FEDERAL REGISTER

Vol. 81 Monday,
No. 84 May 2, 2016

Pages 26089–26460

OFFICE OF THE FEDERAL REGISTER

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Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

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Presidential Documents

Title 3—

The President

Proclamation 9427 of April 27, 2016

National Physical Fitness and Sports Month, 2016

By the President of the United States of America

A Proclamation

For generations, sports have brought Americans of all ages together and helped us celebrate our country's competitive spirit. When we work to instill an appreciation for physical fitness in our people, we do more than honor an age-old tradition—we take a critical step toward ensuring the prospect of a long and healthy life. During National Physical Fitness and Sports Month, we highlight the importance of staying active, and we encourage all Americans to partake in physical activity to maintain their health and well-being.

Sports and other forms of physical activity inspire us—they bridge differences, unite Americans from every walk of life, and teach the importance of teamwork. Whether exploring the great outdoors or shooting hoops with friends, regular physical activity can also relieve stress, boost energy and self-esteem, and prevent numerous chronic diseases, including some of the leading causes of death, such as cancer, stroke, and heart disease. Children should engage in physical activity for at least 1 hour each day, and adults should do so for at least 30 minutes. Critical to enabling our youth to reach their fullest potential, regular exercise must go hand-in-hand with healthy eating and proper nutrition—because our children's well-being tomorrow depends on what they eat today.

This year, we celebrate six decades since President Dwight Eisenhower established the President's Council on Youth Fitness, known today as the President's Council on Fitness, Sports, and Nutrition. The Council partners with the public, private, and non-profit sectors to empower people to lead healthy and active lives. Through their *I Can Do It, You Can Do It!* program, the Council facilitates physical activity for individuals with disabilities and offers opportunities for regular exercise at sites across our country. My Administration's *Go4Life* campaign is motivating older Americans to recommit to making exercise a part of their daily lives. And First Lady Michelle Obama's *Let's Move!* initiative continues to inspire a rising generation to eat healthily and get plenty of physical activity so they can grow up strong and pursue their dreams. For more information on my Administration's actions to promote sports and physical fitness—and for ways you can get involved—visit www.Fitness.gov and www.LetsMove.gov.

Participation in sports and other physical activity represents our country's promise: the idea that if you work hard, commit to a goal, and never give up on yourself, there is nothing you cannot achieve. This month, let us each strive to make fitness a greater part of our lives, and let us join together as one American team to promote physical activity and chart a healthier, fitter future for our country.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2016 as National Physical Fitness and Sports Month. I call upon the people of the United States to make daily physical activity, sports participation, and good nutrition a priority in their lives.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of April, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

[FR Doc. 2016–10298
Filed 4–29–16; 8:45 am]
Billing code 3295–F6–P

Presidential Documents

Proclamation 9428 of April 27, 2016

Law Day, U.S.A., 2016

By the President of the United States of America

A Proclamation

Underpinning American democracy and upholding the founding principles of our Nation, the law enshrines our bedrock belief in equality and justice for all. Central to securing these ideals is ensuring that every American's fundamental, constitutionally-guaranteed individual rights are protected, and by respecting these rights, our Nation demonstrates its unwavering dedication to the law. Our fidelity to the rule of law has guided our country in times of trial and triumph, and it helps us keep faith with our Founders and with generations to come.

On this year's Law Day, we celebrate 50 years since the Supreme Court's ruling in *Miranda* v. *Arizona.* This landmark decision made clear that the Fifth Amendment ''. . . serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.'' *Miranda* v. *Arizona* institutionalized the important practice of explaining constitutional rights prior to interrogation. And it established the important general rule that individuals interrogated in police custody cannot have their answers admitted into evidence against them unless they had first been informed of their rights—including the right to remain silent and the right to have an attorney present.

The Court's decision in *Miranda* v. *Arizona* affirmed that ''Equal Justice Under Law'' is more than just words, but a cornerstone of our Nation's legal system—the idea that no matter who you are or where you come from, you will be treated equally and afforded due process. Today, our society faces new challenges to this age-old tenet. Our criminal justice system is in serious need of reform; disparities in stops, arrests, and sentencing persist; and in too many places distrust exists between community members and law enforcement officers. I am committed to ensuring our Nation's criminal justice system is fair, smart, and effective. By engaging people across America, my Task Force on 21st Century Policing has provided a roadmap for strengthening relationships between local police and the communities they serve, helping to uphold the integrity of our criminal justice system. My Administration has also taken action to address unfair sentencing disparities that undermine the equitable application of the law, and we will continue working to bring greater fairness to our criminal justice system and to ensure that the rule of law remains the foundation of our country.

Miranda v. *Arizona* imparts an important lesson: Knowledge of our constitutional rights is an essential component to fully exercising those rights. Safeguarding the promise of equal justice requires the participation of all our citizens, and across America, community and court programs that offer civic education and prepare members of the public to fulfill their civic responsibilities are vital to this task.

Chief Justice Earl Warren, the author of the Supreme Court's decision in *Miranda* v. *Arizona,* once observed that, ''In civilized life, law floats in a sea of ethics.'' The law informs right from wrong—it affects the daily reality of our lives and safeguards the birthrights of all Americans. On Law Day, let us recommit to building a future rooted in the rule of law,

in which our laws apply equally to everyone and all our children know a fair and just world.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, in accordance with Public Law 87–20, as amended, do hereby proclaim May 1, 2016, as Law Day, U.S.A. I call upon all Americans to acknowledge the importance of our Nation's legal and judicial systems with appropriate ceremonies and activities, and to display the flag of the United States in support of this national observance.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of April, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

[FR Doc. 2016–10302
Filed 4–29–16; 8:45 am]
Billing code 3295–F6–P

Presidential Documents

Proclamation 9429 of April 27, 2016

Loyalty Day, 2016

By the President of the United States of America

A Proclamation

America endures because of the generations of our people who have endeavored alongside one another, joining their voices and their efforts to ensure our Nation lives up to its highest ideals. Driven by the determination to continue making our society more just and more equal, our work to fulfill our country's potential has always relied on our willingness to see ourselves in our fellow citizens.

Our Nation has always been at its finest when guided by a spirit of shared sacrifice and common purpose. It is that spirit that led a small band of patriots to declare our fledgling democracy free from the grasp of tyranny, that slaves and abolitionists carried in their hearts as they marched forward on the long journey toward freedom, and that guides the men and women who wear our country's uniform in their selfless service. From the unlit paths of the Underground Railroad to the lunch counters of Greensboro, the first streets draped in the colors of pride to the highest Court in our land, we have seen throughout our history that America is inexorably driven forward by those who commit themselves to expanding our founding promise through extraordinary acts of courage and heroism. We honor that legacy—that demonstrates that the forces of hope and love of country are strong enough to overcome even our most deeply entrenched obstacles—by resolving to carry it forward, by rejecting appeals to prejudice and division in our time, and by drawing on the hopes and dreams that bind us.

While ours has always been a large and complicated democracy, full of differing views and boisterous debates, our history also makes clear that we are strongest when we find in our diversity a deeper, richer unity, stemming from an overarching belief in the possibilities our shared future holds. This Loyalty Day, let us remember that what defines us as one American people is our dedication to common ideals—rather than similarities of origin or creed—and let us reaffirm that embracing this truth lies at the heart of what it means to be a citizen. As long as we stay true to that mission and uphold our responsibility to deliver a freer, fairer Nation to the next generation, a future of ever greater progress will remain within our reach.

In order to recognize the American spirit of loyalty and the sacrifices that so many have made for our Nation, the Congress, by Public Law 85–529 as amended, has designated May 1 of each year as ''Loyalty Day.'' On this day, let us reaffirm our allegiance to the United States of America and pay tribute to the heritage of American freedom.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim May 1, 2016, as Loyalty Day. This Loyalty Day, I call upon all the people of the United States to join in support of this national observance, whether by displaying the flag of the United States or pledging allegiance to the Republic for which it stands.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of April in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

[FR Doc. 2016–10309
Filed 4–29–16; 8:45 am]
Billing code 3295–F6–P

Presidential Documents

Proclamation 9430 of April 27, 2016

Workers Memorial Day, 2016

By the President of the United States of America

A Proclamation

The story of America is the story of its workers. With faith in one another and hope for what their country could be, generations of laborers fought, sacrificed, and organized for the rights and protections that workers across our Nation have today—including requirements to protect their health and safety. Today, we honor this legacy by reflecting on those who have lost their lives in the workplace, and we reaffirm our dedication to ensuring that people can work knowing the fullest measure of stability, security, and opportunity.

