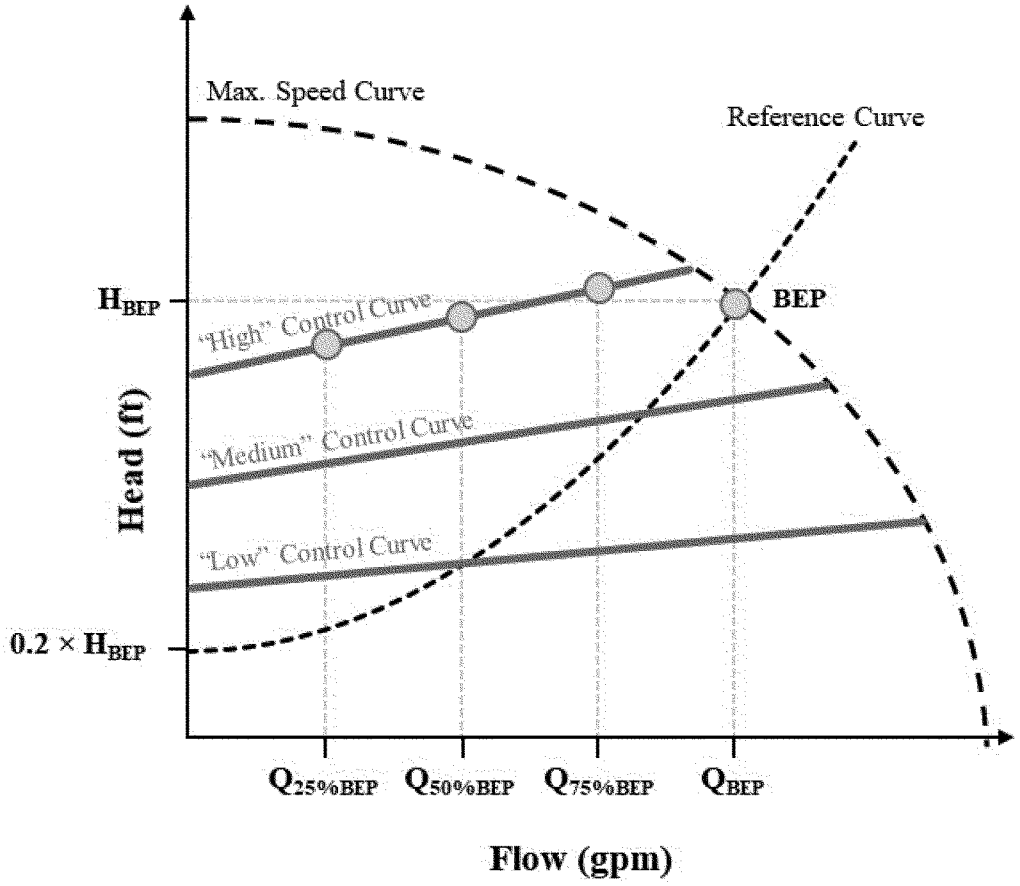

Figure III.1. Illustration of Testing of Pressure Controls with Multiple Control Curve Options

The CPWG also recommended that if a circulator pump with pressure controls is tested with automatic speed adjustment, that the pump can be manually adjusted to achieve 100 percent BEP flow and head point at max speed. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7); 86 FR 24516, 24524. DOE interpreted this to mean that the test point at 100 percent BEP flow and maximum speed may be generated using a combination of alternative speed control and throttling. This modification would be necessary in the event the manufacturer-selected control curve does not intersect the maximum speed pump curve at the BEP of the pump, as shown in Figure III.1. In such a case, the test point at 100 percent of BEP flow and maximum speed could be generated from the control curve at the maximum speed setting of the pump and throttled to reach the specific test point.

In the May 2021 RFI, DOE requested comment on the recommended test methods, test points, and weights for circulator pumps with pressure controls. 86 FR 24516, 24524.

HI recommended that DOE implement the testing methodology in HI 41.5–2021 section 41.5.3.4.2 for pressure control, which does not require all test points on a control curve to exist above the reference curve. Specifically, HI asserted that the minimum system control head should be the value at 25 percent BEP on the reference curve for the manual control (and pressure control) method. HI stated that it found that intersecting the pump curve at BEP and requiring the control mode to be above the reference curve was too limiting. HI asserted that this approach did not represent the controls available in the market, nor did it properly demonstrate the benefit of the onboard controls. HI stated that section 41.5.3.4.2 allows controls to be rated below the reference curve with power correction back to the reference curve. (HI, No. 112 at 4) HI stated that this change eliminates the need for all control curves to exist above the reference curve, allowing for a better presentation of control curves used in the market and for the circulator pump CEI values to better represent a pump's capabilities. (HI, No. 112 at p. 2) HI provided an additional appendix in support of its recommendation for the changes. (HI, No. 112 at p.11–12) Grundfos recommended that DOE accept the approach defined in HI 41.5 for calculating CEI that allows for constant pressure control methods to be rated across the entire curve. (Grundfos, No. 113 at p. 2)

The CA IOUs stated that experiences with field testing the metric on circulator pumps in the market led to discovering unintended challenges of testing both constant and proportional pressure controls in most applications. The CA IOUs noted that these products generally operate at head pressure below or significantly below the reference curve at one or more measurement points; thus, most programmed pressure control curves in a product are not testable under the

previous methodology. Some products do not have any pre-set control methods that meet all the requirements and thus must be tested as having no controls. The CA IOUs added that all of the below reference curve performance measurements remain valid after adjustment, since the adjustment uses an assumed constant efficiency calculation. The CA IOUs asserted that this ensures that products do not gain any arbitrary input power advantage from the head pressure below the reference curve adjustment. The CA IOUs stated that not addressing this issue would force DOE to grant numerous test procedure waivers. (CA IOUs, No. 116 at pp.2, 4–5)

DOE has reviewed the revised test method for pressure control in section 41.5.3.4.2 of HI 41.5–2021. DOE notes that HI 41.5–2021 does not include the CPWG recommendation to allow manual adjustment of automatic speed adjusted controls to achieve 100 percent BEP flow and head point at maximum speed (although this provision is included for adaptive pressure controls, discussed later in this section). As stated previously, DOE did not understand this recommendation to mean that the pressure control curve should intersect the pump curve at BEP, which HI noted in their comments was too limiting. However, section 41.5.3.4.2 #2a–c of HI 41.5–2021 in general allows for throttling in combination with any of the three recommended methods to adjust speed: Automatic speed adjustment based on the factory selected control setting, manual speed adjustment, or simulated pressure signal to trace a factory selected control curve setting. In addition, as noted by HI, HI 41.5–2021 also contains a requirement that the control curve setting must achieve 100 percent BEP flow of the reference curve. DOE understands this to mean that a control curve cannot include artificial limitations on speed. Otherwise, DOE understands that any control curve would be able to achieve 100 percent of BEP flow of the reference curve after intersecting with the maximum speed curve. Finally, DOE understands that the provision that the control must produce head equal to or greater than 25 percent of BEP head at a minimum of one test point is designed to limit testing of control curves that would not be viable in the field.

DOE agrees with commenters that it is important for the test method to capture the variety of pressure controls on the market, and that correction back to the reference curve would prevent any unfair advantage among the variety of controls on the market. DOE notes that in this proposal, all three curves depicted in Figure III.1 could be used in this test method. For all of these reasons, DOE is proposing a test method for circulator pumps with pressure controls consistent with the method included in HI 41.5–2021. Specifically, DOE proposes that circulator pumps with pressure controls be tested at test points of 25, 50, 75, and 100 percent of BEP flow based on a manufacturer-selected control curve that is available to the end user, must produce a head equal to or greater than 25 percent of BEP head at a minimum of one test point, and must achieve 100 percent BEP flow of the reference curve. DOE proposes that such the test points may be obtained based on automatic speed adjustment, manual speed adjustment, or simulated pressure signal, or a combination of these adjustments, including throttling. Additionally, DOE proposes that the CEI for circulator pumps with pressure controls be calculated with the unique weights and test points as shown in equation (4).

DOE requests comment on the proposed test method for circulator pumps with pressure controls, including whether DOE's interpretation of the new provisions in HI 41.5–2021 are accurate.

DOE is aware of some circulator pumps that are equipped with user-adjustable pressure controls such that the maximum and minimum head values on the control curve can be set to specifically match the system into which the pump is being installed. DOE's interpretation HI 41.5–2021 is that these types of controls are not addressed in the industry standard. To test such controls, DOE proposes that the maximum and minimum head values on user-adjustable pressure controls may be adjusted, if possible, to coincide with a maximum head value at the pump's BEP and a minimum head value equivalent to 20 percent of the BEP head value (consistent with the static offset of the proposed reference system curve). If only the maximum or minimum head value can be adjusted, DOE proposes that only the adjustable setting would be adjusted. In either case, DOE also proposes that the settings can be adjusted for testing only if they are adjustable by the user. DOE believes that this proposed methodology would result in the most representative performance of such adjustable controls by preventing the testing of specifically tuned control options that would not be representative of likely field performance. DOE notes that further adjustment to attain 100 percent of BEP head would be required.

In summary, for adjustable pressure controls with user-adjustable maximum and/or minimum head values, DOE proposes to allow one-time manual adjustment of the maximum and/or minimum control curve head values, as applicable, to coincide with a maximum head value at the pump's BEP and a minimum head value equivalent to 20 percent of the BEP head value with all subsequent test points taken along the adjusted control curve.

DOE requests comment on whether specific test provisions for circulator pumps equipped with user-adjustable pressure controls are needed, and if so, on the proposed provisions for such pumps.

The CPWG also identified a specific style of pressure control that adapts the control curve setting dynamically to the system in which it is installed; the CPWG referred to this style of pressure control as adaptive pressure controls. (Docket No. EERE–2016–BT–STD–0004, No. 72 at p. 45) As discussed in the introduction to section III.D, adaptive pressure controls are installed in similar applications as pressure controls, but can also be effective at reducing the head and flow provided in single-zone systems to adjust for typical pump oversizing. Also, due to the ability of adaptive pressure controls to measure and automatically adjust to the system requirements over time, adaptive pressure controls can result in optimized performance and energy use as compared to pressure-based controls. The CPWG noted that current adaptive pressure controls are learning-based controls that gradually adjust the pressure control set point over time based on the needs of the system. (Docket No. EERE–2016–BT–STD–0004, No. 72 at pp. 45–46) As such, the CPWG recommended separate test methods for pressure controls and adaptive pressure controls, noting the difference in operation and control logic between the control varieties. (Docket No. EERE–2016–BT–STD–0004, No. 73 at p. 176) Specifically, the CPWG discussed that since adaptive pressure controls gradually adjust the control curve over time to optimize the pressure control performance for the system in which it is installed, the test method specified for circulator pumps with pressure controls was not applicable because there is no fixed pressure control curve that can be evaluated. (Docket No. EERE–2016–BT–STD–0004, No. 72 at pp. 45–46) Instead, adaptive pressure controls have a control ''area'' that is defined by a minimum head value (H_{auto_min} and H_{set_min}), the maximum speed pump curve, and a maximum head value (H_{set}), as depicted in in Figure III.2.

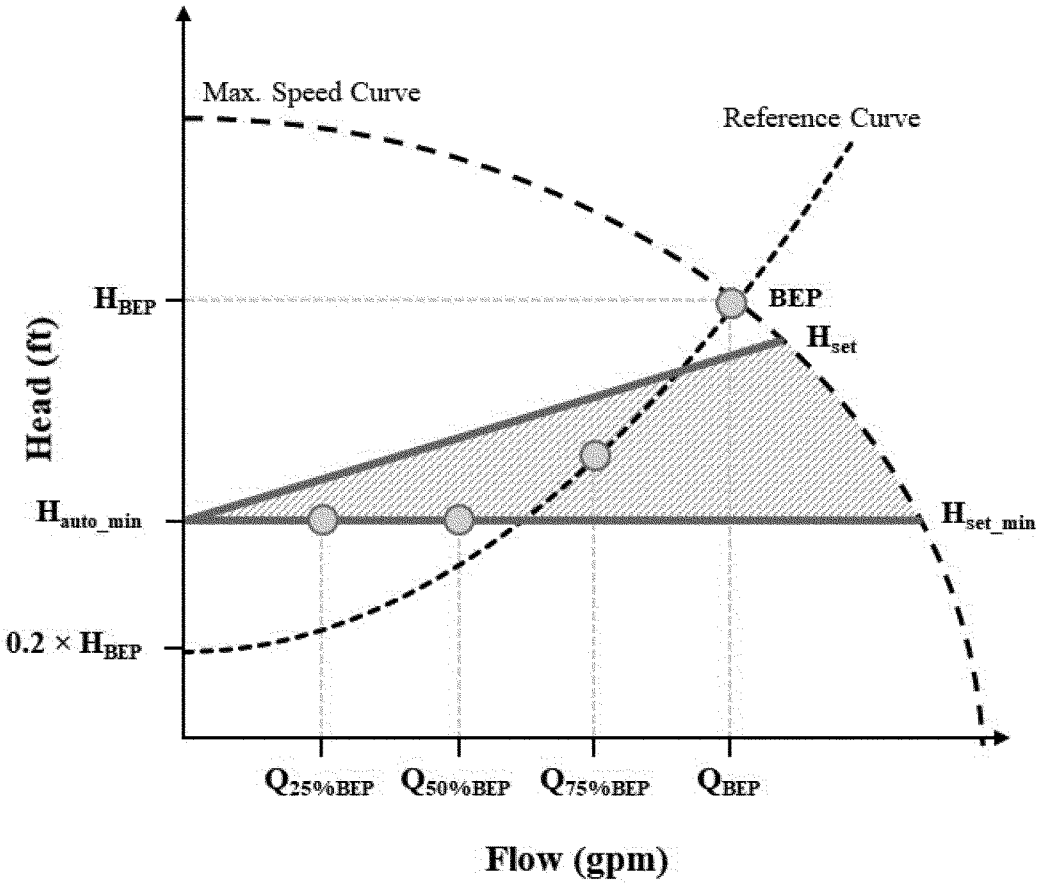

Figure III.2 Most Common Adaptive Control Operating Conditions and Proposed Test Method Test Points

Within the adaptive pressure control ''area,'' a multitude of different control curves may be selected based on the detected system head requirements. Therefore, the CPWG discussed the need to specify the ''control curve'' within an adaptive pressure control's control area along which such controls would be evaluated. (Docket No. EERE–2016–BT–STD–0004, No. 66 at pp. 95–98) For circulator pumps with adaptive pressure controls, the CPWG recommended that testing be conducted at the minimum thresholds for head based on manufacturer literature and through manual speed adjustment to achieve the test point flow rates with head values at or above the reference curve. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7); 86 FR 24516, 24524.

For example, in Figure III.2, the CPWG recommended test method would result in minimum head thresholds of H_{auto_min} at no flow conditions and H_{set_min} at maximum flow, essentially the bottom edge of the adaptive pressure control area. However, DOE notes that the CPWG also specified that the test points could not be below the reference system curve (specified in section III.D.2), similar to pressure controls. Therefore, the CPWG discussed how adaptive pressure controls would be tested through manual speed adjustment to test points that are at or above the reference system curve or minimum head thresholds of the adaptive pressure control area, whichever is greater. (Docket No. EERE–2016–BT–STD–0004, No. 66 at pp. 95–98) This results in, for example, the test points denoted with the circles along the minimum pressure setting curve and the reference system curve in Figure III.2.

In response to the May 2021 RFI, DOE requested comment on the recommended test methods, test points, and weights for circulator pumps with adaptive pressure controls. 86 FR 24516, 24524.

In response, the CA IOUs encouraged DOE to incorporate representative field data for adaptive controls in a future test method, asserting there may be a minimal relationship between the preloaded defaults or reference curve and the eventual operating points of these devices in the field, in aggregate. The CA IOUs further recommended that DOE collaborate with industry to develop test procedures for these units to capture energy savings occurring in the overall marketplace. (CA IOUs, No. 116 at p. 7)

Grundfos commented that adaptive pressure control should not be an allowed test method in DOE's regulations. Grundfos stated that adaptive pressure controls cannot be tested in the way they operate. Grundfos commented that because the recommended test procedure would allow such pumps to be manually adjusted to the reference curve, a manufacturer could state that any product has adaptive pressure controls and test the product in a manner that is not aligned with actual performance. (Grundfos, No. 113 at p. 3)

DOE notes that the test method for such controls in HI 41.5–2021 (section

41.5.3.4.2 #4) is consistent with the CPWG recommendation. Section 41.5.3.4.2 #4 also allows for manual adjustment to achieve 100 percent BEP flow and head point at max speed.

In response to Grundfos, DOE notes that, as recommended by the CPWG, the proposed test procedure would require minimum head thresholds to be documented in the manufacturer literature associated with the given circulator pump model and be accessible based on the capabilities of the control with which the pump is distributed in commerce. That is, the minimum head thresholds may be manually set before testing the pump (similar to adjustable pressure controls), but such adjustment must be possible on the control with which the circulator pump is distributed in commerce and described in the manufacturer's literature. DOE believes this would ensure that the evaluated control threshold is representative of minimum head values that are realized in the field.

In response to the CA IOUs, DOE welcomes additional field data that could provide more information to support a future update of any finalized adaptive control test method. Based on the information currently available, DOE has tentatively determined that the adaptive pressure control test method recommended by the CPWG and proposed in this NOPR is reasonably designed to reflect energy use under typical operating conditions.

In summary, consistent with HI 41.5–2021, for adaptive pressure controls, DOE proposes to test at each test point at the minimum thresholds for head noted in the manufacturer literature or the head values specified along the reference system curve, whichever is greater. In addition, although not included in HI 41.5–2021, DOE also proposes that if the pump does not have a manual control mode available, the speed would be adjusted based on the pressure control mode with the lowest head at each load point, and if the selected pressure control results in a head value below the reference system curve, the pump would be throttled to achieve a head value at or above the reference system curve.

DOE requests comment on the proposed test methods for circulator pumps with adaptive pressure controls, and in particular on the proposed provisions not included in HI 41.5–2021, including for pumps without a manual control mode, whether throttling should be allowed to achieve head above the reference system curve, or instead head should be allowed below the reference system curve and adjusted back to the curve, as with other non-adaptive pressure controls. DOE also requests comment on the HI 41.5–2021 provision for manual adjustment to achieve 100 percent BEP flow and heat point at max speed, which is not included for other pressure controls.

4. Temperature Control

As previously discussed and as presented in the May 2021 RFI, temperature controls are controls that automatically adjust the speed of the variable speed drive in the pump continuously over the operating speed range to respond to a change in temperature of the operating fluid in the system. Typically, temperature controls are designed to achieve a fixed temperature differential between the supply and return lines and adjust the flow rate through the system by adjusting the speed to achieve the specified temperature differential. Similar to pressure controls, temperature controls are also designed primarily for hydronic heating applications. However, temperature controls may be installed in single- or multi-zone systems and will optimize the circulator pump's operating speed to provide the necessary flow rate based on the heat load in each zone. Unlike pressure controls, there are no minimum head requirements inherent to the temperature control, so temperature controls have the potential to use the least amount energy to serve a given load. 86 FR 24516, 24524.

The CPWG recommended that for circulator pumps distributed in commerce with temperature controls, PER_{CIRC} should be calculated in the same way and with the same weights as for pressure controls, as shown in equation (4).(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #6A at pp. 4–5); 86 FR 24516, 24524.