In 1969 and 1970, two pieces of legislation of enormous consequence forever changed the lives of workers across our Nation. Passed by a Democratic Congress and signed by a Republican President, the Federal Coal Mine Health and Safety Act—which required Federal inspections of coal mines, established processes and protections for ensuring the health and safety of coal miners, and was later amended to cover all miners—and the Occupational Safety and Health Act—which created new standards for worker protections in industries across America—represented milestone achievements for a cause borne out of decades of toil and struggle. Spurred by working men and women of every origin and background, the movement for worker safety was inspired by a simple notion: that those who contribute so much to the economy and spirit of our country should have every chance to share in its promise.

Since I took office, my Administration has advanced protections for America's workers. In 2014, I signed an Executive Order aimed at cracking down on Federal contractors who violate our labor laws, and in the time since, we have enhanced our rigorous processes for companies contracting with the Federal Government while working to enforce and raise standards for employers throughout our economy. We have implemented rules that cut the amount of coal dust inhaled by coal miners, and we have taken steps to protect more workers from diseases caused by exposure to silica and other harmful substances. And we will enhance our efforts to support workers injured on the job, because if you are hurt at the workplace after giving your all, you should still be able to keep food on the table.

The history of America's workers reminds us that, far from being inevitable, the progress each generation has known has been the result of the courage, determination, and solidarity demonstrated by the last. This Workers Memorial Day, as we join in solemn remembrance of those who lost their lives undertaking their labor, let us carry forward the vision of just and safe working conditions for all of America's workers. If we stay true to that essential mission, we can deliver to our children and grandchildren a future of ever greater possibility and security.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 28, 2016, as Workers Memorial Day. I call upon all Americans to participate in ceremonies and activities in memory of those killed or injured due to unsafe working conditions.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of April, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

[FR Doc. 2016–10312
Filed 4–29–16; 8:45 am]
Billing code 3295–F6–P

Rules and Regulations

Federal Register
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Monday, May 2, 2016

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–1363; Directorate Identifier 2015–CE–040–AD; Amendment 39–18496; AD 2016–08–19]

RIN 2120–AA64

Airworthiness Directives; Mitsubishi Heavy Industries, Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Mitsubishi Heavy Industries, Ltd. Models MU–2B–30, MU–2B–35, MU–2B–36, MU–2B–36A, and MU–2B–60 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued 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 reports of cracks found in the attach fittings of the main landing gear oleo strut. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of June 6, 2016.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–1363; or in person at Document Management Facility, 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 service information identified in this AD, contact Mitsubishi Heavy Industries America, Inc., c/o Turbine Aircraft Services, Inc., 4550 Jimmy Doolittle Drive, Addison, Texas 75001; telephone: (972) 248–3108, ext. 209; fax: (972) 248–3321; Internet: *http://mu-2aircraft.com.* You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the Internet at *http://www.regulations.gov* by searching for Docket No. FAA–2016–1363.

FOR FURTHER INFORMATION CONTACT: Andrew McAnaul, Aerospace Engineer, FAA, ASW–143 (c/o San Antonio MIDO), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; email: *andrew.mcanaul@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Mitsubishi Heavy Industries, Ltd. Models MU–2B–30, MU–2B–35, MU–2B–36, MU–2B–36A, and MU–2B–60 airplanes. The NPRM was published in the **Federal Register** on January 26, 2016 (81 FR 4217). The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country.

The Japan Civil Aviation Bureau (JCAB), which is the aviation authority for Japan, has issued AD No. TCD–8595–2015, dated July 1, 2015 (referred to after this as ''the MCAI''), to correct an unsafe condition for certain Mitsubishi Heavy Industries, Ltd. (MHI) Models MU–2B–30, MU–2B–35, and MU–2B–36 airplanes. You may examine the MCAI on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2016-1363.*

We have received reports of seven failures of the main landing gear oleo strut attach fitting on certain MHI Models MU–2B–30, MU–2B–35, MU–2B–36, MU–2B–36A, and MU–2B–60 airplanes. Investigation revealed that the failures resulted from improper lubrication and/or hard landings, which caused cracks to develop in the main landing gear oleo strut attach fitting.

Japan is the State of Design for MHI Models MU–2B–30, MU–2B–35, and MU–2B–36 airplanes, which the MCAI AD applies to, and the United States is the State of Design for MHI Models MU–2B–36A and MU–2B–60 airplanes.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 4217, January 26, 2016) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (81 FR 4217, January 26, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (81 FR 4217, January 26, 2016).

Related Service Information Under 1 CFR Part 51

We reviewed Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 243, dated June 30, 2015, and MU–2 Service Bulletin No. 105/32–017, dated September 29, 2015. The service information describes procedures for visually inspecting the lugs of the oleo attach fittings on both sides for cracks, and if any visible cracks are found, replacing with a new fitting. We also reviewed Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 171, FAA T.C.: No. 124/32–011, dated April 27, 2012, and MU–2 Service News JCAB T.C.: No. 176, FAA T.C.: No. 128/32–013, dated July 18, 2013. This service information specifies doing repetitive ultrasound inspections of the main landing gear oleo upper attach fittings for cracks and ensuring proper lubrication of the main landing gear oleo fitting. 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 of the AD.

Differences Between This AD and the MCAI

We have determined that the repetitive visual inspections specified in the MCAI are not adequate for detecting cracks in the main landing gear oleo strut attach fitting. Repetitive ultrasonic inspections of the main landing gear oleo strut attach fitting have been added into the maintenance requirement manual for these airplanes, which is not considered mandatory in the FAA's airworthiness regulatory system. Therefore, we are incorporating that requirement through the rulemaking process.

Costs of Compliance

We estimate that this AD will affect 95 products of U.S. registry. We also estimate that it will take about 5 work-hours per product to comply with the visual inspection requirement of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the visual inspection requirements of this AD on U.S. operators to be $40,375, or $425 per product.

We also estimate that it will take about 3 work-hours per product to comply with the ultrasound inspection requirements of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the ultrasound inspection requirements of this AD on U.S. operators to be $24,225, or $255 per product.

Owner/operators have the option to do an ultrasound inspection in lieu of the required visual inspection.

In addition, we estimate that any necessary follow-on actions will take about 24 work-hours and require parts costing $5,220, for a cost of $7,260 per product to replace the left-hand main landing gear oleo strut. We have no way of determining the number of products that may need this action.

In addition, we also estimate that any necessary follow-on actions will take about 45 work-hours and require parts costing $5,220, for a cost of $9,045 per product to replace the right-hand main landing gear oleo strut. We have no way of determining the number of products that may need this action.

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.

We are 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

We 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 AD:

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

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

(4) 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.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–1363; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–08–19 Mitsubishi Heavy Industries, Ltd.: Amendment 39–18496; Docket No. FAA–2016–1363; Directorate Identifier 2015–CE–040–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Mitsubishi Heavy Industries, Ltd. Models MU–2B–30, MU–2B–35, and MU–2B–36 airplanes, serial numbers 502 through 696, except 652 and 661, and Models MU–2B–36A and MU–2B–60 airplanes, serial numbers 661SA, and 697SA through 1569SA, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

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 reports of cracks found in the upper attach fittings of the main landing gear oleo strut. We are issuing this AD to prevent failure of the main landing gear oleo strut attach fitting, which could cause the landing gear to fail and result in loss of control.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) Within the next 100 hours time-in-service (TIS) after June 6, 2016 (the effective date of this AD) or within the next 6 months after June 6, 2016 (the effective date of this AD), whichever occurs first, do a visual inspection of the main landing gear oleo upper attach fittings for cracks. Do the inspection following the INSTRUCTIONS section in Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 243, dated June 30, 2015, and the INSTRUCTIONS section in Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 105/32–017, dated September 29, 2015, as applicable.

(2) Before further flight after the inspection required in paragraph (f)(1) of this AD, if no signs of cracks are found, lubricate the pin assembly attached to the main landing gear oleo attach fitting as specified in Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 171, FAA T.C.: No. 124/32–011, dated April 27, 2012.