As temperature controls serve similar hydronic heating applications as pressure controls, the CPWG assigned the same weights, which are representative of the loads the circulator pump is serving. (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 113–115) Specifically, for circulator pumps with temperature controls, the CPWG recommended weights of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #7 at p.6)

Since circulator pumps with temperature controls are not limited by head requirements present in pressure controls and can match the required speed to meet the demand of the system, the head values at the specified flow rates of 25, 50, 75, and 100 percent of BEP flow are not dictated by the control curve logic. As such, the temperature control is able to achieve the exact head values at each flow rate described by the reference system curve (discussed in section III.D.2). Assuming the reference system curve represents a typical system, testing temperature controls along the reference system curve represents their likely performance because temperature controls have the ability to sense and respond precisely to the load on the system.

In addition to the test points, the CPWG also discussed how circulator pumps with temperature control should be controlled during testing. The CPWG discussed how testing temperature controls using conditioned water would be extremely burdensome and expensive. The CPWG discussed that providing less burdensome options for testing would represent a reasonable compromise to reduce the burden associated with testing temperature controls, while still resulting in representative energy performance ratings. (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 282–288) Therefore, the CPWG recommended that circulator pumps with temperature controls be tested based on manual speed adjustment or with a simulated temperature signal to activate the temperature-based control to achieve the test point flow rates with a head at or above the reference curve. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7); 86 FR 24516, 24524.

In the May 2021 RFI, DOE requested comment on the recommended test methods, test points, and weights for circulator pumps with temperature controls. Specifically, DOE requested comment on whether the technology or market for such controls has changed sufficiently since the term sheet to warrant a different approach. 86 FR 24516, 24524.

HI stated that it was not aware of any technical or market changes. (HI, No. 112 at p. 4) Grundfos stated that temperature control is a form of external control (*i.e.,* temperature sensor input to the controller), and that therefore, temperature control should be removed and included as part of external control for testing purposes. Grundfos suggested, however, that in this case manufacturers should be allowed to identify temperature control on their products. (Grundfos, No. 113 at p. 3–4)

DOE notes that the temperature control test method recommended by the CPWG is consistent with that in section 41.5.3.4.3 of HI 41.5–2021. In response to Grundfos, DOE notes that

the CPWG considered the category of external input signal controls as separate from temperature controls. Specifically, the CPWG noted that unlike pressure and temperature controls, for external input signal controls, the logic that defines how the circulator pump operating speed is selected in response to some measured variable (*e.g.,* temperature, pressure, or boiler fire rate) is not integral to the circulator as distributed in commerce. Instead, it is part of another control system, such as a building management system or a boiler control system. (Docket No. EERE–2016–BT–STD–0004, No. 72 at p. 83–84) DOE also notes that the test method recommended by the CPWG and in HI 41.5–2021 for circulator pumps with external input signal controls only and that cannot operate without an external signal control is the same as the test method for circulator pumps with temperature control. However, the CPWG recommended, and HI 41.5–2021 included, a different test method for external input signal controls with other control varieties or that can be operated without external input signal control. The reasons for this difference are discussed in section III.D.6. As such, DOE proposes to remain consistent with the CPWG recommendations and HI 41.5–2021 regarding specification of a temperature control test method.

DOE tentatively determines that the CPWG for temperature controls would allow for temperature controls to be tested in a way that captures the potential energy savings from this control variety without being overly burdensome for manufacturers to conduct. Therefore, DOE proposes to adopt the recommendations of the CPWG to test temperature controls based on manual speed adjustment or with simulated temperature signal to activate the temperature-based control to achieve the test point flow rates with a head at or above the reference system curve. Additionally, DOE proposes to use the weights and test points shown in equation (4) for circulator pumps distributed in commerce with temperature controls.

DOE requests comment on the proposed test methods, test points, and weights for circulator pumps with temperature controls.

5. Manual Speed Control

As discussed previously and as stated in the May 2021 RFI, manual speed controls are a control variety for which the speed of the pump is adjusted manually, typically to one of several pre-set speeds, by a dial or a control panel to fit the demand of the system within which it is installed. The CPWG discussed how circulator pumps installed with manual speed controls are typically only adjusted one time upon installation, if at all, and will operate at that set speed as if it were a single-speed circulator pump. As such, many manual speed control circulator pumps operate at full speed in the field, while a portion of them may be turned down to a medium or low speed to suit the needs of the systems. (Docket No. EERE–2016–BT–STD–0004, No. 65 at pp. 131–133); 86 FR 24516, 24524.

Therefore, the CPWG recommended to test circulator pumps with manual speed controls both: (1) Along the maximum speed circulator pump curve to achieve the test point flow rates for the max speed input power values, and (2) based on manual speed adjustment to the lowest speed setting that will achieve a head at or above the reference curve at the test point flow rate for the reduced speed input power values. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7); 86 FR 24516, 24524.

To accomplish a single rating representative of the ''average'' energy use of a manual speed circulator, the CPWG recommended that for circulator pumps distributed in commerce with manual speed controls, the PER_{CIRC} should be calculated as the weighted average of $P_{in,max}$ (the weighted average input power at specific load points across the maximum speed curve) and $P_{in,reduced}$ (the weighted average input power at specific load points at reduced speed), but recommended separate load points and speed factors, as shown in equations (5), (6), and (7):

$$PER_{CIRC} = z_{max}\left(P_{in_{max}}\right) + z_{reduced}\left(P_{in_{reduced}}\right) \quad \textbf{(5)}$$

Where:

PER_{CIRC} = circulator pump energy rating (hp);

z_{max} = speed factor weight of 0.75;

P_{in_max} = weighted average input power at maximum rotating speed of the circulator (hp), as specified in equation (6);

$z_{reduced}$ = speed factor weight of 0.25; and

$P_{in\_reduced}$ = weighted average input power at reduced rotating speed of the circulator (hp), as specified in equation (7).

$$P_{in_{max}} = \sum_{i} \omega_{i_{max}}\left(P_{in,i_{max}}\right) \quad \textbf{(6)}$$

Where:

P_{in_max} = weighted average input power at maximum speed of the circulator (hp);

w_{i_max} = 0.25;

P_{in,i_max} = power input to the driver at maximum rotating speed of the circulator pump at each test point i (hp); and

i = test point(s), defined as 25, 50, 75, and 100 percent of the flow at BEP.

$$P_{in_{reduced}} = \sum_{i} \omega_{i_{reduced}} \left(P_{in,i_{reduced}} \right) \quad (7)$$

Where:

$P_{in\_reduced}$ = weighted average input power at reduced speeds of the circulator (hp);

$w_{i\_reduced}$ = 0.3333;

$P_{in,i\_reduced}$ = power input to the driver at reduced rotating speed of the circulator pump at each test point i (hp); and

i = test point(s), defined as 25, 50, and 75 percent of the flow at BEP of max speed and head values at or above the reference curve.

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #6B and 7 at pp. 5–6); 86 FR 24516, 24524–24525.

The CPWG specified the speed factor for maximum speed (z_{max}) and reduced speed ($z_{reduced}$) to represent the likelihood that the circulator pump would operate at maximum versus reduced speed, or the likelihood that an installer would turn down the speed of the circulator pump in the field. The CPWG concluded that about 75 percent of the time, circulator pumps with manual speed controls are operated at maximum speed. (Docket No. EERE–2016–BT–STD–0004, No. 71 at p. 377) Therefore, the CPWG recommended that the speed factor for maximum speed (z_{max}) should be 0.75 and the speed factor for reduced speed ($z_{reduced}$) should be 0.25. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #7 at p. 6)

The CPWG concluded that when a circulator pump with manual speed control is installed and set to maximum speed, it operates like a single-speed pump and should receive the same weighting as a circulator pump with no controls for the maximum speed weights, represented as w_{i_max} in equation (6). (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 183–184) For the weights associated with reduced speeds using manual speed controls, the CPWG concluded that equal weighting of 0.3333 for each of the reduced speed points of 25, 50, and 75 percent of BEP flow at maximum speed would best represent the ''average'' performance of the manual speed circulator pump at reduced speed, represented as $w_{i\_reduced}$ in equation (7). (Docket No. EERE–2016–BT–STD–0004, No. 71 at pp. 433–437)

DOE requested comment on the CPWG-recommended test method and the unique test points, weights, and speed factors for circulator pumps distributed in commerce with manual speed controls. Specifically, DOE requested comment on whether the technology or market for such controls has changed sufficiently since the term sheet to warrant a different approach. 86 FR 24516, 24525.

Grundfos recommended that DOE remove manual speed control from the regulation, stating that these pumps should be tested as circulator pumps with no control. (Grundfos, No. 113 at p. 4) Grundfos asserted that these devices are not manually controlled in real application and are simply set at a desired speed, violating the intention of energy savings and the intention of the ability to reduce speed during operation. (Grundfos, No. 113 at p. 3)

DOE notes that the CPWG specifically addressed the issues raised by Grundfos in discussing how the test points at maximum speed were designed to represent the performance at maximum speed and account for operation at maximum speed the majority of the time, while the test points at reduced speed allowed some ''credit'' for being able to reduce speed. (Docket No. EERE–2016–BT–STD–0004, No. 70 at p. 201–202) As stated previously, the CPWG concluded that about 75 percent of the time, circulator pumps with manual speed controls are operated at maximum speed, as reflected in its recommended procedure. (Docket No. EERE–2016–BT–STD–0004, No. 71 at p. 377) For these reasons, DOE proposes to include manual speed control as a test method in the circulator pump test procedure.

HI recommended using the modified testing methodology in HI 41.5–2021 section 41.5.3.4.5 for manual speed control. Specifically, HI believes the minimum system control head should be the value at 25 percent BEP on the reference curve for the manual control (and pressure control) method. HI described its findings that intersecting the pump curve at BEP and requiring the control mode to be above the reference curve was too limiting. HI asserted that this did not represent the controls available in the market, nor did it properly demonstrate the benefit of the onboard controls. HI commented that section 41.5.3.4.5 allows controls to be rated below the reference curve with power correction back to the reference curve. (HI, No. 112 at 5) HI stated that this change eliminates the need for all control curves to exist above the reference curve, allowing for a better presentation of control curves used in the market and for the circulator pump CEI values to better represent a pump's capabilities. (HI, No. 112 at p. 2)

The Advocates supported the update in HI 41.5–2021 that includes a modification to correct for test data below the reference curve, stating that this improves representativeness for many circulator pump models. (Advocates, No. 114 at pp. 1–2) As stated previously, NEEA generally supported adopting HI 41.5–2021 as the test method for pumps, which incorporates these modifications discussed by HI and the Advocates. (NEEA, No. 115 at p. 4)

DOE tentatively determines the CPWG recommendations regarding the test method for manual speed control circulator pumps are appropriate and representative, as they account for the likelihood that a circulator pump with manual speed controls will be installed and operated at maximum speed, but also accounts for the potential energy savings associated with reduced speed operation. However, DOE understands that through stakeholders' experience with using this test method, certain changes to the term sheet recommendations would improve representativeness by capturing the benefit of onboard controls available in the market. Therefore, DOE proposes to test circulator pumps with manual speed controls consistent with the provisions in section 41.5.3.4.5 of HI 41.5–2021, as follows: (1) The tested control must produce head equal to or greater than 25 percent of BEP head at a minimum of one test point (HI 41.5–2021 section 41.5.3.4.5 #2a), and (2) the control curve setting being evaluated must achieve 100 percent BEP flow of the reference curve (HI 41.5–2021 section 41.5.3.4.5 #2b). DOE also proposes that the CER be calculated as the weighted average of $P_{in,max}$ and $P_{in,reduced}$, as shown in equations (5), (6), and (7), but with removal of the requirements for test points to be at or above the reference curve. DOE notes that HI 41.5–2021 section 41.5.3.4.5 #3 still retains that provision, which DOE assumes to be an error based on HI's comments and recommendations in response to the May 2020 RFI.

DOE also notes that the introductory text of HI 41.5–2021 section 41.5.3.4.5 specifies that the test method applies to manual speed control, which can be operated without an external input signal, but DOE also believes this provision is superfluous as manual speed controls by definition do not require an external input signal.

DOE requests comment on the proposed test method and the unique test points, weights, and speed factors for circulator pumps distributed in commerce with manual speed controls.

6. External Input Signal Control

As discussed previously and as stated in the May 2021 RFI, the final control variety considered by the CPWG was external input signal controls. External input signal controls are controls in which the device that responds to the stimulus, or the primary control logic, is external to the circulator pump. Unlike pressure and temperature controls, the logic that defines how the circulator pump operating speed is selected in response to some measured variable (*e.g.,* temperature, pressure, or boiler fire rate) is not part of the circulator, as distributed in commerce. Instead, it is part of another control system, such as a building management system or a boiler control system. (Docket No. EERE–2016–BT–STD–0004, No. 72 at p. 84) 86 FR 24516, 24525.

For circulator pumps that have only an external input signal control, the CPWG recommended testing along the reference control curve to achieve the test point flow rates with a head at or above the reference system curve with the same weights as temperature and pressure controls, as shown in equation (4). The CPWG recommended that, in order to ensure that the rating was representative of the performance of such pumps, the external input signal control must be the only control mode that can be used with the circulator pump, and the circulator pump must not be able to operate without an external input signal. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #9 at pp. 7–8); 86 FR 24516, 24525.

The CPWG asserted that if external input signal control is one of multiple options available on a circulator pump, or the pump is able to operate without an external input signal, it is less likely that the external input signal control option is going to be utilized since it requires external logic and equipment in order to operate properly. (Docket No. EERE–2016–BT–STD–0004, No. 72 at pp. 216–218, 229). The CPWG recommended testing circulator pumps with external input signal controls similar to manual speed controls. (Docket No. EERE–2016–BT–STD–0004, No. 47 at p. 480) Specifically, the CPWG recommended testing a circulator pump sold with external input signal controls and another control variety with a simulated signal both: (1) Along the maximum speed circulator pump curve to achieve the test point flow rates for the max speed input power values and (2) with speed adjustment using a simulated signal to the lowest speed setting that will achieve a head at or above the reference curve at the test point flow rates for the reduced speed input power values. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at pp. 7–8); 86 FR 24516, 24525.

As such, the CPWG recommended that for circulator pumps distributed in commerce with external input signal controls among other control varieties, the PER_{CIRC} should be calculated as the weighted average of $P_{in,max}$ (the weighted average input power at specific load points across the maximum speed curve) and $P_{in,reduced}$ (the weighted average input power at specific load points at reduced speed), similar to circulator pumps with manual speed control, as shown in equation (8), (9), and (10):

$$PER_{CIRC} = z_{max}\left(P_{in_{max}}\right) + z_{reduced}\left(P_{in_{reduced}}\right) \quad \textbf{(8)}$$

Where:

PER_{CIRC} = circulator pump energy rating (hp);

Z_{max} = speed factor weight of 0.30;

$P_{in—max}$ = weighted average input power at maximum rotating speed of the circulator pump (hp);

$Z_{reduced}$ = weighted average input power at reduced rotating speed of the circulator (hp).

$$P_{in_{max}} = \sum_{i} \omega_{i_{max}}\left(P_{in,i_{max}}\right) \quad \textbf{(9)}$$

Where:

$P_{in—max}$ = weighted average input power at maximum speed of the circulator (hp);

$W_{i—max}$ = 0.25;

$P_{in.i—max}$ = power input to the driver at maximum rotating speed of the circulator pump at each test point i (hp);and

i = test point(s), defined as 25, 50, 75, and 100 percent of the flow at BEP.

$$P_{in_{reduced}} = \sum_{i} \omega_{i_{reduced}}\left(P_{in,i_{reduced}}\right) \quad \textbf{(10)}$$

Where:

$P_{in—reduced}$ = weighted average input power at reduced speeds of the circulator pump (hp);

$W_{i—reduced}$ = 0.3333;

$P_{in.i—reduced}$ = power input to the driver at reduced rotating speed of the circulator pump at each test point i (hp); and

i = test point(s), defined as 25, 50, 75 percent of the flow at BEP of max speed and head values at or above the reference curve.

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendations #6B and #7 at pp. 5–6); 86 FR 24516, 24525–24526.

The CPWG recommended the speed factors of 0.30 at maximum speed and 0.70 at reduced speed in order to produce a rating on an equivalent basis as that of a circulator pump with a typical differential pressure control. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #7 at p. 6). In addition, these speed factors would represent the likelihood that a circulator pump with an external input signal control is selected to operate with that external input signal control, and whether the signal it receives results in the circulator pump reducing speed. 86 FR 24516, 24526.

DOE requested comment on the CPWG-recommended test method for circulator pumps distributed in commerce with only external input signal controls, as well as for those distributed in commerce with external input signal controls in addition to other control varieties. Specifically, DOE requested comment on whether the technology or market for such controls has changed sufficiently since the term sheet to warrant a different approach. 86 FR 24516, 24526.

HI stated that it is not aware of any technical or market changes. (HI, No. 112 at p. 5). As stated previously, Grundfos recommended that external input and temperature controls be tested in the same way, with labeling to differentiate these control methods for consumer purposes. Grundfos stated that the functional characteristics are the same between both methods. (Grundfos, No. 113 at p. 4) DOE addressed this comment in section III.D.4.

DOE notes that the CPWG-recommended test method for circulator pumps distributed in commerce with only external input signal controls is generally consistent with that found in section 41.5.3.4.4 of HI 41.5–2021. HI 41.5–2021 contains additional specifications not found in CPWG recommendations that, for circulator pumps with only external input signal control, manual speed adjustment or simulated external input signal can be used to achieve the relevant flow rates (section 41.5.3.4.4.1 #2). DOE also notes that the CPWG-recommended test method for circulator pumps distributed in commerce with external input signal controls in addition to other control varieties is mostly consistent with that found in section 41.5.3.4.4.2 of HI 41.5–2021. However, where the CPWG recommendations specify testing using a simulated signal, whereas HI 41.5–2021 specifies testing using manual speed adjustment (section 41.4.3.4.4.2 #2). In addition, HI 41.5–2021 does not specify using the lowest speed setting that results in a head value at or above the reference system curve; rather, it specifies to manually adjust the speed to achieve the specified flow rates with head at or above the reference control curve (section 41.4.3.4.4.2 #2).

DOE proposes to specify a test method for circulator pumps sold only with external input signal control and that cannot operate without an external input signal. Specifically, DOE proposes to test along the reference system curve to achieve the test point flow rates with a head at or above the reference curve, and that CEI would be calculated as shown in equation (2). DOE also proposes to test circulator pumps sold with external input signal controls along with other controls, or which can be operated without an external input signal control, both: (1) Along the maximum speed circulator pump curve to achieve the test point flow rates for the max speed input power values and (2) with speed adjustment that will achieve a head at or above the reference system curve at the test point flow rates for the reduced speed input power values. DOE proposes that in either case, either manual speed adjustment or simulated external input signal can be used to achieve the relevant flow rates. DOE is not proposing that the speed adjustment include the ''lowest speed setting'' that results in a head value at or above the reference system curve; however, DOE addresses this issue in its enforcement provision proposals (section III.F.2). Finally, DOE proposes that the CEI should be calculated as the weighted average of $P_{in,max}$ and $P_{in,reduced}$, as shown in equations (8), (9), and (10).

Based on consideration of the CPWG recommendations and stakeholder comments, DOE tentatively concludes that the proposed test provisions for circulator pumps distributed in commerce with external input signal controls would produce representative results for such equipment and would not be unduly burdensome to conduct.

DOE requests comment on the proposed test method and the unique test points, weights, and speed factors for circulator pumps distributed in commerce with external input signal controls. In particular, DOE requests comment on whether manual speed adjustment and/or simulated external input signal are appropriate for testing circulator pumps with external input signal only, as well as circulator pumps with external input signal in addition to other control varieties. DOE also seeks comment on whether it is necessary to reference the ''lowest speed setting'' when determining the appropriate test points. Finally, DOE seeks comment on whether the test points and weights for circulator pumps distributed in commerce with external input signal control in addition to other control varieties are appropriately reflective of their energy consumption in the field relative to other control varieties.

7. No Controls

As discussed previously and as stated in the May 2021 RFI, for circulator pumps with no controls,[24] the CPWG recommended testing the pump along the maximum speed circulator pump curve to achieve the test point flow rates of 25, 50, 75, and 100 percent of BEP flow. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7); 86 FR 24516, 24526.

The CPWG also recommended that for circulator pumps distributed in commerce without manual speed controls, pressure controls, temperature controls or external input signal controls, PER_{CIRC} should be calculated with the unique weights and test points as shown in equation (11):

[24] In this document, circulator pumps with no controls are also inclusive of other potential control varieties that are not one of the specifically identified control varieties.

$$PER_{CIRC} = \sum_{i} \omega_i \left(P_{in,i}\right) \quad \textbf{(11)}$$

Where:

PER_{CIRC} = circulator pump energy rating (hp);

w_i = 0.25;

$P_{in,i}$ = power input to the driver at each test point i (hp); and

i = test point(s), defined as 25, 50, 75, and 100 percent of the flow at BEP.

(Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #6A at pp. 4–5); 86 FR 24516, 24526.

The CPWG recommended the 0.25 weights at each test point (*i.e.,* 25, 50, 75, and 100 percent of the flow at BEP) in order to account for the variety of systems and operating points a single-speed circulator pump may encounter. (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 172–173); 86 FR 24516, 24526.

DOE requested comment on the CPWG-recommended test methods, test points, and weights for circulator pumps with no controls. 86 FR 24516, 24526.

HI stated that it is not aware of any changes; however, HI recommended that DOE change the term ''no controls'' to ''full speed'' to ensure market clarity and align with common terminology. (HI, No. 112 at p. 5) Grundfos also recommended that DOE change this name to Full Speed to clarify the intent of the testing and make it clear that this test method is only to define the baseline circulator pump CEI and is not a qualified control method for rating a circulator pump by itself. (Grundfos, No. 113 at p. 4)

DOE notes that the CPWG recommended test method for circulator pumps with no controls is consistent with that in section 41.5.3.4.1 of HI 41.5–2021 (''Determination of CER—Full Speed''). In response to Grundfos, DOE notes that the ''no controls'' test method as recommended by the CPWG and as proposed in this NOPR is a test method for rating a pump that does not have any of the other controls for which a test method is specified. DOE proposes to define this test method separately from the calculation to determine the CER_{STD}. In response to HI, DOE understands that as part of the HI Energy Rating program, manufacturers are using the no controls test to determine the most consumptive rating for their pumps. Therefore, in order to provide regulatory clarity about which pumps must be rated using the ''no controls'' test method, but also accommodate the option for any pump to be rated using the ''no controls'' test method, DOE proposes to refer to this test method in the regulatory text as the test method for circulator pumps without external signal, manual, pressure, or temperature controls (*i.e.,* full speed test). DOE also proposes additional language in the scope section regarding this clarification.

Consistent with the recommendations of the CPWG, DOE proposes to test circulator pumps without external input signal, manual, pressure, or temperature controls along the maximum speed circulator pump curve to achieve the test point flow rates. DOE agrees that since these circulator pumps with no controls are single-speed controls and only have a single speed, testing at maximum speed is representative of the typical operation of circulator pumps with no controls. Additionally, DOE proposes to use equation (11) with the unique weights and test points to test circulator pumps with no controls, with nomenclature updated from PER_{CIRC} to CER.

DOE requests comment on the proposed test method for circulator pumps distributed in commerce with no controls.

E. Determination of Circulator Pump Performance

As stated in the May 2021 RFI, as part of the September 2016 CPWG Recommendations, the CPWG recommended that all test points be tested on a wire-to-water basis, in accordance with HI 40.6–2014, with minor modifications. The CPWG also recommended that if an updated version of HI 40.6 is published prior to publication of the test procedure final rule, DOE should review and incorporate the updated version. (Docket No. EERE–2016–BT–STD–0004, No. 58, Recommendation #10 at p. 8–9); 86 FR 24516, 24526. The CPWG also recommended several modifications related to frequency of data collection, BEP speed, electrical measurement equipment, relevant parameters at specific load points, power supply characteristics, and rounding of values for calculating and reporting purposes. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #10 at pp. 8–9)

Two updated versions of HI 40.6—HI 40.6–2016 and HI 40.6–2021—have been published since the CPWG meetings concluded. Section III.E.1 discusses HI 40.6–2021, the industry standard, which DOE proposes to incorporate by reference, for measuring the performance of circulator pumps, noting the changes made from the previous version of HI 40.6–2014. DOE believes that it is necessary to make several exceptions, modifications, and additions to this test procedure to ensure accuracy and repeatability of test measurements (sections III.E.2.a through III.E.2.c) and that the test method produces results that reflect energy efficiency or energy use during a representative average use cycle without being unduly burdensome to conduct. Additionally, DOE proposes specific procedures for calculating the CEI and rounding of values to ensure that the resultant ratings are determined in a consistent manner (section III.E.2.d).

1. Incorporation by Reference of HI 40.6–2021

As stated in the May 2021 RFI, in 2016, HI published an updated industry standard, HI 40.6–2016, ''Methods for Rotodynamic Pump Efficiency Testing'' (''HI 40.6–2016''). 86 FR 24516, 24526. This update aligned the definitions and procedures described in HI Standard 40.6 with the DOE test procedure for pumps published in the January 2016 TP final rule. Appendix A to subpart Y to 10 CFR part 431. In the September 2020 Early Assessment RFI for pumps, DOE requested comment on the potential effect of incorporating HI 40.6–2016 by reference as the DOE test procedure for pumps. 85 FR 60734, 60737. Grundfos, NEEA, and HI commented that HI expects to publish another standard update in 2021 and urged DOE to incorporate by reference HI 40.6–2021 rather than HI 40.6–2016 (Grundfos, Docket No. EERE–2020–BT–TP–0032, No. 07 at p. 2; NEEA, Docket No. EERE–2020–BT–TP–0032, No. 08 at p. 6; HI, Docket No. EERE–2020–BT–TP–0032, No. 06 at pp. 1, 3). HI specified that HI 40.6–2016 included updates to match DOE's test procedure for pumps, and that HI 40.6–2021 would further include editorial revisions and would add circulator pump testing, and also would not impact measured values, burden, or representativeness. (HI,

Docket No. EERE–2020–BT–TP–0032, No.06 at p. 3); 86 FR 24516, 24526. At the time of the May 2021 RFI development, HI 40.6–2021 was not yet published.

In the May 2021 RFI, DOE sought comment and feedback on whether HI 40.6–2016 or HI 40.6–2021 is an appropriate test method for conducting wire-to-water testing of circulator pumps, as recommended by the CPWG. In addition, DOE sought comment on whether the modifications in HI 40.6–2016 and/or HI 40.6–2021 adequately capture the CPWG recommended modifications in Recommendation #10. 86 FR 24516, 24526.

HI stated that HI 40.6–2021 should be incorporated by reference and that the 2021 edition modified the 2016 version only to add specific testing requirements for circulator pumps. (HI, No. 112 at p. 5) Grundfos also stated that DOE should accept HI 40.6–2021 for incorporation into the regulation and that it provides appropriate testing methods as defined by the CPWG. Grundfos also stated that there were some specific deviations from Recommendation #10 with respect to ''Relevant Parameters at Specific Load Points.'' Specifically, Grundfos stated that while implementing the industry rating program, manufacturers identified that requiring all tested flow points to be within ±10 percent of the reference curve was not feasible for pressure control, especially when operating at constant pressure at heads below the BEP head. Grundfos further stated that the HI committee made modifications to this recommendation in HI 41.5 that preserve the integrity of the calculation of efficiency and allow for these products to be properly tested and labeled. (Grundfos, No. 113 at p. 4–5)

NEEA, the Advocates, and the CA IOUs recommended that DOE adopt HI 41.5–2021 as the test method for circulator pumps. (NEEA, No. 115 at p. 4, Advocates, No. 114 at p. 1, CA IOUs, No. 116 at p. 2) The Advocates stated that an update to the program guideline, HI 41.5–2021, includes a modification to correct for test data below the reference curve and that they understand that this change improves representativeness for many circulator pump models and is consistent with the intent of the term sheets. They also stated that HI 41.5–2021 includes additional minor modifications to improve accuracy and clarity. (Advocates, No. 114 at pp. 1–2) Similarly, NEEA stated that HI 41.5–2021 includes slight modifications from the original term sheet for testing with pressure controls that operate below the reference curve, and that the modifications provide more representative values. (NEEA, No. 115 at p.4)

China made several requests related to specific provisions in the HI 40.6 test procedure. China commented that DOE should present the information related to pump test acceptance grades and corresponding tolerance, referring to Table 8 of part 4.4.1 and the provision of part 4.4.2 in ISO 9906:2012. China recommended that DOE clarify the scientific basis of the selection of the 7 test points which are 40, 60, 75, 90, 100 and 120 percent of the flow rate at the expected BEP. China further recommended that DOE clarify the efficiency testing method for integrated design products of electric pumps. (China, No. 111 at p. 3)

Since publication of the May 2021 RFI, HI has published HI 40.6–2021. DOE has reviewed HI 40.6–2021 and determined that the test methods contained within HI 40.6–2021 are generally consistent with HI 40.6–2014 and are sufficiently specific and reasonably designed to produce test results to determine a CEI that is representative of an average use cycle of applicable circulator pumps. Specifically, Table 40.6.2 of HI 40.6–2021, like HI 40.6–2014, defines and explains how to calculate driver power input,[25] volume per unit time,[26] pump total head,[27] and other relevant quantities, which are essential to determining the metric.

HI 40.6–2021 also contains appropriate specifications regarding the scope of pumps covered by the test method, standard rating conditions, equipment specifications, uncertainty calculations, and tolerances. The electrical measurement specification and associated equipment specifications in section C.4.3 of HI 40.6–2021 contain the relevant measurement specifications for certain non-energy metrics (*i.e.,* true RMS current, true RMS voltage, and real power) that manufacturers may choose to make representations about for each rated circulator pump. These specifications also describe the relevant measurements used in the calculation of true power factor (''PF'') at each applicable load point for each circulator pump control variety, a non-energy metric manufacturers may wish to use to make representations. In addition, HI 40.6–2021 contains a new appendix E with specific test instructions for circulator pumps. DOE notes that section 41.5.3.1 of HI 41.5–2021 references Appendix E of HI 40.6–2021 as the test standard that governs measurements of all test points in the standard. DOE has reviewed HI 40.6–2021 with respect to the minor modifications listed by the CPWG in Recommendation #10. DOE has found that recommendations regarding frequency of data collection are included in section 40.6.5.5.1, and recommendations regarding electrical measurement equipment and power supply characteristics are included in section C.3.4.1 and Table 40.6.3.2.3. The recommendation regarding BEP speed—specifically, to test at max speed with no adjustment to nominal—is addressed in Appendix E of HI 40.6–2021, which excludes sections 40.6.5.5.2, 40.6.6.1, and 40.6.6.1.1, dealing with the specified speed of rotation and translation to that specified speed. The recommendations for relevant parameters at specific load points have been addressed in Appendix E of HI 40.6–2021 as well as HI 41.5–2021, with some modifications. These provisions are discussed in section III.E.2.c of this NOPR. The recommendations for rounding values for calculation and reporting purposes are not addressed in HI 40.6–2021 or HI 41.5–2021; DOE discusses these provisions in section III.E.2.d of this document.

In response to NEEA, the Advocates, and the CA IOUs, DOE does not propose to incorporate by reference HI 41.5–2021 as the test method for circulator pumps, as noted in section II. DOE instead proposes to rely on the industry test standard, HI 40.6–2021, with additional provisions in regulatory text consistent with HI 41.5–2021.

In response to China, with respect to section 40.6.4.4 of HI 40.6–2021, DOE notes that HI 40.6–2021 provides methods to determine energy efficiency as opposed to guaranteeing certain performance (*e.g.,* pump head, flow, power, or efficiency) in a particular application. As such, acceptance grades are not relevant. However, HI 40.6–2021 does define permissible fluctuations in Table 40.6.3.2.2. With respect to the test points in 40.6.5.5.1, DOE discusses these further in section III.E.2.c of this document.

With respect to section 40.6.3 of HI 40.6–2021 and the efficiency testing method of integrated design products of

[25] The term ''driver or control power input'' in HI 40.6–2021 is defined as ''the power input to the driver or control;'' in this NOPR, DOE refers to ''driver power input'' as the power to either the motor or the controls, if present.

[26] The term ''volume per unit time'' in HI 40.6–2021 is defined as ''. . . the volume rate of flow in any given section . . . Also referred to as *flow, flow rate,* and *rate of flow*.''

[27] The term ''pump total head'' is defined in HI 40.6–2021 as ''the algebraic difference between the outlet total head and the inlet total head'' and is used synonymously with the term ''head'' in this document.

electric pumps, DOE is not clear what is meant by ''integrated design products.'' However, section 40.6.4.4 of HI 40.6–2021 discusses determination of pump overall efficiency of a motor pump unit or a complete pump (*i.e.,* bare pump, mechanical equipment, driver and drive coupled together and treated as an integral unit). In addition, Appendix E of HI 40.6–2021 specifies that for circulator pumps, all power measurements must be measured inclusive of the driver, or driver and controls when applicable, and refers to section 40.6.4.4.

After considering stakeholder comments, DOE proposes to incorporate HI 40.6–2021, inclusive of Appendix E, for the purposes of testing circulator pumps, including the minor modifications and additions discussed previously. However, DOE also proposes to exclude certain sections of HI 40.6–2021 that are not relevant to determining the CEI of tested circulator pumps, as discussed in section III.E.2.a. Additionally, there are specifications that the CPWG recommended for the circulator pump test procedure that are not included in HI 40.6–2021, including test arrangements for twin-head circulator pumps and circulators-less-volute specific procedures for calculating the CEI and rounding of values. DOE also discusses determination of driver power input at specified load points, as included in HI 40.6–2021 and HI 41.5–2021, as compared to the CPWG recommendations. These modifications and additions are discussed in sections III.E.2.b through III.E.2.d of this document.

DOE requests comment on the proposal to incorporate by reference HI 40.6–2021, inclusive of Appendix E, into the proposed appendix D to subpart Y, with the exceptions, modifications, and additions described in section III.E.2 of this document.

2. Exceptions, Modifications and Additions to HI 40.6–2021

In general, DOE finds the test methods contained within HI 40.6–2021 are sufficiently specific and reasonably designed to produce test results to determine a CEI that is representative average use cycle of applicable circulator pumps. However, only certain sections of HI 40.6–2021 are applicable to the proposed circulator pump test procedure. In addition, DOE proposes certain exceptions, modifications, and additions to ensure test results are sufficiently repeatable and reproducible, addressed in the subsequent sections III.E.2.a through III.E.2.d of this document.

a. Applicability and Clarification of Certain Sections of HI 40.6–2021

Although DOE is incorporating by reference HI 40.6–2021 as the basis for its test procedure, DOE notes that some sections of the standard are not applicable to the circulator pump test procedure, while other sections require additional specification regarding their applicability when conducting the circulator pump test procedure.

DOE is not proposing to reference section 40.6.4.1, ''Vertically suspended pumps,'' and section 40.6.4.2, ''Submersible pumps,'' of HI 40.6–2021 in the circulator pump test procedure because circulator pumps are IL pumps and are not vertical turbine or submersible pumps. As such, the test provisions applicable to vertical turbine and submersible pumps described in section 40.6.4.1 and section 40.6.4.2 of HI 40.6–2021 would not apply to the circulator pump test procedure.

Additionally, section 40.6.5.5.2 of HI 40.6–2021, ''Speed of rotation during test,'' requires that the speed of rotation to establish flow rate, pump total head, and power input be within the range of 80 percent to 120 percent of the rated speed. However, in the proposed circulated pump test procedure, rated or nominal speeds are not relevant, as DOE is not proposing that speed be measured as part of the test procedure. Similarly, section 40.6.6.1, ''Translation of test results to the specified speed of rotation,'' describes the method by which tested data can be translated to the rated speed of rotation for subsequent calculations and reporting purposes. As DOE is not proposing that speed be measured as part of this circulator pump test procedure, translation of tested results based on speed is not necessary. As a result, DOE is not proposing to reference sections 40.6.5.5.2 and 40.6.6.1 (including 40.6.6.1.1) of HI 40.6–2021. This is consistent with the exclusions for circulator pump testing in Appendix E of HI 40.6–2021.

DOE also proposes to exclude section 40.6.5.3, ''Test report,'' that provides requirements regarding reporting of test results and Appendix B, ''Reporting of test results,'' that refers to DOE's existing reporting requirements at 10 CFR 429.59 for general pumps, both of which are not required for testing and rating circulator pumps in accordance with DOE's procedure. Specifically, the updated appendix B references specific reporting requirements established in the general pumps test procedure, of which not all specifications are applicable to circulator pumps. DOE would propose specific certification and reporting requirements for circulator pumps as part of an energy conservation standard rulemaking, should such standards be proposed.[28]

Finally, DOE proposes to exclude Appendix G, ''DOE compared to HI 40.6 nomenclature,'' which refers to nomenclature used by DOE in the general pumps test procedure (appendix A to subpart Y of 10 CFR part 431), and is not in all cases consistent with the terminology used in the proposed circulator pump test procedure.

In summary, for the reasons stated previously, DOE is not proposing to reference sections 40.6.4.1, 40.6.4.2, 40.6.5.3, 40.6.5.5.2, 40.6.6.1, 40.6.6.1.1, Appendix B, and Appendix G of HI 40.6–2021 as part of the DOE test procedure for circulator pumps.

In addition, DOE notes that Appendix E of HI 40.6–2021 includes modifications to testing in section 40.6.5.5.1 and 40.6.6.3, as discussed in section III.E.2.c of this NOPR. DOE is proposing to reference HI 40.6–2021 inclusive of Appendix E and the modifications therein.

DOE requests comment on its proposal to not reference sections 40.6.4.1, 40.6.4.2, 40.6.5.3, 40.6.5.5.2, 40.6.6.1, 40.6.6.1.1, Appendix B, and Appendix G of HI 40.6–2021 as part of the DOE test procedure for circulator pumps.

b. Testing Twin Head Circulator Pumps and Circulators-Less-Volute

A twin head circulator pump is a type of circulator pump that contains two impeller assemblies, mounted in two volutes that share a single inlet and discharge in a common casing. HI 40.6–2014 does not specify the procedures for testing twin head circulator pumps. In the May 2021 RFI, DOE noted that the CPWG recommended that to test twin head circulator pumps, one of the two impeller assemblies is to be incorporated into an adequate, single impeller volute and casing. An adequate, single impeller volute and casing means a volute and casing for which any physical and functional characteristics that affect energy consumption and energy efficiency are essentially identical to their corresponding characteristics for a single impeller in the twin head circulator pump volute and casing. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #11 at p. 9); 86 FR 24516, 24526–24527.

In the May 2021 RFI, DOE sought comment on whether the

[28] For more information on any energy conservation standard rulemaking for circulator pumps see Docket No. EERE–2016–BT–STD–0004.

recommendation for testing twin-head circulator pumps had been adequately addressed in HI 40.6–2021. 86 FR 24516, 24527. HI stated that in HI 41.5–2021, section 41.5.3 specifies the testing of twin head pumps and refers to HI 40.6 as the testing standard to be used. HI also noted that in section 41.5.1.5.1, the approach for testing twin head circulator pumps aligns with Recommendation #11 from the CPWG. (HI, No. 112 at p. 5) Grundfos commented that HI 40.6 does not directly address twin-head or volute-less products and that DOE would need to specify the testing requirements for these product variants. Grundfos further commented that HI 41.5.3 does identify how to test a twin-head circulator pump and is aligned with the current twin-head testing process that DOE established for IL products in 10 CFR part 431 subpart Y. (Grundfos, No. 113 at p. 5)

DOE has reviewed the test specification for twin head circulator pumps and proposes the test specifications recommended by the CPWG for twin head circulator pumps, which is consistent with section 41.5.3 of HI 41.5–2021 and with stakeholder comments. This proposed treatment of twin head circulator pumps would be consistent with the treatment of twin head pumps in the general pumps test procedure at appendix A to subpart Y of part 431.