(3) Within the next 100 hours TIS after doing the initial visual inspection required in

paragraph (f)(1) of this AD or within the next 12 months after doing the initial visual inspection required in paragraph (f)(1) of this AD, whichever occurs first, do an ultrasound inspection of the main landing gear oleo upper attach fittings for cracks as specified in Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 176, FAA T.C.: No. 128/32–013, dated July 18, 2013. This ultrasound inspection may also be done in place of the visual inspection required in paragraph (f)(1) of this AD if done within the next 100 hours TIS after June 6, 2016 (the effective date of this AD) or within the next 6 months after June 6, 2016 (the effective date of this AD), whichever occurs first. Repetitively thereafter ultrasound inspect the attach fittings every 600 hours TIS or 36 months, whichever occurs first, and any time a hard landing or overweight landing occurs.

(4) Before further flight after any inspection required in paragraph (f)(3) of this AD, if no signs of cracks are found, lubricate the pin assembly attached to the main landing gear oleo attach fitting as specified in Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 171, FAA T.C.: No. 124/32–011, dated April 27, 2012, and Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 176, FAA T.C.: No. 128/32–013, dated July 18, 2013.

(5) Before further flight after any inspection required in paragraph (f)(1) and (f)(3) of this AD where cracks are found, replace the main landing gear oleo upper attach fittings following the INSTRUCTIONS section in Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 243, dated June 30, 2015, and the INSTRUCTIONS sections in Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 105/32–017, dated September 29, 2015, as applicable. After replacement, continue with the repetitive ultrasound inspection requirements of paragraph (f)(3) and lubrication requirements of paragraph (f)(4) of this AD.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Andrew McAnaul, Aerospace Engineer, FAA, ASW–143 (c/o San Antonio MIDO), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; email: *andrew.mcanaul@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(h) Related Information

Refer to MCAI Japan Civil Aviation Bureau (JCAB) AD No. TCD–8585–2015, dated July 1, 2015, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2016-1363.*

(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) Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 105/32–017, dated September 29, 2015.

(ii) Mitsubishi Heavy Industries, Ltd. MU–2 Service Bulletin No. 243, dated June 30, 2015.

(iii) Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 176, FAA T.C.: No. 128/32–013, dated July 18, 2013.

(iv) Mitsubishi Heavy Industries, Ltd. MU–2 Service News JCAB T.C.: No. 171, FAA T.C.: No. 124/32–011, dated April 27, 2012.

(3) For Mitsubishi Heavy Industries, Ltd service information identified in this AD, contact Mitsubishi Heavy Industries America, Inc., c/o Turbine Aircraft Services, Inc., 4550 Jimmy Doolittle Drive, Addison, Texas 75001; telephone: (972) 248–3108, ext. 209; fax: (972) 248–3321; Internet: *http://mu-2aircraft.com*.

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. In addition, you can access this service information on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–1363.

(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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on April 14, 2016.

Robert P. Busto,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09239 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0657; Directorate Identifier 2014–NM–058–AD; Amendment 39–18501; AD 2016–09–03]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Dassault Aviation Model FALCON 2000, FALCON 2000EX, MYSTERE–FALCON 900, and FALCON 900EX airplanes. This AD was prompted by reports of a co-pilot sliding aft on his seat during take-off at rotation. This AD requires replacement of certain springs installed on the pilot and co-pilot seats. We are issuing this AD to prevent fatigue wear, which, if not corrected, could cause the seat to slide and the pilot or co-pilot to lose contact with the controls, leading to an inadvertent input on the flight control commands during take-off or climb, possibly resulting in loss of control of the airplane.

DATES: This AD becomes effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0657.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0657; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday,

except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model FALCON 2000, FALCON 2000EX, MYSTERE–FALCON 900, and FALCON 900EX airplanes. The NPRM published in the **Federal Register** on November 17, 2014 (79 FR 68392) (''the NPRM'').

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2014–0061, dated March 11, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Dassault Aviation Model FALCON 2000, FALCON 2000EX, MYSTERE–FALCON 900, and FALCON 900EX airplanes. The MCAI states:

> During take-off at rotation, a co-pilot reported to slide aft on his seat.
>
> The results of the investigations concluded that one spring of the seat locking system was broken and the other was weak. The root cause was determined to be fatigue wear. As springs accumulate cycles in service, they become increasingly exposed to the risk of unnoticed degradation or rupture.
>
> This condition, if not corrected, could cause the pilot or the co-pilot to lose contact with the controls, leading to an inadvertent input on the flight control commands during take-off or climb, possibly resulting in loss of control of the aeroplane.
>
> To address this unsafe condition, it was decided to require replacement of the affected seat springs for older aeroplanes and for newer aeroplanes; this task has been embodied in the aeroplane maintenance manual.
>
> For the reasons described above, this [EASA] AD requires replacement of the springs installed on the pilot and co-pilot seats with serviceable springs.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0657.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Revise the Compliance Times

Travis Reinhardt requested that if paragraph (g) of the proposed AD is revised to include other airplanes that we consider different replacement times. The commenter stated that the NPRM is applicable to certain Dassault Aviation airplanes equipped with SICMA 132-series or 142-series pilot and co-pilot seats. The commenter noted he has Embraer 120 airplanes equipped with SICMA 147-series seats, which include part number (P/N) 132100–19 and/or 147100–19 stop pin springs. The commenter stated the Embraer 120 heavy checks are due at 4,000 flight hours versus the stated 3,750 total flight cycles or 74 months for the listed Falcon airplanes. The commenter stated that he has only changed out one spring, approximately twelve years ago, and that currently, his installed springs, P/N 132100–19, have approximately 34,000 flight hours and 34,600 flight cycles.

While we appreciate the information Mr. Reinhardt has given, we are not revising this final rule to include other airplane models (or different replacement times) because the identified unsafe condition only affects the Dassault Aviation airplanes identified in the Applicability paragraph of this AD that are equipped with SICMA 132-series or 142-series pilot and co-pilot seats. However, if we determine that an unsafe condition exists on other airplane models, we might consider further rulemaking on this issue. We have made no changes to this final rule in this regard.

Request To Add Part Number

Mr. Reinhardt requested that if the NPRM is revised, we consider adding P/N 132100–19 to paragraph (h) of the proposed AD, as stated in EASA AD 2014–0061, dated March 11, 2014.

For the reasons stated by the commenter, we agree to add P/N 132100–19 to paragraph (h) of this AD.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Dassault Aviation has issued the following service information:

- Dassault Service Bulletin F900–429, Revision 1, dated July 13, 2012.
- Dassault Service Bulletin F900EX–446, Revision 1, dated July 13, 2012.
- Dassault Service Bulletin F2000–401, Revision 1, dated July 13, 2012.
- Dassault Service Bulletin F2000EX–267, Revision 1, dated July 13, 2012.

The service information describes procedures for replacing certain springs installed on the pilot and co-pilot seats. 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.

Costs of Compliance

We estimate that this AD affects 528 airplanes of U.S. registry.

We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $83 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $133,584, or $253 per product.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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.

We are 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

We 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 that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

4. 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–09–03 Dassault Aviation: Amendment 39–18501. Docket No. FAA–2014–0657; Directorate Identifier 2014–NM–058–AD.

(a) Effective Date

This AD becomes effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD, certificated in any category, equipped with SICMA 132-series or 142-series pilot and co-pilot seats.

(1) Dassault Aviation Model FALCON 2000 airplanes.

(2) Dassault Aviation Model FALCON 2000EX airplanes.

(3) Dassault Aviation Model MYSTERE–FALCON 900 airplanes.

(4) Dassault Aviation Model FALCON 900EX airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Reason

This AD was prompted by reports of a co-pilot sliding aft on his seat during take-off at rotation. We are issuing this AD to prevent fatigue wear, which, if not corrected, could cause the seat to slide and the pilot or co-pilot to lose contact with the controls, leading to an inadvertent input on the flight control commands during take-off or climb, possibly resulting in loss of control of the airplane.

(f) Compliance

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

(g) Replacement

For airplanes that have accumulated more than 3,750 total flight cycles or have exceeded 74 months since the airplane's first flight as of the effective date of this AD: Within 9 months after the effective date of this AD, replace each spring having part number (P/N) 132100–19 and P/N 147100–19 installed on the pilot and co-pilot seats with a spring as specified in, and in accordance with, the Accomplishment Instructions of the service information identified in paragraph (g)(1), (g)(2), (g)(3), or (g)(4) of this AD, as applicable. Repeat the replacement thereafter at intervals not to exceed 78 months or 3,750 flight cycles, whichever occurs first.

(1) Dassault Service Bulletin F900–429, Revision 1, dated July 13, 2012.

(2) Dassault Service Bulletin F900EX–446, Revision 1, dated July 13, 2012.

(3) Dassault Service Bulletin F2000–401, Revision 1, dated July 13, 2012.

(4) Dassault Service Bulletin F2000EX–267, Revision 1, dated July 13, 2012.

(h) Parts Installation Limitation

As of the effective date of this AD, installation of a spring having P/N 147100–19 or P/N 132100–19 on any airplane is allowed, provided that the spring is new.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* 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. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency Airworthiness Directive 2014–0061, dated March 11, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0657.

(k) Material Incorporated by Reference

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

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

(i) Dassault Service Bulletin F900–429, Revision 1, dated July 13, 2012.

(ii) Dassault Service Bulletin F900EX–446, Revision 1, dated July 13, 2012.

(iii) Dassault Service Bulletin F2000–401, Revision 1, dated July 13, 2012.

(iv) Dassault Service Bulletin F2000EX–267, Revision 1, dated July 13, 2012.

(3) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on April 20, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09800 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–4814; Directorate Identifier 2015–NM–105–AD; Amendment 39–18502; AD 2016–09–04]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This AD was prompted by the discovery of a number of incorrectly calibrated angle of attack (AOA) transducers installed in the stall protection system. This AD requires replacement of incorrectly calibrated AOA transducers. We are issuing this AD to detect and replace incorrectly calibrated AOA transducers; incorrect calibration of the transducers could result in late activation of the stick pusher.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–4814.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–4814; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, 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: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7318; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100&440) airplanes. The NPRM published in the **Federal Register** on November 17, 2015 (80 FR 71749) (''the NPRM''). The NPRM was prompted by the discovery of a number of incorrectly calibrated AOA transducers installed in the stall protection system. The NPRM proposed to require replacement of incorrectly calibrated AOA transducers. We are issuing this AD to detect and replace incorrectly calibrated AOA transducers; incorrect calibration of the transducers could result in late activation of the stick pusher.

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2015–17, effective July 16, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The MCAI states:

> It was discovered that a number of [angle of attack] AOA transducers installed on Bombardier CL–600–2B19 aeroplanes were incorrectly calibrated due to a quality control problem at both the production and repair facilities. Incorrect calibration of the AOA transducer could result in a late activation of the stick pusher.
>
> This [Canadian] AD mandates the replacement of the incorrectly calibrated AOA transducer.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–4814.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed, except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Bombardier Service Bulletin 601R–27–164, dated March 30, 2015. The service information describes procedures for replacement of incorrectly calibrated AOA transducers. 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.

Costs of Compliance

We estimate that this AD affects 575 airplanes of U.S. registry.

We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts would cost about $10,000 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $5,945,500, or $10,340 per product.

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.

We are 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) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

(4) 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–09–04 Bombardier, Inc.: Amendment 39–18502; Docket No. FAA–2015–4814; Directorate Identifier 2015–NM–105–AD.

(a) Effective Date

This AD is effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 7067 inclusive, 7069 through 7990 inclusive, and 8000 through 8999 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Reason

This AD was prompted by the discovery of a number of incorrectly calibrated angle of attack (AOA) transducers installed in the stall protection system. We are issuing this AD to detect and replace incorrectly calibrated AOA transducers; incorrect calibration of the transducers could result in late activation of the stick pusher.

(f) Compliance

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

(g) Replacement

For AOA transducers identified in paragraph 1.A., ''Effectivity,'' of Bombardier Service Bulletin 601R–27–164, dated March 30, 2015: Within 2,500 flight hours or 12 months, whichever occurs first after the effective date of this AD, replace the AOA transducers with correctly calibrated AOA transducers, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–164, dated March 30, 2015.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install, on any airplane, an AOA transducer having a part number or serial number listed in paragraph 1.A., ''Effectivity,'' of Bombardier Service Bulletin 601R–27–164, dated March 30, 2015.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. 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. The AMOC approval letter must specifically reference this AD.

(2) Contacting the Manufacturer: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

For more information about this AD, contact Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7318; fax 516–794–5531.

(k) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 601R–27–164, dated March 30, 2015.

(ii) Reserved.

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on April 20, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09791 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3970; Directorate Identifier 2015–SW–006–AD; Amendment 39–18497; AD 2016–08–20]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters (Previously Eurocopter France)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2014–12–51 for Airbus Helicopters (previously Eurocopter France) Model EC130B4 and

EC130T2 helicopters. AD 2014–12–51 required repetitively inspecting the tailboom to Fenestron junction frame (junction frame) for a crack. This new AD retains the requirements of AD 2014–12–51, changes the applicability from helicopters with certain hours time-in-service (TIS) to junction frames with certain hours TIS, and adds a compliance time for sling cycles to the junction frame inspection interval. The actions of this AD are intended to detect a crack and to prevent failure of the junction frame, which could result in loss of the Fenestron and subsequent loss of control of the helicopter.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. It is also on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3970.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3970; or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (EASA) AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Robert Grant, Aviation Safety Engineer, Safety Management Group, FAA, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; email *robert.grant@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On September 25, 2015, at 80 FR 57742, the **Federal Register** published our notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to remove AD 2014–12–51, Amendment 39–17921 (79 FR 45335, August 5, 2014), and add a new AD. AD 2014–12–51 applied to Airbus Helicopters Model EC130B4 and EC130T2 helicopters with 690 or more hours TIS and required, within 10 hours TIS, dye-penetrant inspecting certain areas of the junction frame for a crack. AD 2014–12–51 also required, at intervals not exceeding 25 hours TIS, either repeating the dye-penetrant inspection or performing a borescope inspection of certain areas of the junction frame for a crack. If there was a crack, AD 2014–12–51 required replacing the junction frame. AD 2014–12–51 was prompted by two incidents of crack propagation through the junction frame that initiated in the lower right-hand side between the web and the flange where the lower spar of the tailboom is joined. The cracks were significant in length and not visible from the outside of the helicopter.

The NPRM was prompted by AD No. 2015–0033–E dated February 24, 2015 (AD 2015–0033–E), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition on Airbus Helicopters EC130B4 and EC130T2 helicopters. The NPRM proposed to require retaining the dye penetrant and borescope inspections in AD 2014–12–51 but with revised compliance times. The NRPM also proposed to change the applicability to helicopters with 690 hours TIS accumulated on the junction frame instead of on the helicopter, and proposed including an inspection interval defined in sling cycles. These actions were intended to detect a crack and to prevent failure of the junction frame, which could result in loss of the Fenestron and subsequent loss of control of the helicopter.

Comments

After our NPRM (80 FR 57742, September 25, 2015) was published, we received a comment from one commenter.

Request

One commenter requested the addition of a 10-hour or 250-sling cycle visual pilot check for helicopters with Modification 350A087421 or that have complied with Airbus Helicopters Service Bulletin No. EC130–53–029, Revision 0, dated February 20, 2015 (SB EC130–53–029). The commenter stated this pilot check would benefit operators and provide the same level of safety.

We disagree. While the EASA AD allows the check requested by the commenter as an alternative method, because the cause of the fatigue cracking is still under investigation, we cannot determine that this method would correct the unsafe condition.

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by EASA, reviewed the relevant information, considered the comment received, and determined the unsafe condition exists and is likely to exist or develop on other helicopters of the same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Interim Action

We consider this AD to be an interim action. If final action is later identified, we might consider further rulemaking then.

Differences Between This AD and the EASA AD

The EASA AD includes alternate compliance instructions for helicopters modified with a cut-out in production by Airbus Helicopters Modification 350A087421 or in service by compliance with SB EC130–53–029. This AD does not.

Related Service Information Under 1 CFR Part 51

We reviewed Airbus Helicopters Emergency Alert Service Bulletin No. 05A017, Revision 2, dated February 20, 2015 (EASB 05A017), for Model EC130B4 and EC130T2 helicopters. EASB 05A017 describes alternate procedures for inspecting outside the tailboom for a crack at reduced inspection intervals in combination with the internal inspections at extended intervals. EASB 05A017 also specifies adding sling cycles to the existing flight hour inspection interval for helicopters that perform external load-carrying operations. EASA issued AD No. 2015–0033–E mandating the requirements in EASB 05A017 to ensure the continued airworthiness of these helicopters.

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

Airbus Helicopters also issued SB EC130–53–029, which contains procedures to cut out the skin and splice at the junction frame to facilitate the external inspection specified in EASB 05A017.