DOE requests comment on the proposed test procedure for twin head circulator pumps.

As discussed in section III.B.4, a circulator-less-volute is a circulator pump with a complete motor that is sold without a volute, but for which a paired volute is available in commerce from a manufacturer. HI 40.6–2014 did not specify procedures for testing circulators-less-volute. As stated in the May 2021 RFI, the CPWG recommended that to test circulators-less-volute, the circulator-less-volute should be paired with the specific volute(s) with which the circulator pump is advertised to be paired, based on manufacturer's literature, to determine the CEI rating for each circulator-less-volute and volute combination. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #12 at p. 9); 86 FR 24516, 24527.

In the May 2021 RFI, DOE sought comment on whether the recommendation for circulators-less-volute had been adequately addressed in HI 40.6–2021. 86 FR 24516, 24527. Grundfos stated that HI 40.6 does not directly address volute-less products and that DOE would need to define the testing requirements for this product variant. For testing of circulating pumps without volutes, Grundfos stated that a ''reference volute'' can be used for testing purposes, in which the manufacturer defines the volute to be used during testing, and that this same process is used in the regulated EU market. (Grundfos, No. 113 at p. 1–2, 5) China stated that the test method of circulator-less-volute pumps has not been specified and that DOE should define the test method for these pumps. (China, No. 111 at p. 3)

DOE notes that HI 41.5–2021 does not address circulators-less-volute. As such, DOE is proposing instructions for testing circulators-less-volute. Specifically, consistent with CPWG recommendations and Grundfos' comment, DOE proposes that the circulator-less-volute would be paired with specific volute(s) with which the circulator-less-volute is offered for sale or advertised to be paired with, and that the combination would be subject to the proposed applicable DOE test procedure for that circulator-less-volute model.

DOE recognizes that circulators-less-volute may be offered for sale or advertised to be paired with multiple volutes, and that each combination may have a different CEI. Since each of these volutes may impact the CEI rating, each volute and circulator-less-volute pairing would represent a unique pairing. Therefore, DOE proposes that the CEI for each volute and circulator-less-volute pairing be determined separately. In the context of other equipment, DOE provides that manufacturers may elect to group similar individual models within the same equipment class into the same basic model to reduce testing burden, provided all representations regarding the energy use of individual models within that basic model are identical and based on the most consumptive unit. *See* 76 FR 12422, 12429 (Mar. 7, 2011). DOE proposes to allow manufacturers of circulator pumps to group similar volute and circulator-less-volute pairings within a given basic model rating to minimize testing burden, while still ensuring that the CEI rating is representative of minimum efficiency or maximum energy consumption of the group. Circulator-less-volute manufacturers could opt to make representations of the CEI of each individual circulator-less-volute and volute combination, or could elect to make CEI representations regarding a circulator-less-volute combined with several individual volutes and rate the group with the same representative CEI value, which would be representative of the least efficient model.

DOE requests comment on the proposed test procedure for circulators-less-volute. Specifically, DOE seeks comment as to any additional details that should be addressed in testing a circulator-less-volute with any given volute to determine applicable CEI values.

c. Determination of Circulator Pump Driver Power Input at Specified Flow Rates

The CPWG recommended that for single speed circulator pumps, the measured input power and flow data corresponding to the load points from 60 percent of expected BEP flow to 120 percent of expected BEP flow be linearly regressed and the input power at the specific load points of 25, 50, 75, and 100 percent of BEP flow be determined from that regression equation. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #10 at p. 8) Appendix E of HI 40.6–2021 provides the following testing modifications for circulator pumps, which differ from the CPWG recommendations:

- Section 40.6.5.5.1 Test procedure—A minimum of nine test points shall be taken for all performance tests. Points are to be selected at approximately 10 percent, 25 percent, 40 percent, 60 percent, 75 percent, 90 percent, 100 percent, 110 percent, and 120 percent of the flow rate at the expected BEP of the circulator pump.
- Section 40.6.6.3 Performance curve—Determine the pump total head versus flow rate curve only based on a polynomial of the 6th order.
- Section 40.6.6.3 Performance curve—Determine the driver power input at 25 percent, 50 percent, 75 percent, and 100 percent of BEP based on a 3rd order polynomial curve of best fit of the tested values (as specified in Section 40.6.5.5.1) at 10 percent, 25 percent, 40 percent, 60 percent, 75 percent, 90 percent, 100 percent, 110 percent, and 120 percent of expected BEP flow rate.

In response to the May 2021 RFI, China commented that the seven test points (*i.e.,* 40, 60, 75, 90, 100 and 120 percent of the flow rate at the expected BEP of the pump) in section 40.6.5.5.1 are approximately selected, and that these selected points are different from those of PEI. China recommended that DOE clarify the basis of the selection of these seven points. (China, No. 111 at p. 3)

DOE notes that Appendix E to HI 40.6–2021 has modified the provision referenced by China. DOE has reviewed Appendix E and determined that unlike general pumps, which require load points at 75, 100, 110, and 120 percent

of BEP flow, Appendix E requires determining the driver power input at 25, 50, 75, and 100 percent of BEP flow. If DOE were to define the lowest test point as 40 percent, the lowest required drive power input point (25 percent) would fall outside the range of tested points (*i.e.,* 40 percent to 120 percent). Whereas, if DOE were to define the lowest test point as 10 percent, the lowest required drive power input point (25 percent) would fall withing the range of tested points (*i.e.,* 10 percent to 120 percent). DOE tentatively concludes that specifying a test range, which is broader than the range for which driver power input must be determined, through the use of a mathematical regression would result in more accurate driver power input values than a test range that is narrower than the range for which driver power input must be determined. Therefore, DOE has preliminarily determined that it is appropriate, consistent with Appendix E of HI 40.6–2021, to require test points starting at 10 percent rather than a higher value such as 40 percent or 60 percent of expected BEP flow. Therefore, DOE proposes to rely on the modified test points in Appendix E of HI 40.6–2021. DOE notes that Appendix E also specifies curve fitting using specific polynomial curves of best fit (6th order for head versus flow and 3rd order for power versus flow). DOE has no reason to believe that these curves are not appropriate, and as such, proposes to rely on the curve fitting in Appendix E of HI 40.6–2021.

DOE requests comment on its proposal to adopt the provisions in Appendix E of HI 40.6–2021 for determining circulator pump driver power input at specified flow rates, including whether these provisions are more appropriate than those recommended by the CPWG.

DOE notes that the procedure specified in section 40.6.6.3 and Appendix E of HI 40.6–2021 is applicable for test points gathered at maximum speed, but the other test points proposed for circulator pumps with pressure controls, temperature controls, manual speed controls, and external input signal controls are not specified in HI 40.6–2016. For circulator pumps with pressure controls, temperature controls, manual speed controls, and external input signal controls, the general test procedure consists of ''sweeping'' the maximum speed curve (*i.e.,* taking measurements at flow intervals along the head/flow curve associated with maximum pump speed) to determine BEP, adjusting the pump to the determined BEP at maximum speed, and then adjusting the speed of the pump according to the applicable control or reference system curve to achieve the specified load points at 25, 50, 75 percent of BEP flow at reduced speed. As such, for these test points, unlike the test points at maximum speed derived from the data collected to determine BEP, manufacturers would adjust the operation of the pump to specifically achieve the load points at 25, 50, 75, and 100 percent of BEP flow, as applicable. Due to experimental uncertainty the specific test points measured in the test protocol may not be exactly at 25, 50, 75, or 100 percent of the BEP flow load points specified in the test procedure and, thus, the relevant power input measurements must be adjusted to reflect the power input at the specific load points specified in the test procedure. DOE notes that HI 40.6–2021 does not specify the tolerances around which the specified flow values must be achieved or how to adjust the test points to the specified load points, accounting for such experimental tolerance.

The CPWG recommended that for circulator pumps with pressure controls, manual speed controls, temperature controls, and external input signal controls, all tested flow values must be within ±10 percent of the target flow load points as specified by the reference system curve. In addition, the CPWG recommended that the tested driver input power should be adjusted to the specified flow and head points, except that any head values that are above the reference system curve by more than 10 percent should not be adjusted. The CPWG also clarified that, in their recommendation, if the tested head value is below the reference curve by more than 10 percent, the circulator pump must be retested. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #10 at p. 8) While not specifically recommended, the CPWG discussed adjusting the test points proportionally, consistent with the method for adjusting reduced speed test points adopted in the January 2016 TP final rule. *See* 81 FR 4086, 4155–4156 (Jan. 25, 2016); (Docket No. EERE–2016–BT–STD–0004, No. 70 at pp. 325–328)

HI 41.5–2021 includes certain modifications to these provisions, as noted by HI in their comments. Specifically, under HI 41.5–2021, all tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve. (HI 41.5–2021 section 41.5.3.4.2 #3c, 41.5.3.4.3, 41.5.3.4.4.1–2, 41.5.3.45) HI stated that this change limits the pump efficiency ranges allowed for a given test point and minimizes variation in CEI values for a given test. In addition, any head values that are above the reference system curve (including within 10 percent) are not adjusted. HI stated that this change eliminates a discontinuity in CEI values when transitioning between corrected and uncorrected values and allows for better representation of pump CEI. Finally, for pressure control and manual speed control, tested head is allowed to be below the reference curve and corrected back to the reference curve. HI stated that this change eliminates the need for all control curves to exist above the reference curve allowing for a better representation of control curves used in the market and for the circulator pump CEI values to better represent a pump's capabilities. (HI, No. 112 at p.2) These provisions are found throughout each of the individual control variety test methods in HI 41.5; a summary is available in 41.5.1. As stated previously, HI, NEEA, the CA IOUs, and the Advocates supported use of HI 41.5–2021. (HI, No. 112 at p. 2; NEEA, No. 115 at p. 4, Advocates, No. 114 at p. 1, CA IOUs, No. 116 at p. 2).

DOE interprets HI 41.5–2021's updated provision to reduce the tested flow tolerance to ±5 percent of the target flow load points as an indication that this tolerance has been achievable in tests.

DOE notes that HI's comment and the Introduction to HI 41.5–2021 (section 41.5.1) state that correction of power to the reference curve above the reference curve has been removed. However, in section 41.5.3.4.2 (pressure speed control) and 41.5.3.4.5 (manual speed control), the test method says ''Adjust measured driver input power to the specific flow and head points as defined in [the reference curve], except do not adjust for head values when head is at or above the reference curve.'' This indicates that driver input power measured above the reference curve should still be adjusted based on deviation from the flow point. In addition, section 41.5.3.4.3 (temperature speed control) and 41.5.3.4.4 (external input signal speed control) still retain the provision not to adjust for head values that are above the reference curve by more than 10 percent.

DOE proposes to incorporate the provisions in HI 41.5–2021, rather than removing all correction of power measured above the reference curve for all test methods. DOE believes that correction for flow points within the tolerance is still appropriate. If stakeholders comment that the test methods in HI 41.5–2021 have been implemented incorrectly and that all correction of power above the reference

curve should be removed, and provide accompanying support, DOE will consider adopting the provisions in HI 41.5–2021. DOE understands that artificially adjusting head values significantly above the reference system curve back to the reference system curve would result in an unrepresentative CEI rating.

DOE notes that in the case that the tested head value is within 10 percent of the reference system curve, it is likely that the tested circulator pump could achieve the specified flow and head values along the reference system curve and that the deviation in head, in this case, would likely be due to experimental uncertainty. DOE notes that unlike pressure controls and manual speed controls, circulator pumps with temperature controls and circulator pumps with external input signal controls should be able to match the required speed to meet the exact head values at each flow rate described by the reference system curve. Therefore, DOE believes that continuing to adjust for head values within 10 percent above the reference curve would not be likely to cause any discontinuity in CEI for these control methods.

Regarding permitting testing below the reference curve for pressure control and manual speed control, DOE proposes these changes to the CPWG recommendations in sections III.D.3 and III.D.5 of this document. DOE also agrees that given testing below the curve would be permitted, the measured test points should be corrected back to the reference curve, as included in HI 41.5–2021.

DOE notes that the proposed load points are specified with a discrete flow value (*i.e.,* 25, 50, 75, and/or 100 percent of BEP flow) and, for temperature control and external input signal controls, a minimum head value (*i.e.,* at or above the reference system curve). Therefore, as proposed the flow values must be achieved within ±5 percent and, for temperature controls and external input signal controls, the tested head values must not be more than 10 percent below the reference system curve. Any test point with a flow value that is more than ±5 percent away from the specified value or, for temperature controls and external input signal controls, a head value is more than 10 percent below the reference system curve would be invalid and, therefore, must be retested.

DOE also proposes to adjust the tested driver input power values for all relevant test points for circulator pumps with temperature and external input signal controls using the methods adopted in the January 2016 TP final rule and discussed by the Circulator Pump Working Group. Specifically, DOE proposes that if the tested flow values are within ±5 percent of the flow load point specified by the reference system curve and the head values are within ±10 percent of the head load points specified by the reference system curve, the tested driver input power values would be proportionally adjusted to the specified flow and head points, as shown in equation (12):

$$P_{R,i} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right)P_{T,j} \quad \textbf{(12)}$$

Where:

$P_{R,i}$ = the driver power input (hp);
$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);
$H_{T,j}$ = the tested head at load point j (ft);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,j}$ = the tested driver power input at load point j (hp).

DOE also proposes that for pressure controls and manual speed controls, if the tested flow values are within ±5 percent of the flow load point specified by the reference system curve and the tested head values are below the head load points specified by the reference system curve, the tested driver power input values would be proportionally adjusted to the specified flow and heat points as shown in equation (12).

Finally, DOE proposes, consistent with the recommendations of the CPWG and the modifications in HI 41.5–2021, that for temperature controls and external input signal controls, if the tested head values are above the reference system curve by more than 10 percent, or for pressure controls and manual speed controls, if the tested head values are above the reference system curve at all, only the flow values would be proportionally adjusted to the specified value, as shown in equation (13):

$$P_{R,i} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right)P_{T,j} \quad \textbf{(13)}$$

Where:

$P_{R,i}$ = the driver power input (hp);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,j}$ = the tested driver power input at load point j (hp).

With regards to the test points to which the tolerance and adjustment methods are applicable, DOE notes that the CPWG recommended that ''all'' test points for circulator pumps with pressure controls, temperature controls, manual speed controls, or external input signal controls apply the specified tolerances and adjustment methods. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #10 at pp. 8–9) However, DOE believes that the curve fitting method for determining driver power input at the specified load points at maximum speed is more applicable and less burdensome for many of the maximum speed test points than requiring retesting along the maximum

speed curve to achieve those test points within ±10 percent. Specifically, for manual speed controls and external input signal controls in addition to other control varieties, as discussed in detail in section III.D, the proposed test methods and CEI calculation methods require load points be determined at 25, 50, 75, and 100 percent of BEP flow along the maximum speed curve, as well as at 25, 50, and 75 percent of BEP flow at reduced speeds. For the test points at reduced speed, DOE believes, as recommended by the CPWG, the proposed tolerances and proportional adjustment would be applicable. However, for the test points at 25, 50, and 75 percent of maximum speed, DOE believes that it would be less burdensome and more consistent with the proposed testing of circulator pumps with no controls to determine such test points via curve fitting of the BEP test data at maximum speed. DOE believes this is consistent with section 41.5.3.4.4.2 and 41.5.3.4.5 of HI 41.5–2021. With regard to the test point at 100 percent of BEP flow and maximum speed, DOE notes that, in order to test such circulator pump models, the circulator pump must be adjusted to a test point at 100 percent of BEP flow and maximum speed before reducing the speed in accordance with the control logic to achieve the reduced speed values. As such, DOE believes that using the tested value at 100 percent of BEP flow and maximum speed as opposed to the value determined via curve fitting would be more accurate and would not increase the burden of the testing. DOE notes that this proposal is inconsistent with HI 41.5–2021, which includes the 100 percent point as part of the points determined by curve fitting, rather than as a measured test point. DOE requests comment on this deviation. Table III.3 summarizes the proposed applicability of the different adjustment methods to the various test points for each circulator pump variety.

TABLE III.3—SUMMARY OF APPLICABLE ADJUSTMENT METHOD FOR DIFFERENT TEST POINTS FOR ALL CONTROL VARIETIES

Control variety	Test points that would be determined via curve fitting	Test points that must be achieved within any specified tolerance and would be determined via proportional adjustment
Pressure controls	None	All (25, 50, 75, and 100 percent of BEP flow).
Temperature Controls	None	All (25, 50, 75, and 100 percent of BEP flow).
Manual Speed Controls	25, 50, and 75 percent of BEP flow at maximum speed.	25, 50, and 75 percent of BEP flow at reduced speed and 100 percent of BEP flow at maximum speed.
External Input Signal Controls	25, 50, and 75 percent of BEP flow at maximum speed.	25, 50, and 75 percent of BEP flow at reduced speed and 100 percent of BEP flow at maximum speed.

DOE requests comment on the proposal that for circulator pumps with pressure and manual speed controls, if all the tested flow values are within ±5 percent of the flow load points specified by the reference curve and tested head values are below the head load points specified by the reference curve, the tested driver power input values would be proportionally adjusted to the specified flow and head points. If the tested head values are above the reference system curve, only the flow values would be proportionally adjusted to the specified value. DOE requests comment on whether HI intended to remove all power correction (including flow correction) above the reference curve for pumps with pressure and manual speed controls.

DOE requests comment on the proposal that for temperature and external input signal controls, if all the tested flow values are within ±5 percent of the flow load points specified by the reference system curve and all the tested head values are within ±10 percent of the head load points specified by the reference system curve, the tested driver power input values would be proportionally adjusted to the specified flow and head points. If the tested head values are above the reference system curve by more than 10 percent, only the flow values would be proportionally adjusted to the specified value. DOE requests comment on whether HI intended to remove all power correction above the reference curve for temperature and external input signal controls.

DOE also requests comment on the proposed applicability of the tolerance and proportional adjustment method to the various test points, as compared to the curve fitting method, based on circulator pump control variety. DOE particularly requests comment on which category is most appropriate for the 100 percent of BEP flow point.

d. Calculation and Rounding Modifications and Additions

DOE notes that HI 40.6–2014 did not specify how to round values for calculation and reporting purposes. DOE recognizes that the manner in which values are rounded can affect the resulting CEI and CEI values should be reported with the same number of significant digits. Therefore, to improve the consistency of calculations, the CPWG recommended that that all calculations be performed with the raw measured data, to ensure accuracy, and that the resultant PER_{CIRC} and PEI_{CIRC} be rounded to 3 significant figures. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #10 at p. 8) DOE notes that neither HI 40.6–2021 nor HI 41.5–2021 include any rounding provisions.

DOE agrees with the CPWG regarding its recommendation to perform all calculations with the raw measured data and to round the resultant CER, CEI, and other relevant measurements and calculations in a standardized manner. In the established provisions for general pumps, PEI is rounded to the nearest hundredths place (*i.e.,* 0.01). See section I.D.3 of appendix A to subpart Y of part 431. To be consistent with the general pumps provisions, DOE proposes to round CER to three significant figures and to round CEI to the nearest hundredths place. Additionally, DOE proposes to calculate relevant non-energy metrics using the raw measured data and to round to the following: BEP flow at maximum speed and BEP head at maximum speed values to three significant figures; real power, true RMS current, and true RMS voltage values to the tenths place (*i.e.,* 0.1); and hydraulic horsepower and true power factor values to the hundredths place unless otherwise specified.