Costs of Compliance

We estimate that this AD affects 208 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. At an average labor rate of $85 per work-hour, dye-penetrant inspecting the junction frame will require 1 work-hour, for a cost of $85 per helicopter and a total cost of $17,680 for the U.S. fleet, per inspection cycle. Borescope inspecting the junction frame will require 0.5 work-hour, for a cost of $43 per helicopter and a total cost of $8,944 for the U.S. fleet, per inspection cycle.

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.

We are 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 helicopters 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) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

(4) 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.

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2014–12–51, Amendment 39–17921 (79 FR 45335, August 5, 2014), and adding the following new AD:

2016–08–20 Airbus Helicopters (Previously Eurocopter France): Amendment 39–18497; Docket No. FAA–2015–3970; Directorate Identifier 2015–SW–006–AD.

(a) Applicability

This AD applies to Airbus Helicopters Model EC130B4 and EC130T2 helicopters with a tailboom to fenestron junction frame (junction frame) that has 690 or more hours time-in-service (TIS), certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack in the junction frame. This condition could result in failure of the junction frame, which could result in loss of the Fenestron and subsequent loss of control of the helicopter.

(c) Affected ADs

This AD supersedes AD 2014–12–51, Amendment 39–17921 (79 FR 45335, August 5, 2014).

(d) Effective Date

This AD becomes effective June 6, 2016.

(e) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(f) Required Actions

(1) Before the junction frame reaches 700 hours TIS or within 10 hours TIS, whichever occurs later, remove the horizontal stabilizer, clean the junction frame, and dye-penetrant inspect around the circumference of the junction frame for a crack in the areas shown in Figure 1 of Airbus Helicopters EC130 Emergency Alert Service Bulletin No. 05A017, Revision 2, dated February 20, 2015 (EASB 05A017). Pay particular attention to the area around the 4 spars (item b) of Figure 1 of EASB 05A017. An example of a crack is shown in Figure 3 of EASB 05A017.

(2) Within 25 hours TIS or 390 sling cycles, whichever occurs first after the inspection required by paragraph (f)(1) of this AD, and thereafter at intervals not exceeding 25 hours TIS or 390 sling cycles, whichever occurs first, either perform the actions of paragraph (f)(1) of this AD or, if the area is clean, using a borescope, inspect around the circumference of the junction frame for a crack in the areas shown in Figure 2 of EASB 05A017. Pay particular attention to the area around the 4 spars (item b) of Figure 2 of EASB 05A017. An example of a crack is shown in Figure 3 of EASB 05A017. For purposes of this AD, a sling cycle is defined as one landing with or without stopping the rotor or one external load-carrying operation; an external load-carrying operation occurs each time a helicopter picks up an external load and drops it off.

(3) If there is a crack, before further flight, replace the junction frame.

(g) Special Flight Permits

Special flight permits are prohibited.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Robert Grant, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(i) Additional Information

(1) Airbus Helicopters Service Bulletin No. EC130–53–029, Revision 0, dated February 20, 2015, which is not incorporated by reference, contains additional information about the subject of this final rule. For service information identified in this final rule, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub*. You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2015–0033–E, dated February 24, 2015. You may view the EASA AD on the Internet at *http://www.regulations.gov* in Docket No. FAA–2015–3970.

(j) Subject

Joint Aircraft Service Component (JASC) Code: 5302: Rotorcraft Tailboom.

(k) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Emergency Alert Service Bulletin No. 05A017, Revision 2, dated February 20, 2015.

(ii) Reserved.

(3) For Airbus Helicopters service information identified in this final rule, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub.*

(4) You may view this service information at 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.

(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, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on April 15, 2016.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–09235 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0338; Directorate Identifier 2014–CE–010–AD; Amendment 39–18495; AD 2016–08–18]

RIN 2120–AA64

Airworthiness Directives; Piper Aircraft, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Piper Aircraft, Inc. Model PA–31–350 airplanes. This AD was prompted by a report of an engine fire caused by a leak in the fuel pump inlet hose. This AD requires inspecting the fuel hose assembly and the turbocharger support assembly for proper clearance between them, inspecting each assembly for any sign of damage, and making any necessary repairs or replacements. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *www.piper.com/home/pages/Publications.cfm.* You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0338.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0338; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, 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: Gary Wechsler, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474–5575; fax: (404) 474–5606; email: *gary.wechsler@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Piper Aircraft, Inc. Model PA–31–350 airplanes. The SNPRM published in the **Federal Register** on January 26, 2016 (81 FR 4214). We preceded the SNPRM with a notice of proposed rulemaking (NPRM) that published in the **Federal Register** on June 3, 2014 (79 FR 31888). The NPRM proposed to require inspecting the fuel hose assembly and the turbocharger support assembly for proper clearance between them, inspecting each assembly for any sign of damage, and making any necessary repairs or replacements. The NPRM was prompted by a report of an engine fire on a Piper Aircraft, Inc. (Piper) Model PA–31–350 airplane. Investigation revealed that the fire was caused by a leak in the fuel pump inlet hose that resulted from repeated contact with an adjacent turbocharger support assembly caused by inadequate clearance between the two assemblies. The SNPRM proposed to require the same actions as proposed in the NPRM using revised service information issued by the manufacturer to clarify which engines are part of the airplane applicability and to revise the instructions for accomplishing the proposed actions.

This condition, if not corrected, could result in damage to the fuel inlet hose assembly, which could cause the fuel pump inlet hose to fail and leak fuel in the engine compartment. This condition could also cause damage to the turbocharger support assembly, which could require the turbocharger support assembly to be repaired or replaced.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the SNPRM (81 FR 4214, January 26, 2016) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM (81 FR 4214, January 26, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (81 FR 4214, January 26, 2016).

Related Service Information Under 1 CFR Part 51

We reviewed Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015. The service information describes procedures for the following. 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.

—Inspecting for a minimum 3/16-inch clearance between the fuel hose assembly and the turbocharger support assembly and making any necessary adjustments.

—Inspecting the fuel hose assembly for any signs of damage and, if necessary, replacing with a serviceable part.

—Inspecting the turbocharger support assembly for any signs of damage and, if necessary, repairing or replacing with a serviceable part.

—Performing an engine run-up to check for any leaks.

Differences Between This AD and the Service Information

There are differences between the compliance times for the corrective actions in this AD and those in the related service information.

We based the compliance times in this AD on risk analysis and cost impact to operators. There has only been one event of the reported incident in the operational history of Piper Model PA–31–350 airplanes. Cost was also a strong consideration due to the age of the fleet and the number of airplanes still in service.

The one-time inspection required in this AD is very inexpensive and requires minimal time to accomplish. It is expected that almost all airplanes in service can be cleared with a single inspection, and no additional actions or costs would be incurred by the vast majority of the fleet.

We determined that a single inspection with any necessary corrective actions is an adequate terminating action for the unsafe condition. The risk related to future maintenance on the fuel line would be mitigated by the related service information and awareness from this AD.

Costs of Compliance

We estimate that this AD affects 773 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspect for proper clearance between the fuel hose assembly and the turbocharger support assembly.	.5 work-hour × $85 per hour = $85	N/A	$42.50	$32,852.50
Inspect the fuel hose assembly for evidence of leaking, cracking, chafing, and any other sign of damage.	.5 work-hour × $85 per hour = $42.50	N/A	42.50	32,852.50
Inspect the turbocharger support assembly for evidence of chafing and any other sign of damage.	.5 work-hour × $85 per hour = $42.50	N/A	42.50	32,852.50
Engine run-up/leak check	1 work-hour × $85 = $85 (.5 work hour per engine).	N/A	85	65,705

We estimate the following costs to do any necessary follow-on actions that will be required based on the results of the inspection. We have no way of determining the number of airplanes that might need these corrective actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Adjust routing of fuel hose assembly for proper clearance between the fuel hose assembly and the turbocharger support assembly.	5.5 work-hours × $85 per hour = $467.50	N/A	$467.50
Replace Piper fuel pump inlet hose assembly, part number 39995–34 (2 per airplane).	1 work-hour × $85 per hour = $85	1,068	1,153
Replace Lycoming turbocharger support assembly, part number LW–18302 (2 per airplane).	24 work-hours × $85 per hour = $2,040	12,874	14,914

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.

We are 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) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

(4) 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–08–18 Piper Aircraft, Inc.: Amendment 39–18495; Docket No. FAA–2014–0338; Directorate Identifier 2014–CE–010–AD.

(a) Effective Date

This AD is effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Piper Aircraft, Inc. Model PA–31–350 airplanes, serial numbers 31–5001 through 31–5004, 31–7305005 through 31–8452024, and 31–8253001 through 31–8553002, certificated in any category, that are equipped with the following engines and fuel pump hose assemblies:

TABLE 1 TO PARAGRAPH (C) OF THIS AD—APPLICABLE ENGINES AND FUEL PUMP HOSE ASSEMBLIES

Engine	Manufacturer's hose name	Manufacturer's part number (P/N)	Hose description
TIO–540–J2B (right wing)	Hose Assembly—Fuel	Piper 39995–034	Inlet fuel hose to engine fuel pump.
LTIO–540–J2B (left wing)	Hose, Fuel pump to Injector	Lycoming LW–12877–6S142	Exit fuel hose from engine fuel pump.
TIO540–J2BD (right wing)	Hose, Fuel pump to Injector	Lycoming LW–12877–6S142	Exit fuel hose from engine fuel pump.
LTIO–540–J2BD (left wing) ..	Hose Assembly—Fuel	Piper 39995–034	Inlet fuel hose to engine fuel pump.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 73: Engine Fuel and Control.

(e) Unsafe Condition

This AD was prompted by a report of an engine fire caused by a leak in the fuel pump inlet hose. We are issuing this AD to correct the unsafe condition on these products.

(f) Compliance

Comply with this AD within the compliance times specified in paragraphs (g)(1) through (j)(2) of this AD, unless already done.

(g) Ensure Proper Clearance Between the Fuel Hose Assembly and the Turbocharger Support Assembly

(1) Within the next 60 hours time-in-service (TIS) after June 6, 2016 (the effective date of this AD) or within the next 6 months after June 6, 2016 (the effective date of this AD), whichever occurs first, inspect to determine the clearance between the inlet and exit fuel hose assemblies listed in table 1 to paragraph (c) of this AD, and each turbocharger support assembly, Lycoming P/N LW–18302. There should be a minimum 3/16-inch clearance. Do the inspection following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(2) Before further flight after the inspection required in paragraph (g)(1) of this AD, if the measured clearance is less than 3/16-inch, make all necessary adjustments to make the clearance a minimum of 3/16-inch between the inlet and exit fuel hose assemblies listed in table 1 to paragraph (c) of this AD and each turbocharger support assembly, Lycoming P/N LW–18302, following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(h) Visually Inspect the Fuel Hose Assembly and Replace if Necessary

(1) Within the next 60 hours TIS after June 6, 2016 (the effective date of this AD) or within the next 6 months after June 6, 2016 (the effective date of this AD), whichever occurs first, visually inspect the inlet and exit fuel hose assemblies listed in table 1 to paragraph (c) of this AD for evidence of leaking, cracking, chafing, and any other sign of damage. Do the inspection following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(2) Before further flight after the inspection required in paragraph (h)(1) of this AD, if any evidence of leaking, cracking, chafing, or any other sign of damage is found in any inlet or exit fuel host assembly listed in table 1 to paragraph (c) of this AD, replace the fuel hose assembly with a serviceable part. Do the replacement following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(i) Visually Inspect the Turbocharger Support Assembly and Replace if Necessary

(1) Within the next 60 hours TIS after June 6, 2016 (the effective date of this AD) or within the next 6 months after June 6, 2016 (the effective date of this AD), whichever occurs first, visually inspect each turbocharger support assembly, Lycoming P/N LW–18302, for evidence of chafing and any other signs of damage. Do the inspection following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(2) Before further flight after the inspection required in paragraph (i)(1) of this AD, if any evidence of chafing or any other sign of damage is found on any turbocharger support assembly, replace Lycoming P/N LW–18302 with a serviceable part. Do the replacement following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(j) Engine Run-Up

(1) If any fuel line component was adjusted or replaced during any actions required in paragraphs (g)(1) through (i)(2) of this AD, before further flight, perform an engine run-up on the ground to check for leaks. Do the engine run-up following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(2) If any leaks found during the engine run-up required in paragraph (j)(1) of this AD emanate from any fuel line component adjusted, repaired, or replaced during any actions required in paragraphs (g)(1) through (i)(2) of this AD, before further flight, take all necessary corrective actions following the INSTRUCTIONS section of Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta Aircraft Certification Office (ACO), 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, send it to the attention of the person identified in the Related Information section 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.

(l) Related Information

For more information about this AD, contact Gary Wechsler, Aerospace Engineer, FAA, Atlanta ACO, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474–5575; fax: (404) 474–5606; email: *gary.wechsler@faa.gov*.

(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 the AD specifies otherwise.

(i) Piper Aircraft, Inc. Service Bulletin No. 1257A, dated August 4, 2015.

(ii) Reserved.

(3) For Piper Aircraft, Inc. service information identified in this AD, contact Piper Aircraft, Inc., 926 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; fax: (772) 978–6573; Internet: *www.piper.com/home/pages/Publications.cfm.*

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on April 14, 2016.

Robert P. Busto,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09238 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–1428; Directorate Identifier 2015–NM–026–AD; Amendment 39–18499; AD 2016–09–01]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 777–200 and –300 series airplanes. This AD was prompted by reports of fatigue cracking of a certain chord of the pivot bulkhead. This AD requires repetitive inspections for cracking of the left side and right side forward outer chords of the pivot bulkhead, and related investigative and corrective actions if necessary. This AD also provides a modification of the pivot bulkhead, which would terminate the repetitive inspections. We are issuing this AD to detect and correct fatigue cracking of the outer flanges of the left and right side forward outer chords of the pivot bulkhead, which could result in a severed forward outer chord and consequent loss of horizontal stabilizer control.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; *telephone:* 206–544–5000, extension 1; *fax:* 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1428.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1428; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, 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: Narinder Luthra, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; *phone:* 425–917–6513; *fax:* 425–917–6590; email: *narinder.luthra@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 777–200 and –300 series airplanes. The NPRM published in the **Federal Register** on June 15, 2015 (80 FR 34103) (''the NPRM''). The NPRM was prompted by reports of fatigue cracking of a certain chord of the pivot bulkhead. The NPRM proposed to require repetitive inspections for cracking of the left side and right side forward outer chords of the pivot bulkhead, and related investigative and corrective actions if necessary. The NPRM also proposed to provide a modification of the pivot bulkhead, which would terminate the repetitive inspections. We are issuing this AD to detect and correct fatigue cracking of the outer flanges of the left and right side forward outer chords of the pivot bulkhead, which could result in a severed forward outer chord and consequent loss of horizontal stabilizer control.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Exclude Certain Requirements From the NPRM

American Airlines (AA) requested that we revise the NPRM to exclude doing the work in accordance with paragraph 3.B.4., of the Work Instructions of Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015, which specifies ''Put the airplane back into a serviceable condition.'' AA stated that doing this action does not affect the condition that the AD seeks to address. AA added that most operators will accomplish these modifications as part of a maintenance visit, and returning the airplane to a serviceable condition will not be possible in the context of the statement, but rather will occur at a point in time well after the work is completed.

We agree that putting the airplane back into a serviceable condition is not directly related to addressing the unsafe condition identified in this AD. However, we do not agree to specifically exclude paragraph 3.B.4., of the Work Instructions of Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015, from this final rule because it is not required for compliance with the AD actions.

The FAA worked in conjunction with industry, under the Airworthiness Directives Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement is a new process for annotating which steps in the service information are ''required for compliance'' (RC) with an AD. Differentiating these steps from other tasks in the service information is expected to improve an owner's/operator's understanding of AD requirements and help provide consistent judgment in AD compliance.

In response to the AD Implementation ARC, the FAA released AC 20–176A, dated June 16, 2014 (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rg*

AdvisoryCircular.nsf/0/979ddd1479e1ec6f86257cfc0052d4e9/$FILE/AC%2020-176A.pdf*); and Order 8110.117A, dated June 18, 2014 (*http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgOrders.nsf/0/d715cdfc08ac0ddc86257cfc00528297/$FILE/110.117A.pdf), which include the concept of RC. The FAA has begun implementing this concept in ADs when we receive service information containing RC steps.

Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015, includes the concept of RC. In paragraph 3.B. of the Work Instructions of Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015, certain steps are marked RC. The step that specifies ''Put the airplane back into a serviceable condition'' is not marked RC. Therefore, no change to this final rule is necessary in this regard.