DOE requests comment on the proposal that all calculations be performed with the raw measured data, to ensure accuracy, and to round CER, BEP flow at maximum speed and BEP head at maximum speed values to three significant figures; real power, true RMS

current, and true RMS voltage values the tenths place (*i.e.,* 0.1); and CEI, hydraulic horsepower, and true power factor values to the hundredths place (*i.e.,* 0.01).

3. Rated Hydraulic Horsepower

As discussed in section III.B.2, the proposed definitions of dry rotor, two-piece circulator pumps and dry rotor, three-piece circulator pumps each contain a clause that the pump must have a rated hydraulic power less than or equal to 5 hp at BEP at full impeller diameter. Accordingly, DOE proposes nomenclature to consistently refer to and categorize dry rotor circulator pumps based on the hydraulic horsepower they can produce at BEP and full impeller diameter, as measured in accordance with the proposed circulator pump test procedure. DOE notes that hydraulic horsepower (termed pump power output [29]) is defined in HI 40.6–2021, which DOE proposes to incorporate by reference (see section III.E.1). HI 40.6–2021 also contains a test method for determining pump power output. However, HI 40.6–2021 includes methods for determining pump power output at any load point.

To specify the pump power characteristic that DOE proposes to use to describe the size of dry rotor circulator pumps, DOE proposes to introduce a new term, the ''rated hydraulic horsepower,'' that is identified as the measured hydraulic horsepower at BEP and full impeller diameter for the rated pump. DOE believes that measuring and reporting rated hydraulic horsepower at BEP and full impeller diameter for each dry rotor circulator pump variety would result in the most consistent determination of applicability of this circulator pump test procedure.

DOE requests comment on the proposal to use rated hydraulic horsepower, identified as the measured hydraulic horsepower at BEP and full impeller diameter for the rated pump, as the primary standardized metric to determine the scope of applicability of dry rotor circulator pumps in this circulator pump test procedure.

F. Sampling Plan and Enforcement Provisions for Circulator Pumps

For determining the proposed representative values (*i.e.,* both the proposed energy- and non-energy-related metrics) for each basic model, DOE proposes that manufacturers must use a statistical sampling plan of tested data, consistent with the sampling plan for pumps that is currently specified at 10 CFR 429.59. In addition, DOE is proposing specific enforcement procedures that DOE would follow when testing equipment to verify compliance of any circulator pump basic model. The following sections III.F.1 and III.F.2 discuss DOE's proposed sampling plan and enforcement provisions for circulator pumps.

1. Sampling Plan

DOE provides, in subpart B to 10 CFR part 429, sampling plans for covered equipment. The purpose of a statistical sampling plan is to provide a method to determine representative values of energy- and non-energy-related metrics, for each basic model. In the January 2016 TP final rule, DOE adopted sampling provisions applicable to pumps that were similar to those used for other commercial and industrial equipment. 81 FR 4086, 4135–4136 (Jan. 25, 2016). *See also* 10 CFR 429.59.

For circulator pumps, DOE proposes to adopt statistical sampling plans similar to that adopted for pumps. That is, DOE proposes to amend 10 CFR 429.59 to require that, for each basic model of pump (including circulator pumps), a sample of sufficient size must be randomly selected and tested to ensure that any representative value of CEI or other measure of energy consumption of a basic model for which customers would favor lower values is greater than or equal to the lower of the following two values:

(1) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and $\bar{x}$ is the sample mean, n is the number of samples, and x_i is the maximum of the i^{th} sample;

Or,

(2) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean, s is the sample standard deviation, n is the number of samples, and $t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with $n-1$ degrees of freedom (from appendix A of subpart B of 10 CFR part 429).

Under this proposal, for purposes of certification testing, the determination that a basic model complies with the applicable energy conservation standard would be based on testing conducted using the proposed DOE test procedure and sampling plan. The general sampling requirement currently applicable to all covered products and equipment provides that a sample of sufficient size must be randomly selected and tested to ensure compliance and that, unless otherwise specified, a minimum of two units must be tested to certify a basic model as compliant. 10 CFR 429.11(a)–(b).

DOE proposes to apply this same minimum sample size requirement to circulator pumps. Thus, if a statistical sampling plan is used, DOE proposes that a sample of sufficient size be selected to ensure compliance and that at least two units must be tested to determine the representative values of applicable metrics for each basic model. Manufacturers may need to test a sample of more than two units depending on the variability of their sample, as provided by the statistical sampling plan.

DOE notes that the proposed sampling provisions would be applicable to all energy-related metrics for which each manufacturer elected to make representations. DOE believes that, similar to other pumps, a UCL of 0.95 divided by a de-rating factor of 1.05 would also be applicable to circulator pumps, based on the variability inherent in the test procedure and manufacturing variability among units within a given model. Specifically, DOE notes that the proposed circulator pump test procedure is based on the same fundamental test standard (*i.e.,* HI 40.6–2021), with identical equipment accuracy requirements and test tolerances. In addition, DOE believes circulator pumps would realize similar performance variability to other commercial and industrial equipment, such as general pumps and dedicate-purpose pool pumps, based on a statistical analysis conducted by DOE discussed in section III.F.2 of this document.

In addition to CEI, the rated hydraulic horsepower would also be an important characteristic for determining the applicability of the proposed test procedure to a given circulator pump model. Specifically, rated hydraulic horsepower would determine the scope of applicability of the proposed test procedure for dry-rotor close-coupled circulator pump and dry-rotor mechanically-coupled circulator pump (see section III.B.2). DOE proposes that the representative value of rated

[29] The term ''pump power output'' in HI 40.6 is defined as ''the mechanical power transferred to the liquid as it passes through the pump, also known as pump hydraulic power.'' It is used synonymously with ''hydraulic horsepower'' in this document. However, where hydraulic horsepower is used to reference the size of a dry rotor circulator pump, it refers to the rated hydraulic horsepower.

hydraulic horsepower be determined as the average of all the tested units that serve as the basis for the rated efficiency for that basic model. Similarly, the true power factor and the flow and head at BEP at each load point are important characteristics that may aid utilities in crafting incentive programs regarding circulator pumps or aid customers in properly selecting circulator pumps. As discussed in section III.E.1, DOE notes that HI 40.6–2021 specifies measurement equipment for determining the circulator pump performance characteristics of true RMS current, true RMS voltage, input power, and the flow and head at BEP at each load point. Additionally, as discussed in section III.E.1, DOE discussed how to calculate true power factor based on the measurements of true RMS current, true RMS voltage, and real power. To ensure such values are determined in a consistent manner, DOE also proposes that true RMS current, true RMS voltage, true power factor, input power, and the flow and head at BEP at each load point be determined based on the average of the test results, for each metric, from all the tested units that serve as the basis for the rating for that basic model.

Finally, consistent with provisions for other commercial and industrial equipment, DOE notes the applicability of certain requirements regarding retention of certain information related to the testing and certification of circulator pumps, which are detailed under 10 CFR 429.71. Generally, manufacturers must establish, maintain, and retain certification and test information, including underlying test data for all certification testing for 2 years from the date on which the circulator pump model is discontinued in commerce.

DOE requests comment on the proposed statistical sampling procedures and certification requirements for circulator pumps.

2. Enforcement Provisions

Enforcement provisions govern the process DOE would follow when performing an assessment of basic model compliance with standards, as described under subpart C of 10 CFR part 429. Specifically, subpart C of 10 CFR part 429 describes the notification requirements, legal processes, penalties, specific prohibited acts, and testing protocols related to testing covered equipment to determine or verify compliance with standards. DOE proposes that the same general enforcement provisions contained in subpart C of 10 CFR part 429 would be applicable to circulator pumps.

Related to enforcement testing of circulator pumps, as specified in 10 CFR 429.110(e)(1), DOE proposes that it would conduct the applicable circulator pump test procedure, once adopted, to determine the CEI for tested circulator pump models. In this rulemaking, DOE is proposing circulator-pump specific enforcement testing provisions for 10 CFR 429.134.[30] Specifically, if a manufacturer did not certify a control setting, DOE would test the circulator pump model using the no controls test method if no controls were available, or if controls are available, DOE would test using the test method for any one of the available control varieties on board.

DOE requests comment on how, absent information on the tested control method for a basic model, DOE should determine which test method to conduct.

The CPWG recommended that for pressure controls, manufacturers choose the factory control logic to test, report the control setting used for rating, and report the method of control (automatic speed adjustment, manual speed adjustment, or simulated pressure signal adjustment). (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7) However, DOE proposes that it would test using the specified control curve, but would always use the automatic control option for testing of pressure controls, to ensure that any rated CEI is representative of commercially available performance, as distributed in commerce (see section III.D.3). In addition, for circulator pumps rated with adaptive pressure controls, DOE proposes to test the circulator pump using the manual control option that results in the lowest head values at each test point below maximum speed. This would ensure that, if the minimum head thresholds are not accessible via the commercially available control with which the pump is distributed in commerce, a representative CEI can still be obtained for the compliance of that circulator pump to be assessed. If a specified control curve is not available, DOE proposes to test using any control that meets the requirements specified in the pressure control test method. DOE would consider adopting more specific provisions in the final rule given feedback on the most appropriate selection criteria.

For manual speed controls and external input signal controls, the CPWG recommended testing at the lowest speed setting that will achieve a head at or above the reference curve. (Docket No. EERE–2016–BT–STD–0004, No. 58 Recommendation #9 at p. 7–8) As discussed in section III.D.6, this requirement has been removed in HI 41.5–2021. For external input signal controls and temperature controls, DOE proposes that it would conduct enforcement testing with this provision. DOE understands that if manual speed control testing is allowed below the reference curve, this provision would not be applicable to certification testing. However, to provide certainty as to how DOE would conduct enforcement testing DOE proposes to specify that it would conduct testing using the speed setting closest to each of the head points specified by the reference system curve (above or below).

DOE requests comment on the proposed product-specific enforcement testing provisions for circulator pumps, particularly with regard to the appropriate control curve for pressure controls (when not specified) and the appropriate speed settings for other control methods.

In addition, DOE believes that, as circulator pumps have relatively large shipments and are generally a high-volume piece of equipment, DOE should apply the enforcement testing sample size and calculations applicable to consumer products and certain high-volume commercial equipment specified in appendix A to subpart C of 10 CFR part 429. Therefore, DOE proposes to use, when determining performance for a specific basic model, the enforcement testing sample size, calculations, and procedures laid out in appendix A to subpart C of 10 CFR part 429 for consumer products and certain high-volume commercial equipment. These procedures, in general, provide that DOE would test an initial sample of at least 4 units and determine the mean CEI value and standard error of the sample. DOE would then compare these values to the CEI standard level, once adopted, to determine the compliance of the basic model or if additional testing (up to a total of 21 units) is required to make a compliance determination with sufficient confidence.

DOE notes that this proposal differs from the enforcement testing sample size and calculations for DOE adopted for general pumps in the January 2016 TP final rule. Specifically, in the January 2016 TP final rule, DOE adopted provisions at 10 CFR 429.110(e)(5) [31] stating that DOE would

[30] DOE intends to propose certification requirements in a separate energy conservation standards rulemaking.

[31] DOE notes that the 2016 general pumps TP final rule were originally adopted into 10 CFR 429.110(e)(1)(iv), but a recent rulemaking for battery

Continued

assess compliance of any pump basic models undergoing enforcement testing based on the arithmetic mean of up to four units. 81 FR 4086, 4121 (Jan. 25, 2016). In the August 2017 DPPP TP final rule, DOE also adopted the enforcement testing sample provisions in appendix A and clarified that the enforcement provisions adopted in the January 2016 TP final rule and specified at 10 CFR 429.110(e)(5) are only applicable to those pumps subject to the test procedure adopted in the January 2016 TP final rule. 82 FR 36858, 36910. DOE believes that circulator pumps should be treated similarly to DPPP because of the shipments and high volume of the equipment.

DOE requests comment on the proposal to apply to circulator pumps the enforcement testing sample size, calculations, and procedures laid out in appendix A to subpart C of 10 CFR part 429.

In addition, the rated hydraulic horsepower would be necessary to determine the scope of applicability of the test procedure to certain circulator pump varieties (*i.e.,* dry-rotor close-coupled circulator pump and dry-rotor mechanically-coupled circulator pump, see section III.B.2). Therefore, DOE is also proposing specific procedures to determine the rated hydraulic horsepower of tested circulator pumps when verifying compliance. When determining compliance of any units tested for enforcement purposes, DOE proposes that, if the rated hydraulic horsepower determined through DOE's testing (either the measured rated hydraulic horsepower for a single unit sample or the average of the measured rated hydraulic horsepower values for a multiple unit sample) is within 5 percent of the certified value of rated hydraulic horsepower, then DOE would use the certified value of rated hydraulic horsepower as the basis for determining the scope of applicability for that circulator pump model. However, if DOE's tested value of hydraulic horsepower is not within 5 percent of the certified value of hydraulic horsepower, DOE would use the arithmetic mean of all the hydraulic horsepower values resulting from DOE's testing when determining the scope of applicability for the circulator pump model. DOE believes such an approach would result in more reproducible and equitable compliance determinations among DOE, manufacturers, and test labs.

The 5 percent tolerance on hydraulic horsepower is based on a statistical analysis DOE conducted of the maximum allowed testing uncertainty due to fluctuations in measurements, measurement uncertainty, and the typical manufacturing uncertainty. The maximum experimental uncertainty is discussed in HI 40.6–2021, which DOE proposes to incorporate by reference in the DOE test procedure (section III.E.1). DOE estimated the manufacturing variability based on the maximum tolerances on head and flow that are allowed in the ANSI/HI 14.6–2011 standard tolerance grade 1B. Specifically, ANSI/HI 14.6–2011 requires that the tested flow be within ±5 percent of the pump performance curve and the tested head be within ±3 percent of the pump performance curve for the acceptance grade 1B. DOE recognizes that these are all worst-case uncertainties and that testing a unit with the maximum possible variability in every parameter would be extremely unlikely. Therefore, DOE assumed that the maximum uncertainty would represent a worst case. For the purposes of analysis, DOE assumed the maximum uncertainty was three standard deviations away from the mean (encompassing 99.7 percent of the population) and conducting the analysis assuming a tolerance of one standard deviation.

DOE seeks comment upon the applicability of a 5 percent tolerance on hydraulic horsepower for each tested circulator pump model or if a higher or lower percentage variation would be justified.

G. Representations of Energy Use and Energy Efficiency

Manufacturers of circulator pumps within the scope of the proposed circulator pump test procedure, if finalized, would be required to use the test procedures proposed in this rulemaking when making representations about the energy efficiency or energy use of their equipment. Specifically, 42 U.S.C. 6314(d) provides that ''no manufacturer . . . may make any representation . . . respecting the energy consumption of such equipment or cost of energy consumed by such equipment, unless such equipment has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing.''

If made final, the proposed test procedure would not require manufacturers to test the subject circulator pumps. However, beginning 180 days after publication of a final rule that adopts a test procedure for circulator pumps, any voluntary representations as to the energy efficiency or energy use of a subject circulator pump would be required to be based on the DOE test procedure. (42 U.S.C. 6314(d))

With respect to representations, generally, DOE understands that manufacturers often make representations (graphically or in numerical form) of energy use metrics, including overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower) and may make these representations at a variety of different load points or operating speeds. DOE proposes to allow manufacturers to continue making these representations. In order to ensure consistent and standardized representations across the pump industry and to ensure such representations are not in conflict with the reported CEI for any given circulator pump model, DOE proposes to establish testing procedures for these parameters that are part of the DOE test procedure and that while manufacturers would not be required to make representations regarding the performance of circulator pumps using these additional metrics, to the extent manufacturers wish to do so, they would be required to do so based on testing in accordance with the DOE test procedure. In addition, as noted in section III.C, the CPWG-recommended method of determining $PER_{STD,}$ if adopted by DOE, would require tested hydraulic horsepower of the rated circulator pump at one or more specific load points.

DOE notes that overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower) are already parameters that are described in HI 40.6–2021, which DOE proposes to incorporate by reference in the DOE test procedure (section III.E.1). DOE believes that further specification is not necessary regarding the determination of these parameters. DOE notes that HI 40.6–2021 does not include explicit instructions for determining pump power output at specific load points; however section E.3.2 specifies determination of the circulator pump total head versus flow rate curve based on a polynomial of the 6th order, and DOE assumes this curve would be used to calculate pump power output at any relevant load point.

DOE requests comment on its proposal to adopt provisions for the measurement of several other circulator pump metrics, including overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower).

chargers reorganized the enforcement provisions for various equipment, including pumps, to place the pump enforcement provisions in 10 CFR 429.110(e)(5). 81 FR 31827, 31841 (May 20, 2016).

DOE also requests comment on its belief that HI 40.6–2021 contains all the necessary methods to determine overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower) and that further specification is not necessary.

H. Test Procedure Costs and Harmonization

1. Test Procedure Costs and Impact

In this NOPR, DOE proposes to establish a test procedure for circulator pumps by incorporating by reference the test methods established in HI 40.6–2021, ''Methods for Rotodynamic Pump Efficiency Testing,'' with certain exceptions. This NOPR also contains proposals regarding representations, enforcement, and labeling provisions for circulator pumps that would be added to 10 CFR parts 429 and 431, respectively. DOE has tentatively determined that these proposed amendments would impact testing costs as discussed in the following paragraphs.

DOE proposes to incorporate, by reference, the test methods established in HI 40.6–2021, ''Methods for Rotodynamic Pump Efficiency Testing,'' with certain exceptions. The test results are necessary for calculating the CEI to represent the energy consumption of the circulator pump, inclusive of a motor and any controls, and (3) determine the minimum test sample (*i.e.,* number of units) and permitted method of determining represented values.

By adopting industry standards, DOE has tentatively determined that the proposed amendments in this NOPR would establish DOE test procedures that are reasonably designed to produce test results which reflect energy efficiency and energy use of circulator pumps during a representative average use cycle and that would not be unduly burdensome for manufacturers to conduct. DOE is presenting the costs associated with testing equipment and procedure consistent with the requirements of the proposed test procedure, as would be required to certify compliance with any future energy conservation standard.

DOE recognizes that, because such testing is not currently required or standardized in the United States, testing facilities may vary from one pump manufacturer to another. As such, DOE has estimated a maximum expected testing burden associated with this test procedure NOPR, which is associated with an expectation where all pump manufacturers do not have existing testing capabilities and would be required to purchase the necessary test equipment in accordance with the proposed test procedure, if finalized.

To estimate the burden associated with the testing and sampling plan requirements proposed in this test procedure NOPR, DOE understands that in order to conduct the proposed test procedure, each manufacturer would either (a) have to test the units in-house or (b) test the units at a third-party testing facility. If a manufacturer elects to test circulator pumps in-house, that manufacturer may have to undertake the following burden inducing activities: (1) Acquire necessary testing equipment that is capable of testing circulator pumps in compliance with the test procedure, including acquisition and calibration of any necessary measurement equipment, and (2) conduct the DOE test procedure on two units of each covered circulator pump basic model.

DOE's cost estimates factored in capital costs and labor costs. Capital cost estimates are based on previous manufacturer interviews. The following sections detail those costs in specifics.

a. Estimated Capital Costs for Testing Circulator Pumps

In the maximum-burden case where a circulator pump manufacturer would be required to construct a test lab from scratch, manufacturers would be required to make capital outlays to acquire test equipment.