Request To Change Certain Language in the NPRM

Boeing and United Airlines (UA) asked that the language in paragraph (h) of the proposed AD be reworded for clarity. Boeing asked that we account for the small crack repair being performed on one side only. UA stated that as written, inspecting the left side and right side forward outer chords is incorrect since the small crack repair is performed on one side only. UA noted that the small crack repair may be accomplished on one side of the airplane only, depending on inspection findings. UA asked that paragraph (h) of the proposed AD be changed to specify ''. . . do a surface high frequency eddy current (HFEC) inspection, an open-hole HFEC inspection, and a detailed inspection for cracking of the repaired side (left, right, or both) forward outer chords of the STA 2370 pivot bulkhead.'' Boeing recommended that the language be reworded to specify an ''. . . inspection for cracking of the repaired forward outer chords . . .''

We agree with the commenters' requests for the reasons provided. We have changed the language in paragraph (h) of this AD to specify ''. . . do a surface HFEC inspection, an open-hole HFEC inspection, and a detailed inspection for cracking of the repaired side forward outer chords of the STA 2370 pivot bulkhead.''

Boeing and UA asked that the language in paragraph (i) of the proposed AD be reworded for clarity. Boeing asked that we account for the scenario where the small crack repair is performed on one side only. Boeing stated that the terminating actions for each side of the bulkhead are independent of each other. UA stated that using ''and'' is incorrect because the modification can only be accomplished on one side, not both the left and right sides, depending on inspection findings.

We agree with the commenters for the reasons provided. We have changed the language in paragraph (i) of this AD accordingly.

Request To Include Revised Service Information

All Nippon Airways (ANA) stated that Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015; and Boeing Service Bulletin 777–53–0076, dated January 14, 2015; contain many inconsistencies. We infer that ANA is requesting that we include revised service information because there are errors in the original issues.

We agree with the commenter. Boeing has issued Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015; and Boeing Service Bulletin 777–53–0076, Revision 1, dated December 21, 2015; which include changes found during validation and clarify and correct issues identified by operators. We have included the revised service information as the appropriate source of service information for accomplishing the actions required by this AD and we have referred to Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, in the applicability in paragraph (c) of this AD. We have also added a new credit paragraph (k) to this AD for using the original issues of the service information and reidentified subsequent paragraphs accordingly.

Request To Add a New Paragraph for Clarification

Boeing asked that we add a new paragraph (j)(3) to the proposed AD to specify the following:

> If conducting the Part 2 Small Crack Repair of the Service Bulletin 777–53A0075 dated January 14, 2015, verify the fastener heads and nuts will not interfere with the fillet radius of the parts in the repair installation. If interference will occur, repair before further flight using a method approved in accordance with the procedures specified in paragraph (k) of this AD. . .

Boeing also asked that we add a reference to paragraph (j)(3) in paragraph (g) of the proposed AD by including it in the exception sentence. Boeing stated that during a recent validation it was discovered that, in some cases, radius fillers are required to prevent fasteners from riding the fillet radius of the extended splice chord used in the small crack repair specified in Part 2 of Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015.

We agree with the commenter that interference between the fastener and fillet case should be minimized; however, we do not agree to add a new paragraph (j)(3) to this AD. Boeing has issued Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, which includes instructions for accomplishing the small crack repair. As stated previously, we have revised this AD to refer to Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, for accomplishing certain actions required by this AD.

Request To Correct Minor Error

Boeing asked that we change the service information number identified in paragraph (j)(2) of the proposed AD from ''777–530076'' to ''777–53–0076.''

We agree that the hyphen is missing from the service information number. We have included the hyphen in the service information number identified in paragraph (j)(2) of this AD accordingly.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We reviewed the following Boeing service information.

- Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015. This service information describes procedures for repetitive detailed and HFEC inspections for cracking of the outer flanges of the left and right side forward outer chords of the STA 2370 pivot bulkhead, repetitive post-repair inspections for certain airplanes, and related investigative and corrective actions.
- Boeing Service Bulletin 777–53–0076, Revision 1, dated December 21, 2015. This service information describes procedures for a modification of the STA 2370 pivot bulkhead by replacing the left and right side forward outer chords and upper splice angles, and

related investigative and corrective actions.

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.

Costs of Compliance

We estimate that this AD affects 60 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections of left and right side pivot bulkhead forward chord.	Up to 15 work-hours × $85 per hour = $1,275 per inspection cycle.	$0	Up to $1,275 per inspection cycle.	Up to $76,500 per inspection cycle.
Post-repair Inspections	Up to 11 work-hours × $85 per hour = $935 per inspection cycle.	0	Up to $935 per inspection cycle.	Up to $56,100 per inspection cycle.

We estimate the following costs to do any necessary repairs and modifications that would be required based on the results of the inspection. We have no way of determining the number of airplanes that might need these actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Small crack repair	Up to 45 work-hours × $85 per hour = $3,825 per side	[1]	Up to $7,650.
Modification of the STA 2370 Pivot Bulkhead (forward outer chord replacement).	Up to 137 work-hours × $85 per hour = $11,645	$34,086	Up to $45,731.

[1] We have received no definitive data that would enable us to provide parts cost estimates for the on-condition repair specified in this AD.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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.

We are 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) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

(4) 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–09–01 The Boeing Company: Amendment 39–18499; Docket No. FAA–2015–1428; Directorate Identifier 2015–NM–026–AD.

(a) Effective Date

This AD is effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200 and –300 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of fatigue cracking of the forward outer chord of the station (STA) 2370 pivot bulkhead. We are issuing this AD to detect and correct fatigue cracking of the outer flanges of the left and right side forward outer chords of the STA 2370 pivot bulkhead, which could result in a severed forward outer chord and consequent loss of horizontal stabilizer control.

(f) Compliance

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

(g) Inspections and Corrective Actions

At the times specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, except as provided in paragraph (j)(1) of this AD: Do a detailed inspection and high frequency eddy current (HFEC) inspections for cracking of the left and right side forward outer chords of the STA 2370 pivot bulkhead, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, except as provided in paragraph (j)(2) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the inspections thereafter at the applicable intervals specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, until the modification specified in paragraph (i) of this AD is done.

(h) Post-Repair Inspections

For airplanes on which any repair specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–53A0075 has been done: At the times specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, do a surface HFEC inspection, an open-hole HFEC inspection, and a detailed inspection for cracking of the repaired side forward outer chords of the STA 2370 pivot bulkhead, and do all applicable related investigative and corrective actions, in accordance with Part 3 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, except as required by paragraph (j)(2) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the inspections thereafter at the applicable times specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, until the modification specified in paragraph (i) of this AD is done.

(i) Terminating Action

Modifying the STA 2370 pivot bulkhead by replacing the left or right side forward outer chords and upper splice angles, and doing all applicable related investigative and corrective actions, terminates the repetitive inspections required by paragraphs (g) and (h) of this AD, for the modified location only. The modification must be done in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–53–0076, Revision 1, dated December 21, 2015, except as required by paragraph (j)(2) of this AD.

(j) Exceptions to Service Bulletin Specifications

(1) Where Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, specifies a compliance time ''after the Original Issue date of this Service Bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Although Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015; and Boeing Service Bulletin 777–53–0076, Revision 1, dated December 21, 2015; specify to contact Boeing for appropriate action, and Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015, specifies that action as ''RC'' (Required for Compliance), this AD requires repair before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(k) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 777–53A0075, dated January 14, 2015.

(2) This paragraph provides credit for the actions required by paragraph (i) of this AD, if those actions were performed before the effective date of this AD using Boeing Service Bulletin 777–53–0076, dated January 14, 2015.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), 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, send it to the attention of the person identified in paragraph (m)(1) 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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (j)(2) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (l)(4)(i) and (l)(4)(ii) apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(m) Related Information

(1) For more information about this AD, contact Narinder Luthra, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6513; fax: 425–917–6590; email: *narinder.luthra@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (n)(3) and (n)(4) of this AD.

(n) 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) Boeing Alert Service Bulletin 777–53A0075, Revision 1, dated December 14, 2015.

(ii) Boeing Service Bulletin 777–53–0076, Revision 1, dated December 21, 2015.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; *telephone:* 206–544–5000, extension 1; *fax:* 206–766–5680; *Internet: https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on April 14, 2016.