The first necessary item for testing a circulator pump is a water reservoir to hold the water that the pump circulates during testing. Manufacturers provided estimates to DOE on the cost of water reservoirs for a variety of sizes. The water reservoir sizes provided from manufacturers varied between 5 gallons and 1,500 gallons, as some manufacturers also use their water reservoirs to test larger pumps. Based on the information provided, DOE estimates the cost of a water reservoir to test circulator pumps to be approximately $9.30 per gallon. Because the circulator pumps are typically less than 5 hp in size, DOE is using a 100-gallon water reservoir as a typical size and thus estimates the cost at approximately $930 for the water reservoir.[32]

To complete the circulator pump test loop, assorted piping and valves would be necessary to circulate water from the reservoir to the pump and regulate the flow and head of the water. Multiple diameter pipes, valves, and associated fittings may be required to accommodate different size circulator pumps. The total costs for the values and piping will vary on pipe diameter as well as the actual testing laboratory configuration. DOE estimates a cost of $2,745 for the piping and valves necessary to test the circulator pumps within the scope of the proposed test procedure.[33]

The proposed DOE test procedure also requires the power supply characteristics (*i.e.,* voltage, frequency, voltage unbalance, and total harmonic distortion) to be maintained within specific values. Specifically, the proposed power supply requirements must be within a certain percent of the rated voltage, frequency, and voltage unbalance. Also, the total harmonic distortion must be limited throughout the test. In some situations, manufacturers may be required to acquire power conditioning equipment to ensure the power supplied to the circulator pump motor or control is within the required tolerances. Based on the estimates DOE researched for power supplies as well as incorporated estimates provided by manufacturers of possible equipment costs, DOE estimates the cost for power conditioning equipment as $2,200.[34]

The proposed circulator pump test procedure contains requirements regarding the characteristics and accuracy of the measurement equipment necessary to precisely and accurately determine relevant measured quantities. The primary measurement equipment includes flow measuring equipment, pressure measuring equipment, and electrical measuring equipment.

Test facilities would need equipment to measure the flow rate in gallons per minute to verify that the circulator pump is operating at the applicable load point. Manufacturers indicated that, for flow measurement equipment, they utilized magnetic flow measurement devices. These magnetic flow measurement devices vary in price based on the range of the device to accommodate different sizes of circulator pumps. DOE researched flow measurement devices, as well as referenced feedback from manufacturer interviews about the typical prices of various sizes of flow measurement devices. DOE estimates a typical flow measurement equipment capable of accommodating the full range of

[32] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[33] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[34] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

circulator pumps subject to this proposed test procedure to be $4,400.[35]

Pressure measurement equipment could include a manometer, bourdon tube, digital indicator, or a transducer. Manufacturers provided information as to which pressure measurement device they utilize and the approximate cost of such device. DOE's research indicates that most manufacturers utilize differential pressure transducers to measure pressure in the test setup. Based on this information and DOE research, DOE estimates the average cost of the pressure measurement devices to be $1,650.[36]

Finally, electrical measurement equipment is necessary to determine the input power to the circulator pump, as measured at the input to the motor or controls (if present). There are multiple devices that can measure power and energy values. However, DOE proposes specific requirements regarding the accuracy and quantities measured for such power measuring equipment, as discussed in section III.E.1. In this case, only specific power analyzers and watt-amp-volt meters with the necessary accuracy can measure RMS voltage, RMS current, and real power up to at least the 40th harmonic of fundamental supply source frequency and having an accuracy level of ±2.0 percent of the measured value when measured at the fundamental supply source frequency. DOE researched equipment as well as inquired with manufacturers about the equipment used and related costs. Based on information provided by manufacturers and DOE's own research, DOE estimates the typical cost for the electrical measurement equipment to conduct this proposed test procedure is $4,400.[37]

Additionally, temperature measurements would be necessary, to perform the test procedure as proposed. To verify that the testing fluid (*i.e.,* clear water) is within the specified temperature range, testing facilities will also need to measure temperature. DOE estimates a cost of $220 for potential temperature measurement devices.[38]

Finally, to ensure that all data are taken simultaneously and properly recorded, a data acquisition system might also be necessary. DOE researched data acquisition systems necessary for the proposed test procedure and estimates the typical cost for a data acquisition system as $21,000.[39]

In total, DOE estimates the cost of acquiring all the necessary equipment to perform the proposed circulator pump test procedure as approximately $37,600, if a manufacturer needed to purchase all the testing equipment described in this section.

However, DOE notes that the majority of circulator pump manufacturers may already have existing testing capabilities to verify equipment performance, as well as certify performance for other applicable circulator pump programs.[40] Therefore, DOE interprets the previously estimated $37,600 value as a worst-case estimate that is not representative of the likely eventual burden to most manufacturers.

DOE requests comment on the capital cost burden associated with the proposed circulator pump test procedure, including the estimated capabilities of current manufacturers. Specifically, DOE requests comment on the estimate that the likely capital cost burden incurred by existing circulator pump manufacturers would be between $0 and $37,600.

b. Between Estimated Labor Costs for Testing Circulator Pumps

This test procedure NOPR also proposes requirements regarding the sampling plan and representations for covered circulator pumps at subpart B of part 429 of title 10 of the Code of Federal Regulations. The sampling plan requirements are similar to those for several other types of commercial equipment and, among other things, require a sample size of at least two units per circulator pump basic model be tested when determining representative values CEI, as well as other circulator pump performance metrics.

Based on wage and salary data from the Bureau of Labor Statistics, DOE estimates the fully burdened mechanical engineering technician wage of $41.46/hr.[41] DOE received information from manufacturers about the typical time required to test a circulator pump for applicable programs with similar testing requirements proposed in this test procedure NOPR.[42] The time for testing ranged from an hour per test to over 24 hours when completing testing for multiple programs. The longer testing is a function of the longer stabilization times required for some manufacturers' circulator pumps with new motors. On average, the expected testing time for this proposed test procedure is approximately 7.5 hours per pump based on DOE research and estimates from manufacturers. Using the labor rate established previously, the total cost of labor for testing a circulator pump is estimated to be approximately $622 per basic model.[43]

DOE requests comment on the estimated time and costs to complete a test of a single circulator pump basic model under the proposed test procedure.

Based on a review of the market. DOE is proposing to adopt the industry standard, HI 40.6–2021, ''Methods for Rotodynamic Pump Efficiency Testing,'' with certain exceptions. As previously discussed, DOE estimates the potential capital costs to be approximately $37,600 per manufacturer and DOE estimates the potential labor costs to be approximately $622 per basic model. However, because HI 40.6–2021 is the generally accepted industry standard, DOE believes that manufacturer costs would most likely be less than the estimated costs, as most manufacturers are already testing to HI 40.6–2021. Further, relative costs arising from the proposed test procedure would fall further to the degree to which manufacturers are already rating pumps in accordance with the proposed test procedure. As of mid-October, DOE observes 68 models from 4 manufacturers listed in the Hydraulic Institute's voluntary rating program.[44] While this figure represents a minority of available circulator pump models on the market, the Hydraulic Institute's program is relatively new and manufacturer may still be in the process of adding models. Finally, costs may fall further to the extent already-rated

[35] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[36] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[37] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[38] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[39] DOE based this cost estimate on information gathered from manufacturers during the 2016 CPWG meetings.

[40] See section III.B.1 for a review of applicable circulator pump regulatory and voluntary programs.

[41] DOE estimated the hourly wage using data from BLS's ''Occupational Employment and Wages, May 2020'' publication. DOE used the ''Mechanical Engineering Technologies and Technicians'' mean hourly wage of $29.27 to estimate the hourly wage rate (*www.bls.gov/oes/current/oes173027.htm*). DOE then used BLS's ''Employer Costs for Employee Compensation—June 2021'' to estimate that wages and salary account for approximately 70.6 for private industry workers (*www.bls.gov/news.release/archives/ecec_09162021.pdf*). Last accessed on September 21, 2021. Therefore DOE estimated an fully-burdened labor rate of $41.46 ($29.27 ÷ 0.706 = $41.46),

[42] See section III.B.1 for a discussion of applicable programs and the similarity to DOE's proposed test procedure.

[43] 7.5 hours × $41.46/hr × 2 units per basic model = $621.90 (rounded to $622).

[44] The Hydraulic Institute. Energy Rating Program Database. Available at: *er.pumps.org/circulator/ratings.* Last accessed: October 12, 2021.

models as the basis for certification of other, similar models under the same basic model.

2. Harmonization With Industry Standards

DOE's established practice is to adopt relevant industry standards as DOE test procedures unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that product during a representative average use cycle. Section 8(c) of Appendix A of 10 CFR part 430 subpart C; 10 CFR 431.4. In cases where the industry standard does not meet EPCA statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards as the DOE test procedure.

The industry standard DOE proposes to incorporate by reference via proposals described in this NOPR is discussed in further detail in section IV.M.

DOE requests comments on the benefits and burdens of the proposed additions to industry standards referenced in the test procedure for circulator pumps.

DOE notes that, as discussed in section III.E.2, it is proposing exceptions and additions to HI 40.6–2021 in order to appropriately address circulator pump testing as specific from other rotodynamic pump testing. In addition, DOE is proposing test methods and calculations for circulator pumps with certain control varieties, which are supplemental to the test procedure in HI 40.6–2021. DOE notes that these test method proposals are consistent with HI 41.5–2021, which, as discussed in section II, is a program guideline rather than a test standard.

I. Compliance Date

EPCA prescribes that, if DOE amends a test procedure, all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with that amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6314(d)(1)) To the extent the test procedure proposed in this document is required only for the evaluation and issuance of updated efficiency standards, use of the test procedure, if finalized, would not be required until the implementation date of updated standards. 10 CFR 431.4; Section 8(d) of appendix A 10 CFR part 430 subpart C.

If DOE were to publish an amended test procedure, EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6314(d)(2)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (''OMB'') has determined that this test procedure rulemaking does not constitute ''significant regulatory actions'' under section 3(f) of Executive Order (''E.O.'') 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive order by the Office of Information and Regulatory Affairs (''OIRA'') in OMB.

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 Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 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 DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *www.energy.gov/gc/office-general-counsel.* DOE reviewed the test procedures in this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

The following sections detail DOE's IRFA for this test procedure rulemaking.

1. Description of Why Action Is Being Considered

DOE proposes to amend subpart Y of 10 CFR part 431 to establish a test procedure for circulator pumps in advance of the finalization of any energy conservation standards for this equipment. (*See* Docket No. EERE–2016–BT–STD–0004.) The test procedure for circulator pumps proposed in this test procedure NOPR includes the methods necessary to: (1) Measure the performance of the covered equipment, (2) use the measured results to calculate the CEI to represent the energy consumption of the circulator pump, inclusive of a motor and any controls, and (3) determine the minimum test sample (*i.e.,* number of units) and permitted method of determining represented values. In this test procedure NOPR, DOE also proposes to set the scope of those circulator pumps to which the proposed test methods would apply.

2. Objective of, and Legal Basis for, Rule

EPCA [45] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part C [46] of EPCA, added by Public Law 95–619, Title IV, section 441(a) (42 U.S.C. 6311–6317 as codified), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. This equipment includes pumps, the subject of this document. (42 U.S.C. 6311(1)(A))

Under 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment. EPCA requires that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which reflect energy efficiency, energy use or estimated annual operating cost of a given type of covered equipment during a representative average use cycle and requires that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) To fulfill these requirements, in this test procedure NOPR, DOE proposes to establish a test procedure for circulator pumps in advance of the finalization of any energy conservation standards for this equipment. (*See* Docket No. EERE–2016–BT–STD–0004.)

3. Description and Estimate of Small Entities Regulated

For manufacturers of circulator pumps, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities

[45] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

[46] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. *See* 13 CFR part 121. The equipment covered by this rule are classified under North American Industry Classification System (''NAICS'') code 333914,[47] ''Measuring, Dispensing, and Other Pumping Equipment Manufacturing.'' In 13 CFR 121.201, the SBA sets a threshold of 750 employees or fewer for an entity to be considered as a small business for this category.

DOE reviewed the test procedures proposed in this NOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE used publicly available information to identify potential small businesses that manufacture circulator pumps covered in this rulemaking. DOE identified ten companies that are OEMs of circulator pumps covered by this rulemaking. DOE screened out companies that do not meet the definition of a ''small business'' or are foreign-owned and operated. DOE identified three potential small, domestic OEMs for consideration. DOE used subscription-based business information tools to determine the number of employees and revenue of the potential small businesses.

DOE requests comment on the number of small businesses DOE identified.

4. Description and Estimate of Compliance Requirements

DOE estimates that this proposed test procedure would not require any manufacturer to incur any additional testing burden associated with the proposed test procedure, if finalized, DOE recognizes that circulator pump energy conservation standards may be proposed or promulgated in the future and pump manufactures would then be required to test all covered circulator pumps in accordance with the proposed test procedures. (*See* Docket No. EERE–2016–BT–STD–0004) Therefore, although such is not yet required, DOE is presenting the costs associated with testing equipment and procedure consistent with the requirements of the proposed test procedure, as would be required to certify compliance with any future energy conservation standards.

In the test procedure outlined in this NOPR for circulator pumps, DOE proposes a new metric, called CEI. To determine the applicable measured values for determining circulator pump performance, DOE proposes to incorporate by reference the test methods established in HI 40.6–2021, ''Methods for Rotodynamic Pump Efficiency Testing,'' with certain exceptions. DOE also proposes to set the scope of those circulator pumps to which the proposed test methods would apply.

DOE recognizes that, because such testing is not currently required in the United States, testing facilities may vary from one pump manufacturer to another. As such, DOE has estimated the potential testing burden associated with this test procedure NOPR, which is associated with a situation where a given pump manufacturer does not have existing test facilities and would be required to purchase the necessary test equipment in accordance with any test procedure final rule. Furthermore, DOE believes that manufacturer costs would most likely be less than the estimated costs because most manufacturers are already testing to HI 40.6–2021. Additionally, if manufacturers are already testing to HI 40.6–2021, manufacturers would not be required to re-test those models. DOE's cost estimates factored in capital expenditures required to purchase the necessary testing equipment as well as labor expenditures required to conduct the testing. DOE has tentatively determined that most manufacturers would choose to perform in-house testing as opposed to third-party lab testing.

DOE estimated the range of potential costs for the three small, domestic manufacturers of circular pumps. When developing cost estimates for these manufacturers, DOE considered the cost of testing equipment as well as the labor required to test per basic model. Should DOE adopt energy conservation standards in terms of CEI, the small businesses could incur capital costs of up to $37,600 per manufacturer. Additionally, DOE estimates testing labor costs of approximately $622 per basic model. DOE estimates, based on market research, that circulator pump manufacturers would each typically rate between 75 to 125 models with an average of 100 models per small business manufacture. Therefore, DOE estimates that the associated testing labor costs for a typical small business to be approximately $62,200 to test each small business's currently covered circulator pump basic models.[48]

Should DOE adopt energy conservation standards in terms of CEI, small businesses could incur total capital and labor testing costs of approximately $99,800. DOE understands the annual revenue of the three small businesses to be approximately $2 million, $5 million, and $158 million. Therefore, testing costs could cause these small businesses to incur up to 5 percent, 2 percent, and less than 1 percent of annual revenue, respectively.

DOE requests comment on the estimated potential costs for the small businesses.

5. Duplication Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the proposed rule being considered today.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from DOE's proposed test procedure, if finalized. In reviewing alternatives to the proposed test procedure, DOE examined not establishing a performance-based test procedure for circulator pumps or establishing prescriptive-based test procedures for circulator pumps. While not establishing performance-based test procedures or establishing prescriptive-based test procedures for circular pumps would reduce the burden on small businesses, DOE must use test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

DOE notes there currently are no energy conservation standards prescribed for circular pumps. Therefore, manufacturers would not be required to conduct the proposed test procedure, if made final, until such time as compliance is required with energy conservation standards, should DOE establish such standards, unless manufacturers voluntarily chose to make representations as to the energy use or energy efficiency of circulator pumps.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, section 504 of the

[47] The size standards are listed by NAICS code and industry description and are available at: *www.sba.gov/document/support—table-size-standards* (Last accessed on July 16, 2021).

[48] $622 (per basic model) × 100 (average number of basic models per small business) = $62,200.

Department of Energy Organization Act, 42 U.S.C. 7194, provides authority for the Secretary to adjust a rule issued under EPCA in order to prevent ''special hardship, inequity, or unfair distribution of burdens'' that may be imposed on that manufacturer as a result of such rule. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act of 1995

Although no energy conservation standards have been established for circulator pumps as of the publication of this NOPR, manufacturers of circulator pumps would need to certify to DOE that their products comply with any potential future applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, 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 circulator pumps. (*See generally* 10 CFR part 429.) 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

In this proposed rule, DOE proposes definitions and a test procedure for circulator pumps that it expects will be used to develop and implement future energy conservation standards for this equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, appendix A to subpart D, A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on 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 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(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for 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 sections 3(a) and 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, the proposed rule meets the relevant standards of Executive Order 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, sec. 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 small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the

expenditure of $100 million or more in any year, so these requirements 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 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

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

J. Review Under 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 agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this 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

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to 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 promulgated 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.

The proposed regulatory action to establish a test procedure for measuring the energy efficiency of circulator pumps is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

The proposed test procedure for circulator pumps would incorporate testing methods contained in certain sections of the following commercial standard: Hydraulic Institute (HI) 40.6–2021, (''HI 40.6–2021'') ''Methods for Rotodynamic Pump Efficiency Testing''. DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with both the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition, prior to prescribing a final rule.

M. Materials Incorporated by Reference

In this NOPR, DOE proposes to incorporate by reference the test standard published by Hydraulic Institute (HI), titled ''Methods for Rotodynamic Pump Efficiency Testing,'' HI 40.6–2021. HI 40.6–2021 is an industry-accepted standard used to specify methods of testing for determining the head, flow rate, driver power input, pump power output, and other relevant parameters necessary to determine the CEI of applicable pumps proposed in this TP NOPR. The test procedure proposed in this NOPR references various sections of HI 40.6–2021 that address test setup, instrumentation, measurement, and test specifications. This standard can be obtained from the organization directly at the following address: Hydraulic Institute, 6 Campus Drive, First Floor North, Parsippany, NJ 07054–4406, (973) 267–9700, or by visiting *www.Pumps.org.*

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar, it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *www.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=66.* 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 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/public meeting. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the webinar/public meeting 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/public meeting.

A transcript of the webinar/public meeting 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 no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment 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 *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on 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 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, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the

information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on the proposed definition for circulator pump.

(2) DOE requests comment on the proposed definition for horizontal motor, including whether it meets the intent of the CPWG or whether it would include other motors not intended to be captured in the definition.

(3) DOE requests comment on the proposed definitions of header pump and circulator-less-volute.

(4) DOE requests comment on its proposal to include on-demand circulator pumps within the scope of this test procedure. DOE also requests data and information that would justify a CEI credit for on-demand circulator pumps.

(5) DOE requests comment on the proposed scope of applicability of the circulator pump test procedure to circulator pumps that are clean water pumps, and the exclusion of header pumps and submersible pumps from the scope of the proposed test procedure.

(6) DOE requests comment on the proposed applicability of the definition of ''basic model'' at 10 CFR 431.462 to circulator pumps and any characteristics unique to circulator pumps that may necessitate modifications to that definition.

(7) DOE requests comment on its proposal to adopt CEI as the metric to characterize the energy use of certain circulator pumps and on the proposed equation for CEI.

(8) DOE requests comment on the proposal to allow manufacturers to select the control variety used for testing if the circulator pump model is distributed in commerce with multiple control varieties. DOE specifically requests comment on whether DOE should instead require manufacturers to test a circulator pump model that offers multiple control varieties with the least consumptive control variety. DOE also requests comment on the burden that would be associated with such an approach.

(9) DOE requests comment on its proposed definition of adaptive pressure control.

(10) DOE requests comment on the proposed test method for circulator pumps with pressure controls, including whether DOE's interpretation of the new provisions in HI 41.5–2021 are accurate.

(11) DOE requests comment on whether specific test provisions for circulator pumps equipped with user-adjustable pressure controls are needed, and if so, on the proposed provisions for such pumps.

(12) DOE requests comment on the proposed test methods for circulator pumps with adaptive pressure controls, and in particular on the proposed provisions not included in HI 41.5–2021, including for pumps without a manual control mode, whether throttling should be allowed to achieve head above the reference system curve, or instead head should be allowed below the reference system curve and adjusted back to the curve, as with other non-adaptive pressure controls. DOE also requests comment on the HI 41.5–2021 provision for manual adjustment to achieve 100 percent BEP flow and heat point at max speed, which is not included for other pressure controls.

(13) DOE requests comment on the proposed test methods, test points, and weights for circulator pumps with temperature controls.

(14) DOE requests comment on the proposed test method and the unique test points, weights, and speed factors for circulator pumps distributed in commerce with manual speed controls.

(15) DOE requests comment on the proposed test method and the unique test points, weights, and speed factors for circulator pumps distributed in commerce with external input signal controls. In particular, DOE requests comment on whether manual speed adjustment and/or simulated external input signal are appropriate for testing circulator pumps with external input signal only, as well as circulator pumps with external input signal in addition to other control varieties. DOE also seeks comment on whether it is necessary to reference the ''lowest speed setting'' when determining the appropriate test points. Finally, DOE seeks comment on whether the test points and weights for circulator pumps distributed in commerce with external input signal control in addition to other control varieties are appropriately reflective of their energy consumption in the field relative to other control varieties.

(16) DOE requests comment on the proposed test method for circulator pumps distributed in commerce with no controls.

(17) DOE requests comment on the proposal to incorporate by reference HI 40.6–2021, inclusive of Appendix E, into the proposed appendix D to subpart Y, with the exceptions, modifications, and additions described in section III.E.2 of this document.

(18) DOE requests comment on its proposal to not reference sections 40.6.4.1, 40.6.4.2, 40.6.5.3, 40.6.5.5.2, 40.6.6.1, 40.6.6.1.1, Appendix B, and Appendix G of HI 40.6–2021 as part of the DOE test procedure for circulator pumps.

(19) DOE requests comment on the proposed test procedure for twin head circulator pumps.

(20) DOE requests comment on the proposed test procedure for circulators-less-volute. Specifically, DOE seeks comment as to any additional details that should be addressed in testing a circulator-less-volute with any given volute to determine applicable CEI values.

(21) DOE requests comment on its proposal to adopt the provisions in Appendix E of HI 40.6–2021 for determining circulator pump driver power input at specified flow rates, including whether these provisions are more appropriate than those recommended by the CPWG.

(22) DOE requests comment on the proposal that for circulator pumps with pressure and manual speed controls, if all the tested flow values are within ±5 percent of the flow load points specified by the reference curve and tested head values are below the head load points specified by the reference curve, the tested driver power input values would be proportionally adjusted to the specified flow and head points. If the tested head values are above the reference system curve, only the flow values would be proportionally adjusted to the specified value. DOE requests comment on whether HI intended to remove all power correction (including flow correction) above the reference curve for pumps with pressure and manual speed controls.

(23) DOE requests comment on the proposal that for temperature and external input signal controls, if all the tested flow values are within ±5 percent of the flow load points specified by the reference system curve and all the tested head values are within ±10 percent of the head load points specified by the reference system curve, the tested driver power input values would be proportionally adjusted to the specified flow and head points. If the tested head values are above the reference system curve by more than 10 percent, only the

flow values would be proportionally adjusted to the specified value. DOE requests comment on whether HI intended to remove all power correction above the reference curve for temperature and external input signal controls.

(24) DOE also requests comment on the proposed applicability of the tolerance and proportional adjustment method to the various test points, as compared to the curve fitting method, based on circulator pump control variety. DOE particularly requests comment on which category is most appropriate for the 100 percent of BEP flow point.

(25) DOE requests comment on the proposal that all calculations be performed with the raw measured data, to ensure accuracy, and to round CER, BEP flow at maximum speed and BEP head at maximum speed values to three significant figures; real power, true RMS current, and true RMS voltage values the tenths place (*i.e.,* 0.1); and CEI, hydraulic horsepower, and true power factor values to the hundredths place (*i.e.,* 0.01).

(26) DOE requests comment on the proposal to use rated hydraulic horsepower, identified as the measured hydraulic horsepower at BEP and full impeller diameter for the rated pump, as the primary standardized metric to determine the scope of applicability of dry rotor circulator pumps in this circulator pump test procedure.

(27) DOE requests comment on the proposed statistical sampling procedures and certification requirements for circulator pumps.

(28) DOE requests comment on how, absent information on the tested control method for a basic model, DOE should determine which test method to conduct.

(29) DOE requests comment on the proposed product-specific enforcement testing provisions for circulator pumps, particularly with regard to the appropriate control curve for pressure controls (when not specified) and the appropriate speed settings for other control methods.

(30) DOE requests comment on the proposal to apply to circulator pumps the enforcement testing sample size, calculations, and procedures laid out in appendix A to subpart C of 10 CFR part 429.

(31) DOE seeks comment upon the applicability of a 5 percent tolerance on hydraulic horsepower for each tested circulator pump model or if a higher or lower percentage variation would be justified.

(32) DOE requests comment on its proposal to adopt provisions for the measurement of several other circulator pump metrics, including overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower).

(33) DOE also requests comment on its belief that HI 40.6–2021 contains all the necessary methods to determine overall (wire-to-water) efficiency, driver power input, and/or pump power output (hydraulic horsepower) and that further specification is not necessary.

(34) DOE requests comment on the capital cost burden associated with the proposed circulator pump test procedure, including the estimated capabilities of current manufacturers. Specifically, DOE requests comment on the estimate that the likely capital cost burden incurred by existing circulator pump manufacturers would be between $0 and $37,600.

(35) DOE requests comment on the estimated time and costs to complete a test of a single circulator pump basic model under the proposed test procedure.

(36) DOE requests comments on the benefits and burdens of the proposed additions to industry standards referenced in the test procedure for circulator pumps.

(37) DOE requests comment on the number of small businesses DOE identified.

(38) DOE requests comment on the estimated potential costs for the small businesses.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and request for comment.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation test procedures, Incorporation by reference, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on November 16, 2021, by Kelly Speakes-Backman, Principal Deputy Assistant Secretary and Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 17, 2021.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 429.59 is amended by:
■ a. Revising paragraphs (a)(1)(i), (a)(2)(i) and (a)(2)(iii), and
■ b. Adding paragraphs (a)(2)(iv) through (vii).

The revisions and addition read as follows:

§ 429.59 Pumps.

(a) * * *

(1) * * *

(i) Any representation of the constant load pump energy index (PEI_{CL}), variable load pump energy index (PEI_{VL}), circulator energy index (CEI), or other measure of energy consumption of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

(A) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and $\bar{x}$ is the sample mean, n is the number of samples, and x_i is the maximum of the i^{th} sample;

Or,

(B) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} \mp t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean, s is the sample standard deviation, n is the number of samples, and $t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with n-1 degrees of freedom (from appendix A of subpart B of part 429).

* * * * *

(2) * * *

(i) *Rated hydraulic horsepower.* The representative value of rated hydraulic horsepower of a basic model of dedicated-purpose pool pump or circulator pump must be the mean of the rated hydraulic horsepower for each tested unit.

* * * * *

(iii) *True power factor.* The representative value of true power factor of a basic model of dedicated-purpose pool pump or circulator pump must be determined based on the mean of the true power factors for each tested unit of dedicated-purpose pool pump or circulator pump motor, respectively.

(iv) *True RMS current and true RMS voltage.* The representative values of true RMS current and true RMS voltage of a basic model of circulator pump must be determined based on the mean of the true RMS currents and true RMS voltages, respectively, for each tested unit.

(v) *Input power.* The representative value(s) of input power of a basic model of circulator pump must be determined based on the mean of the input power at measured data point(s) for each tested unit.

(vi) *Flow at BEP and maximum speed.* The representative value of flow at BEP and maximum speed of a basic model of circulator pump must be determined based on the mean of the flow at BEP and maximum speed for each tested unit.

(vii) *Head at BEP and maximum speed.* The representative value of head at BEP and maximum speed of a basic model of circulator pump must be determined based on the mean of the head at BEP and maximum speed for each tested unit.

* * * * *

■ 3. Section 429.110 is amended by revising paragraphs (e)(1) and (5) to read as follows:

§ 429.110 Enforcement testing.

* * * * *

(e) * * *

(1) For products with applicable energy conservation standard(s) in § 430.32 of this chapter, and commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, commercial clothes washers, dedicated-purpose pool pumps, circulator pumps, and metal halide lamp ballasts, DOE will use a sample size of not more than 21 units and follow the sampling plans in appendix A of this subpart (Sampling for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment).

* * * * *

(5) For pumps subject to the test procedures specified in § 431.464(a) of this chapter, DOE will use an initial sample size of not more than four units and will determine compliance based on the arithmetic mean of the sample.

* * * * *

■ 4. Section 429.134 is amended by adding paragraph (i)(3) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(i) * * *

(3) *Circulator pumps.*

(i) The flow rate at BEP and maximum speed of each tested unit of the basic model will be measured pursuant to the test requirements of § 431.464(c) of this chapter, where the value of flow rate at BEP and maximum speed certified by the manufacturer will be treated as the expected BEP flow rate at maximum speed. The resulting measurement will be compared to the value of flow rate at BEP and maximum speed certified by the manufacturer. The certified flow rate at BEP and maximum speed will be considered valid only if the measurement (either the measured flow rate at BEP and maximum speed for a single unit sample or the average of the measured flow rates for a multiple unit sample) is within 5 percent of the certified flow rate at BEP and maximum speed.

(A) If the representative value of flow rate is found to be valid, the measured flow rate at BEP and maximum speed will be used in subsequent calculations of circulator energy rating (CER) and circulator energy index (CEI) for that basic model.

(B) If the representative value of flow rate at BEP and maximum speed is found to be invalid, the mean of all the measured values of flow rate at BEP and maximum speed determined from the tested unit(s) will serve as the new expected BEP flow rate and the unit(s) will be retested until such time as the measured flow rate at BEP and maximum speed is within 5 percent of the expected BEP flow rate.

(ii) DOE will test each circulator pump unit according to the control setting with which the unit was rated. If no control setting is specified and no controls were available, DOE would test using the full speed test. If no control setting is specified and a variety of controls are available, DOE would test using the test method for any one of the control varieties available on board.

(iii) Pressure controls will be tested in the automatic setting except that adaptive pressure controls will be tested at the manual control option that results in the lowest head values at each test point below maximum speed. When conducting tests of pressure controls for which the no control curve is specified, the circulator pump will be tested using any control curve meeting the requirements specified in the test method.

(iv) External input signal controls and temperature controls will be tested at the lowest speed setting that will achieve a head at or above the reference curve.

(v) Manual speed controls will be tested using the speed setting closest to (above or below) each of the head points specified by the reference system curve.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 5. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 6. Section 431.462 is amended by:

■ a. Adding, in alphabetical order, definitions for the terms ''Adaptive pressure controls,'' ''Circulator-less-volute,'' ''Circulator pump,'' ''Dry rotor, three-piece circulator pump,'' ''Dry rotor, two-piece circulator pump,'' ''External input signal control,'' ''Header pump,'' ''Manual speed control,'' ''On-demand circulator,'' ''Pressure control,'' ''Temperature control,'' and ''Wet rotor circulator pump.''; and

■ b. Revising the definition of the term ''Horizontal motor.''

The additions and revision read as follows:

§ 431.462 Definitions.

* * * * *

Adaptive pressure control means a pressure control that continuously senses the head requirements in the system in which it is installed and adjusts the control curve of the pump accordingly.

* * * * *

Circulator-less-volute means a circulator pump distributed in

commerce without a volute and for which a paired volute is also distributed in commerce. Whether a paired volute is distributed in commerce will be determined based on published data, marketing literature, and other publicly available information.

Circulator pump means is a pump that is either a wet rotor circulator pumps; a dry rotor, two-piece circulator pump; or a dry rotor, three-piece circulator pump. A circulator pump may be distributed in commerce with or without a volute.

* * * * *

Dry rotor, three-piece circulator pump means a single stage, rotodynamic, single-axis flow, mechanically-coupled, dry rotor pump that:

(1) Has a rated hydraulic power less than or equal to 5 hp at the best efficiency point at full impeller diameter,

(2) Is distributed in commerce with a horizontal motor, and

(3) Discharges the pumped liquid through a volute in a plane perpendicular to the shaft.

Examples include, but are not limited to, pumps generally referred to in industry as CP3.

Dry rotor, two-piece circulator pump means a single stage, rotodynamic, single-axis flow, close-coupled, dry rotor pump that:

(1) Has a rated hydraulic power less than or equal to 5 hp at best efficiency point at full impeller diameter,

(2) Is distributed in commerce with a horizontal motor, and

(3) Discharges the pumped liquid through a volute in a plane perpendicular to the shaft.

Examples include, but are not limited to, pumps generally referred to in industry as CP2.

* * * * *

External input signal control means a variable speed drive that adjusts the speed of the driver in response to an input signal from an external logic and/or user interface.

* * * * *

Header pump means a circulator pump distributed in commerce without a volute and for which a paired volute is not distributed in commerce. Whether a paired volute is distributed in commerce will be determined based on published data, marketing literature, and other publicly available information.

Horizontal motor means a motor, for which the motor shaft position when functioning under operating conditions specified in manufacturer literature, includes a horizontal position.

* * * * *

Manual speed control means a control (variable speed drive and user interface) that adjusts the speed of the driver based on manual user input.

* * * * *

On-demand circulator pump means a circulator pump that is distributed in commerce with an integral control that:

(1) Initiates water circulation based on receiving a signal from the action of a user [of a fixture or appliance] or sensing the presence of a user of a fixture and cannot initiate water circulation based on other inputs, such as water temperature or a pre-set schedule.

(2) Automatically terminates water circulation once hot water has reached the pump or desired fixture.

(3) Does not allow the pump to operate when the temperature in the pipe exceeds 104 °F or for more than 5 minutes continuously.

* * * * *

Pressure control means a control (variable speed drive and integrated logic) that automatically adjusts the speed of the driver in response to pressure.

* * * * *

Temperature control means a control (variable speed drive and integrated logic) that automatically adjusts the speed of the driver continuously over the driver operating speed range in response to temperature.

* * * * *

Wet rotor circulator pump means a single stage, rotodynamic, close-coupled, wet rotor pump. Examples include, but are not limited to, pumps generally referred to in industry as CP1.

■ 7. Section 431.463 is amended by revising paragraph (a) and adding paragraph (d)(5) to read as follows:

§ 431.463 Materials incorporated by reference.

(a) Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, DOE must publish a document in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza SW, Washington, DC 20024, (202) 586–2945, *https://www.energy.gov/eere/buildings/appliance-and-equipment-standards-program,* and may be obtained from the other sources in this section. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

* * * * *

(d) * * *

(5) HI 40.6–2021, (''HI 40.6–2021''), ''Methods for Rotodynamic Pump Efficiency Testing,'' copyright 2021, IBR approved for appendix D to subpart Y of this part.

* * * * *

■ 8. Section 431.464 is amended by adding paragraph (c) to read as follows:

§ 431.464 Test procedure for measuring energy efficiency and other performance factors of pumps.

* * * * *

(c) *Circulator pumps*—

(1) *Scope.* This paragraph (c) provides the test procedures for determining the circulator energy index for circulator pumps that are also clean water pumps, including on-demand circulator pumps and circulators-less-volute, and excluding submersible pumps and header pumps.

(2) *Testing and calculations.* Determine the circulator energy index (CEI) using the test procedure set forth in appendix D of this subpart Y.

■ 9. Add appendix D to subpart Y of part 431 to read as follows:

Appendix D to Subpart Y of Part 431—Uniform Test Method for the Measurement of Energy Consumption of Circulator Pumps

I. Test Procedure for Circulator Pumps

A. *General*

A.1 Referenced materials. DOE incorporated by reference in § 431.463 the entire standard for HI 40.6–2021. However, not all provisions of HI 40.6–2021 apply to this appendix. If there is any conflict between any industry standard and this appendix, follow the language of the test procedure in this appendix, disregarding the conflicting industry standard language. Specifically, the following provisions are not applicable:

(1) Section 40.6.4—Considerations when determining the efficiency of certain pumps, Section 40.6.4.1—Vertically suspended pumps

(2) Section 40.6.4—Considerations when determining the efficiency of certain pumps, Section 40.6.4.2—Submersible pumps

(3) Section 40.6.5—Test procedures, Section 40.6.5.3—Test report

(4) Section 40.6.5—Test procedures, Section 40.6.5.5—Test conditions, Section 40.6.5.5.2—Speed of rotation during test

(5) Section 40.6.6—Analysis, Section 40.6.6.1—Translation of the test results to the specified speed of rotation

(6) Section 40.6.6—Analysis, Section 40.6.6.1—Translation of the test results to the specified speed of rotation, Section 40.6.6.1.1—Translation of the test results into data based on specified speed of rotation
(7) Appendix B—Reporting of test results
(8) Appendix G—DOE compared to HI 40.6 nomenclature

A.2 To determine the circulator energy index (CEI), testing shall be performed in accordance with HI 40.6–2021, including Appendix E ''Testing Circulator Pumps,'' with the exceptions noted in section A.0 of this appendix and the modifications and additions as noted throughout the following provisions. For the purposes of applying this appendix, the term ''pump power output,'' as defined in section 40.6.2, ''Terms and definitions,'' of HI 40.6–2021 shall be deemed to be synonymous with the term ''hydraulic horsepower'' used throughout that standard and this appendix.

B. *Scope.*

B.1 Section II of this appendix describes the testing of circulator pumps with external input signal controls and the calculation of CER for these circulator pumps.

B.2 Section III of this appendix describes the testing of circulator pumps with manual speed controls and the calculation of CER for these circulator pumps.

B.3 Section IV of this appendix describes the testing of circulator pumps with pressure controls and the calculation of CER for these circulator pumps.

B.4 Section V of this appendix describes the testing of circulator pumps with temperature controls and the calculation of CER for these circulator pumps.

B.5 Section VI of this appendix describes the testing of circulator pumps without external input signal, manual, pressure, or temperature controls (*i.e.,* full speed test) and the calculation of CER for these circulator pumps.

B.6 If a given circulator pump model is distributed in commerce with multiple control varieties available, the manufacturer may select a control variety (or varieties) among those available with which to test the circulator pump, including the test method for circulator pumps without external input signal, manual, pressure, or temperature controls (*i.e.,* full speed test).

C. *Measurement Equipment.* For the purposes of measuring flow rate, head, driver power input, and pump power output, the equipment specified in HI 40.6–2021 Appendix C must be used and must comply with the stated accuracy requirements in HI 40.6–2021 Table 40.6.3.2.3. When more than one instrument is used to measure a given parameter, the combined accuracy, calculated as the root sum of squares of individual instrument accuracies, must meet the specified accuracy requirements.

D. *Test conditions.*

D.1 Pump specifications. Conduct testing in accordance with the test conditions, stabilization requirements, and specifications of HI 40.6–2021 section 40.6.3, ''Pump efficiency testing''; section 40.6.4, ''Considerations when determining the efficiency of a pump,'' including section 40.6.4.4, ''Determination of pump overall efficiency''; section 40.6.5.4 (including Appendix A), ''Test arrangements''; and section 40.6.5.5, ''Test conditions.''

D.2 Twin head circulator pump. To test twin head circulator pumps, one of the two impeller assemblies should be incorporated into an adequate, single impeller volute and casing. An adequate, single impeller volute and casing means a volute and casing for which any physical and functional characteristics that affect energy consumption and energy efficiency are essentially identical to their corresponding characteristics for a single impeller in the twin head circulator pump volute and casing.

D.3 Circulator-less-volute. To determine the CEI for a circulator-less-volute, test each circulator-less-volute with each volute for which the circulator-less-volute is offered for sale or advertised to be paired for that circulator pump model according to the testing and calculations described in sections II, III, IV, V, or VI of this appendix, depending on the variety of control with which the circulator pump model is distributed in commerce, as specified in section B of this appendix. Alternatively, each circulator-less-volute may be tested with the most consumptive volute with which is it offered for sale or advertised to be paired for that circulator pump model.

E. *Data collection and analysis.*

E.1 Stabilization. Record data at any test point only under stabilized conditions, as defined in HI 40.6–2021 section 40.6.5.5.1.

E.2 Testing BEP at maximum speed for the circulator pump. Determine the BEP of the circulator pump at maximum speed as specified in Appendix E of HI 40.6–2021 including sections 40.6.5.5.1 and 40.6.6 as modified. Determine the BEP flow rate at maximum speed as the flow rate at the operating point of maximum overall efficiency on the circulator pump curve, as determined in accordance with section 40.6.6.3 of HI 40.6–2021 as modified by Appendix E, where overall efficiency is the ratio of the circulator pump power output divided by the driver power input, as specified in Table 40.6.2.1 of HI 40.6–2021. For the purposes of this test procedure, all references to ''driver power input'' in this appendix or HI 40.6–2021 shall refer to the input power to the controls, or to the motor if no controls are present.

E.3 Reference system curve. The reference system curve for each circulator pump variety is defined uniquely for each pump as a quadratic function with a fixed head component of 20 percent of the head at BEP at maximum speed as defined by the following equation:

$$H = \left[0.8 * \left(\frac{Q}{Q_{100\%}}\right)^2 + 0.2\right] * H_{100\%}$$

Where:

H = total system head (ft);
Q = flow rate (gpm);
$Q_{100\%}$ = flow rate at 100 percent of BEP flow at maximum speed (gpm); and
$H_{100\%}$ = total pump head at 100 percent of BEP flow at maximum speed (ft).

E.4 Rounding. All terms and quantities refer to values determined in accordance with the procedures set forth in this appendix for the rated circulator pump. Perform all calculations using raw measured values without rounding. Round PER_{CIRC}, BEP flow at maximum speed and BEP head at maximum speed values to three significant figures. Round real power, true RMS current and true RMS voltage values the tenths place (*i.e.,* 0. 1). Round PEI_{CIRC}, hydraulic horsepower, true power factor, and all other reported values to the hundredths place unless otherwise specified.

F. *Calculation of CEI.*

F.1 Determine CEI using the following equation:

$$CEI = \frac{\text{CER}}{CER_{STD}}$$

Where:

CEI = the circulator energy index (dimensionless);
CER = the circulator energy rating determined in accordance with section II (for circulator pumps with external input signal controls), section III (for circulator pumps with manual speed controls), section IV (for circulator pumps with pressure controls), section V (for circulator pumps with temperature controls), or section VI (for circulator pumps without external input signal, manual, pressure or temperature controls) (hp); and
CER_{STD} = the CER for a circulator pump that is minimally compliant with DOE's energy conservation standards with the same hydraulic horsepower as the tested pump, as determined in accordance with the specifications at paragraph (i) of § 431.465.

G. *Determination of Additional Circulator Performance Parameters.*

G.1 To determine flow and head at BEP, as well as pump power output (hydraulic horsepower), driver power input, overall (wire-to-water) efficiency, true RMS current, true RMS voltage, real power, and/or power factor at relevant load points, conduct testing according to section I.A.1 of this appendix.

G.2 Determine the rated hydraulic horsepower as the pump power output

measured at BEP and full impeller diameter for the rated pump.

G.3 Determine the true power factor at each applicable load point specified in sections II, III, IV, V, or VI of this appendix for each circulator pump control variety as a ratio of driver power input to the motor (or controls, if present) (P_i), in watts, divided by the product of the true RMS voltage in volts and the true RMS current in amps at each load point *i,* as shown in the following equation:

$$PF_i = \frac{P_i}{V_i \times I_i}$$

Where:

PF_i = true power factor at each load point *i,* dimensionless;
P_i = driver power input to the motor (or controls, if present) at each load point *i,* in watts;
V_i = true RMS voltage at each load point *i,* in volts;
I_i = true RMS current at each load point *i,* in amps; and
i = load point(s), defined uniquely for each circulator pump control variety as specified in sections II, III, IV, V, or VI of this appendix.

II. Testing and Calculation of CER for Circulator Pumps With External Input Signal Controls

A. *Scope.*

A.1 This section II applies only to circulator pumps sold with only external input signal controls and circulator pumps sold with external input signal controls in addition to other control varieties.

B. *Circulator pumps with only external input signal control, and which cannot be operated without an external input signal.*

B.1 Adjust the speed of the pump using a manual speed adjustment or with a simulated external signal to activate the external signal input control to achieve flow rates of 25, 50, 75, and 100 percent of the BEP flow rate (as determined according to section I.E.2 of this appendix) with head values that are at or above the reference system curve (defined in section I.E.3 of this appendix). Measure the driver power input at those flow rates.

B.1.1 All tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve.

B.1.2 For tested head values more than 10 percent above the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow point using the following equation:

$$P_{in,i} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,j}$ = the tested driver power input at load point j (hp).

B.1.3 For tested head values within ±10 percent of the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow and head point using the following equation:

$$P_{in,i} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);
$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);
$H_{T,j}$ = the tested head at load point j (ft);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,j}$ = the tested driver power input at load point j (hp).

B.1.4 If the tested head value is below the head load point specified by the reference system curve by more than 10 percent, the test point must be retested.

B.2. Calculating the circulator energy rating. Determine the CER of each tested circulator pump using the following equation:

$$CER = \sum_i \omega_i \left(P_{in,i}\right)$$

Where:

CER = circulator energy rating (hp);
ω_i = weight of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively;
$P_{in,i}$ = driver power input at each test point i (hp); and
i = test point(s), corresponding to 25, 50, 75, and 100 percent of the flow at BEP.

C. *Circulator pumps with external input signal control in addition to other control varieties, or which can be operated without an external input signal.*

C.1 Determination of circulator pump driver power input.

C.1.1 Determine the driver power input at 25, 50, and 75 percent of the measured BEP flow rate at maximum speed (as determined according to section I.E.2 of this appendix) of the tested circulator pump in accordance with Appendix E of HI 40.6–2021.

C.1.2 Determine the driver power input at 100 percent of BEP flow at maximum speed and at 25, 50, 75 percent of the BEP flow rate and reduced speed by using a manual speed adjustment or a simulated external input signal to adjust the speed of the driver to achieve those flow rates with a head value at or above the reference system curve defined in section I.E.3 of this appendix. Measure the driver power input at those flow rates.

C.1.2.1 All tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve.

C.1.2.2 For tested head values more than 10 percent above the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow point using the following equation:

$$P_{in,i_{reduced}} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i\_reduced}$ = the driver power input (hp);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,j}$ = the tested driver power input at load point j (hp).

C.1.2.3 For tested head values within ±10 percent of the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow and head point using the following equation:

$$P_{in,i_{reduced}} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i\_reduced}$ = the driver power input (hp);
$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);
$H_{T,j}$ = the tested head at load point j (ft);
$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);
$Q_{T,j}$ = the tested flow rate at load point j (gpm); and
$P_{T,i}$ = the tested driver power input at load point j (hp).

C.1.2.4 If the tested head value is below the head load point specified by the reference system curve by more than 10 percent, the test point must be retested.

C.2 Calculating the circulator energy rating. Determine the CER of each tested circulator pump using the following equation:

$$CER = z_{max}\left(P_{in_{max}}\right) + z_{reduced}\left(P_{in_{reduced}}\right)$$

Where:

CER = circulator energy rating (hp);
z_{max} = speed factor weight of 0.30;
P_{in_max} = weighted average input power at maximum rotating speed of the circulator pump (hp), calculated in accordance with section II.C.2.1 of this appendix;
$z_{reduced}$ = speed factor weight of 0.70; and

$P_{in\_reduced}$ = weighted average input power at reduced rotating speeds of the circulator pump (hp), calculated in accordance with section II.C.2.2 of this appendix.

C.2.1 Determine the weighted average input power at maximum speed using the following equation:

$$P_{in_{max}} = \sum_{i} \omega_{i_{max}} \left(P_{in,i_{max}}\right)$$

Where:

P_{in_max} = weighted average input power at maximum speed of the circulator pump (hp);

ω_{i_max} = 0.25;

P_{in,i_max} = driver power input at maximum rotating speed of the circulator pump at each test point i (hp) determined in accordance with section II.C.1.1 of this appendix; and

i = test point(s) corresponding to 25, 50, 75, and 100 percent of the flow at BEP and maximum speed.

C.2.2 Determine the weighted average input power at reduced speeds of the circulator pump using the following equation:

$$P_{in_{reduced}} = \sum_{i} \omega_{i_{reduced}} \left(P_{in,i_{reduced}}\right)$$

Where:

$P_{in\_reduced}$ = weighted average input power at reduced speeds of the circulator pump (hp);

$\omega_{i\_reduced}$ = 0.3333;

$P_{in,i\_reduced}$ = driver power input at reduced rotating speed of the circulator pump at each test point i (hp) determined in accordance with section II.C.1.2 of this appendix; and

i = test point(s) corresponding to 25, 50, and 75 percent of the flow at BEP with head at or above the reference system curve.

III. Testing and Calculation of CER for Circulator Pumps With Manual Speed Controls

A. *Scope.*

A.1 This section III applies only to circulator pumps sold with manual speed controls.

B. *Determination of circulator pump driver power input.*

B.1 Determine the driver power input at 25, 50, and 75 percent of the measured BEP flow rate at maximum speed (as determined according to section I.E.2 of this appendix) of the tested circulator pump in accordance with Appendix E of HI 40.6–2021.

B.2 Determine the driver power input at 100 percent of BEP flow at maximum speed and at 25, 50, and 75 percent of the BEP flow rate at reduced speed by manually setting the speed of the circulator pump and measuring the driver power input at those flow rates with the following additional requirements:

B.2.1 The tested control curve must:

(1) Be available to the end-user,

(2) Produce a head equal to or greater than 25 percent of BEP head at a minimum of one test point, and

(3) Achieve 100 percent BEP flow of the reference system curve defined in section I.E.3 of this appendix.

B.2.2 All tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve.

B.2.3 For tested head values that are at or above the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow point using the following equation:

$$P_{in,i_{reduced}} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,i}$$

Where:

$P_{in,i\_reduced}$ = the driver power input (hp);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,i}$ = the tested driver power input at load point i (hp).

B.2.4 For tested head values that are below the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow and head point using the following equation:

$$P_{in,i_{reduced}} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i\_reduced}$ = the driver power input (hp);

$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);

$H_{T,j}$ = the tested head at load point j (ft);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,j}$ = the tested driver power input at load point j (hp).

C. *Calculating the circulator energy rating.* Determine the CER of each tested circulator pump using the following equation:

$$CER = z_{max}\left(P_{in_{max}}\right) + z_{reduced}\left(P_{in_{reduced}}\right)$$

Where:

CER = circulator energy rating (hp);

z_{max} = speed factor weight of 0.75;

P_{in_max} = weighted average input power at maximum rotating speed of the circulator pump (hp), calculated in accordance with section III.C.1 of this appendix;

$z_{reduced}$ = speed factor weight of 0.25;

$P_{in\_reduced}$ = weighted average input power at reduced rotating speeds of the circulator pump (hp), calculated in accordance with section III.C.2 of this appendix.

C.1 Determine the weighted average input power at maximum speed using the following equation:

$$P_{in_{max}} = \sum_{i} \omega_{i_{max}} \left(P_{in,i_{max}}\right)$$

Where:

P_{in_max} = weighted average input power at maximum speed of the circulator pump (hp);

ω_{i_max} = 0.25;

P_{in,i_max} = driver power input at maximum rotating speed of the circulator pump at each test point i (hp) determined in accordance with section III.B.1; and

i = test point(s) corresponding to 25, 50, 75, and 100 percent of the flow at BEP and maximum speed.

C.2 Determine the weighted average input power at reduced speeds of the circulator pump using the following equation:

$$P_{in_{reduced}} = \sum_{i} \omega_{i_{reduced}} \left(P_{in,i_{reduced}}\right)$$

Where:

$P_{in\_reduced}$ = weighted average input power at reduced speeds of the circulator pump (hp);

$\omega_{i\_reduced}$ = 0.3333;

$P_{in,i\_reduced}$ = driver power input at reduced rotating speed of the circulator pump at each test point i (hp) determined in accordance with section III.B.2 of this appendix; and

i = test point(s) corresponding to 25, 50, and 75 percent of the flow at BEP and reduced speed.

IV. Testing and Calculation of CER for Circulator Pumps With Pressure Controls

A. *Scope.*

A.1 This section IV applies only to circulator pumps sold with pressure controls, including adaptive pressure controls.

B. *Determination of circulator pump driver power input.*

B.1 Determine the driver power input at 25, 50, 75, and 100 percent of the BEP flow rate (as determined according to section I.E.2 of this appendix) by measuring the driver power input at those flow rates with the following additional requirements.

B.1.1 For pressure controls that are not adaptive pressure controls, select the control settings according to section B.1.1.1 of this appendix, and evaluate the load points at 25, 50, and 75 percent of BEP flow using one of the methods specified in section B.1.1.2 of this appendix.

B.1.1.1 If the minimum and/or maximum head values on the control curve can be adjusted, adjust the maximum head value to 100 percent of BEP head at maximum speed and the minimum head value to 20 percent of BEP head at maximum speed. If the maximum head values on the control curve cannot be adjusted, select a control curve that meets the following requirements:

The tested control curve must:

(1) Be available to the end-user,

(2) Produce a head equal to or greater than 25 percent of BEP head at a minimum of one test point, and

(3) Achieve 100 percent BEP flow of the reference system curve defined in section I.E.3 of this appendix.

B.1.1.2 Adjust the speed of the pump at flow rates of 25, 50, and 75 percent of BEP flow using one of the methods specified in sections B.1.1.3.1 through B.1.1.3.3 of this appendix. Only one control setting may be evaluated.

B.1.1.2.1 Throttle the pump to the desired flow rate and allow the selected pressure control to automatically reduce the speed according to the control curve for the control setting being evaluated.

B.1.1.2.2 Manually adjust the speed of the pump and throttle the pump as needed to achieve speed settings equivalent to those that would be generated by the control setting being evaluated.

B.1.1.2.3 Provide a simulated pressure signal and throttle the pump as needed to achieve speed settings equivalent to those that would be generated by the control setting being evaluated.

B.1.2 For pressure controls that are adaptive pressure controls, select the control settings and adjust the speed of the pump according to section B.1.2.1 or B.1.2.2 of this appendix. Adaptive pressure controls may be manually adjusted to achieve 100 percent BEP flow and head point at max speed.

B.1.2.1 If the pump can be manually controlled, adjust the speed manually to achieve the load point flow rates with head values at or above the greater of the reference system curve and the minimum thresholds for head specified in the manufacturer literature.

B.1.2.2 If the pump does not have a manual control mode available, adjust the speed based on the pressure control mode with the lowest head at each load point. If the selected pressure control mode results in a head value below the reference system curve, the pump may be throttled to achieve a head value at or above the reference system curve.

B.1.3 All tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve equation in section I.E.3 of this appendix.

B.1.4 For tested head values that are at or above the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow point using the following equation:

$$P_{in,i} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,j}$ = the tested driver power input at load point j (hp).

B.1.5 For tested head values that are below the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow and head point using the following equation:

$$P_{in,i} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);

$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);

$H_{T,j}$ = the tested head at load point j (ft);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,j}$ = the tested driver power input at load point j (hp).

C. *Calculating the circulator energy rating.* Determine the CER of each tested circulator pump using the following equation:

$$CER = \sum_i \omega_i \left(P_{in,i}\right)$$

Where:

CER = circulator energy rating (hp);

ω_i = weight of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively;

$P_{in,i}$ = driver power input at each test point i (hp); and

i = test point(s) corresponding to 25, 50, 75, and 100 percent of BEP flow.

V. Testing and Calculation of CER for Circulator Pumps With Temperature Controls

A. *Scope.*

A.1 This section V applies only to circulator pumps sold with temperature controls.

B. *Determination of circulator pump driver power input.*

B.1 Adjust the speed of the pump using a manual speed adjustment or a simulated temperature signal to activate the temperature control to achieve flow rates of 25, 50, 75, and 100 percent of the BEP flow rate (as determined according to section I.E.2 of this appendix) with head values that are at or above the reference system curve (defined in section I.E.3 of this appendix). Measure the driver power input at those flow rates.

B.1.1 All tested flow values must be within ±5 percent of the target flow load points as specified by the reference system curve.

B.1.2 For tested head values that are more than 10 percent above the reference system curve, adjust the tested driver power input to the specified flow point using the following equation:

$$P_{in,i} = \left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,j}$ = the tested driver power input at load point j (hp).

B.1.3 For tested head values within ±10 percent of the head load points specified by the reference system curve, adjust the tested driver power input to the specified flow and head point using the following equation:

$$P_{in,i} = \left(\frac{H_{R,i}}{H_{T,j}}\right)\left(\frac{Q_{R,i}}{Q_{T,j}}\right) P_{T,j}$$

Where:

$P_{in,i}$ = the driver power input (hp);

$H_{R,i}$ = the specified head at load point i based on the reference system curve (ft);

$H_{T,j}$ = the tested head at load point j (ft);

$Q_{R,i}$ = the specified flow rate at load point i based on the reference system curve (gpm);

$Q_{T,j}$ = the tested flow rate at load point j (gpm); and

$P_{T,j}$ = the tested driver power input at load point j (hp).

B.1.4 If the tested head value is below the head load point specified by the reference system curve by more than 10 percent, the test point must be retested.

C. *Calculating the circulator energy rating.* Determine the CER of each tested circulator pump using the following equation:

$$\mathrm{CER} = \sum_{i} \omega_i \left(P_{in,i}\right)$$

Where:

CER = circulator energy rating (hp);
ω_i = weight of 0.05, 0.40, 0.40, and 0.15 at test points of 25, 50, 75, and 100 percent of BEP flow, respectively;
$P_{in,i}$ = driver power input at each test point i (hp); and
i = test point(s) corresponding to 25, 50, 75, and 100 percent of BEP flow.

VI. Testing and Calculation of CER for Circulator Pumps Without External Input Signal, Manual, Pressure, or Temperature Controls (Full Speed Test)

A. *Scope.*

A.1 This section VI applies only to circulator pumps sold without external input signal, manual, pressure, or temperature controls, or to any conduct of a full speed test.

B. *Determination of circulator pump driver power input.* At maximum speed of rotation, determine the driver power input at 25, 50, 75, and 100 percent of the measured BEP flow rate (as determined according to section I.E.2 of this appendix) of the tested circulator pump in accordance with Appendix E of HI 40.6–2021.

C. *Calculating the circulator energy rating.* Determine the CER of each tested circulator pump using the following equation:

$$CER = \sum_{i} \omega_i \left(P_{in,i}\right)$$

Where:

CER = circulator energy rating (hp);
$\omega_i = 0.25$;
$P_{in,i}$ = driver power input at each test point i (hp); and
i = test point(s) corresponding to 25, 50, 75, and 100 percent of BEP flow.

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