Victor Wicklund,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09650 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–6539; Directorate Identifier 2015–NM–036–AD; Amendment 39–18504; AD 2016–09–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A318–111 and –112 airplanes; Model A319–111, –112, –113, –114, and –115 airplanes; Model A320–211, –212, and –214 airplanes; and Model A321–111, –112, –211, –212, and –213 airplanes. This AD was prompted by the results of an evaluation by the design approval holder (DAH). During a residual fatigue test, the forward engine mount failed prior to reaching the threshold/interval for the detailed inspections of the forward engine mounts specified in the airworthiness limitations. This AD requires repetitive detailed inspections of the right and left forward engine mounts, and corrective action if necessary. These inspections are required by AD 2015–05–02. This AD reduces the compliance times for those inspections. We are issuing this AD to detect and correct fatigue cracking in the forward engine mounts. Such cracking could result in reduced structural integrity of the airplane and could lead to in-flight loss of an engine, possibly resulting in reduced controllability of the airplane.

DATES: This AD is effective June 6, 2016.

ADDRESSES: For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–6539; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Model A318–111 and –112 airplanes; Model A319–111, –112, –113, –114, and –115 airplanes; Model A320–211, –212, and –214 airplanes; and Model A321–111, –112, –211, –212, and –213 airplanes. The NPRM published in the **Federal Register** on November 30, 2015 (80 FR 74723) (''the NPRM'').

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0038, dated March 4, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A318–111 and –112 airplanes; Model A319–111, –112, –113, –114, and –115 airplanes; Model A320–211, –212, and –214 airplanes; and Model A321–111, –112, –211, –212, and –213 airplanes. The MCAI states:

> During a A320 Extended Service Goal (ESG) residual fatigue test, in which new loads were used, taking into account the results of the 2006 fleet survey, the CFM56–5A/5B forward engine mount experienced a failure before reaching the threshold/interval for the detailed inspection of that forward engine mount, as identified in Airbus A318/A319/A320/A321 Airworthiness Limitations Section (ALS) Part 2 (hereafter referred to in this [EASA] AD as 'the ALS') task 712111–01. In case of total loss of the primary load path, the current maintenance requirements do not ensure the design integrity of the remaining structure.
>
> This condition, if not corrected, could lead to in-flight loss of an engine, possibly resulting in reduced control of the aeroplane and injury to persons on the ground.
>
> For the reasons described above, this [EASA] AD requires implementation of a reduced threshold and interval for the detailed inspections (DET) of the forward engine mount on both right hand (RH) and left hand (LH) sides, as specified in the ALS, task 712111–01.
>
> Once further investigations and test are completed, the threshold and interval of the ALS task 712111–01 will likely be modified accordingly.

Required actions include repair of discrepancies (cracks) found during the inspection. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–6539.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comment received on the NPRM and the FAA's response.

Request To Clarify That This Final Rule Was Not Prompted by Widespread Fatigue Damage (WFD)

Airbus requested that all references to WFD be removed from the NPRM. Airbus stated that the root cause of the unsafe condition was not associated with WFD. The unsafe condition was revealed during a residual fatigue test of the CFM56–5A/5B forward engine mount. The forward engine mount failed prior to reaching the threshold/interval for the detailed inspections specified in the Airbus A318/A319/A320/A321 Airworthiness Limitations Section Part 2—Damage-Tolerant Airworthiness Limitation Items.

Based on the information provided by the commenter we agree to remove all references to WFD from the preamble and regulatory text and include an explanation that this final rule was prompted by the results of an evaluation by the DAH.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Costs of Compliance

We estimate that this AD affects 940 airplanes of U.S. registry.

We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $79,900, or $85 per product.

We have received no definitive data that will enable us to provide cost estimates for the on-condition parts cost specified in 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.

We are 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

We 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 that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

4. 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–09–06 Airbus: Amendment 39–18504. Docket No. FAA–2015–6539; Directorate Identifier 2015–NM–036–AD.

(a) Effective Date

This AD is effective June 6, 2016.

(b) Affected AD

This AD affects AD 2015–05–02, Amendment 39–18112 (80 FR 15152, March 23, 2015) (''AD 2015–05–02'').

(c) Applicability

This AD applies to all Airbus airplanes, certificated in any category, identified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD.

(1) Model A318–111 and –112 airplanes.

(2) Model A319–111, –112, –113, –114, and –115 airplanes.

(3) Model A320–211, –212, and –214 airplanes.

(4) Model A321–111, –112, –211, –212, and –213 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 05, Periodic Inspections.

(e) Reason

This AD was prompted by the results of an evaluation by the design approval holder. During a residual fatigue test the forward engine mount failed prior to reaching the threshold/interval for the detailed inspections of the forward engine mounts specified in the airworthiness limitations. We are issuing this AD to detect and correct fatigue cracking in the forward engine mounts. Such cracking could result in reduced structural integrity of the airplane and could lead to in-flight loss of an engine, possibly resulting in reduced controllability of the airplane.

(f) Compliance

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

(g) Repetitive Inspections

At the latest of the times specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD: Do a detailed inspection of the left and right forward engine mounts for discrepancies (cracking), using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Repeat the inspection thereafter at intervals not to exceed 800 flight cycles.

Note 1 to paragraphs (g) and (h) of this AD: Guidance for the inspection and engine mount replacement can be found in Task 712111–210–040 of the Airbus A318/A319/A320/A321 Maintenance Manual.

(1) Within 800 flight cycles since the first flight of the airplane.

(2) Within 800 flight cycles since the most recent detailed inspection specified in Airbus Airworthiness Limitation Tasks 712111–01–1, 712111–01–2, 712111–01–3, or 712111–01–4, ''Detailed Inspection of Forward Engine Mount Installation,'' as applicable.

(3) Within 800 flight cycles after the effective date of this AD.

(h) Corrective Action

If any discrepancy (cracking) is found during any inspection required by paragraph (g) of this AD: Before further flight, replace the affected forward engine mount with a serviceable part, using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

(i) No Terminating Action

Replacement of a forward engine mount does not constitute terminating action for the repetitive inspections required by paragraph (g) of this AD.

(j) Termination of Certain Tasks Required by AD 2015–05–02

Accomplishment of the inspections required by paragraph (g) of this AD terminates the initial and repetitive inspections specified in paragraph (n)(2) of AD 2015–05–02, for Airbus Airworthiness Limitation Tasks 712111–01–1, 712111–01–2, 712111–01–3, and 712111–01–4, ''Detailed Inspection of Forward Engine Mount Installation.''

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9–ANM–116–*

AMOC–REQUESTS@faa.gov. 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. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(l) Special Flight Permits

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2015–0038, dated March 4, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–6539.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this service information at the FAA,

Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(n) Material Incorporated by Reference

None.

Issued in Renton, Washington, on April 20, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–10117 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–2458; Directorate Identifier 2014–NM–122–AD; Amendment 39–18468; AD 2016–07–23]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A318, A319, A320, and A321 series airplanes. This AD was prompted by reports of in-flight loss of fixed and hinged main landing gear (MLG) fairings, and reports of post-modification MLG fixed fairing assemblies that have wear and corrosion. This AD requires, for certain airplanes, repetitive replacements of the fixed fairing upper and lower attachment studs of both left-hand (LH) and the right-hand (RH) MLG; and repetitive inspections for corrosion, wear, fatigue cracking, and loose studs of each forward stud assembly of the fixed fairing door upper and lower forward attachment of both LH and RH MLG; and replacement if necessary. This AD also provides an optional terminating modification for the repetitive replacements of the fixed fairing upper and lower attachment studs. We are issuing this AD to prevent in-flight detachment of an MLG fixed fairing and consequent damage to the airplane.

DATES: This AD becomes effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 6, 2016.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2458; or in person at the Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2458.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Model A318, A319, A320, and A321 series airplanes. The NPRM published in the **Federal Register** on July 8, 2015 (80 FR 38992) (''the NPRM''). The NPRM was prompted by reports of in-flight loss of fixed and hinged MLG fairings, and reports of post-modification MLG fixed fairing assemblies that have wear and corrosion. The NPRM proposed to require, for certain airplanes, repetitive replacements of the fixed fairing upper and lower attachment studs of both the LH and RH MLG; and repetitive inspections for corrosion, wear, fatigue cracking, and loose studs of each forward stud assembly of the fixed fairing door upper and lower forward attachment of both LH and RH MLG; and replacement if necessary. The NPRM also proposed an optional terminating modification for the repetitive replacements of the fixed fairing upper and lower attachment studs. We are issuing this AD to prevent in-flight detachment of an MLG fixed fairing and consequent damage to the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0001R1, dated January 15, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A318, A319, A320, and A321 series airplanes. The MCAI states:

> Several occurrences of in-flight loss of main landing gear (MLG) fixed and hinged fairings were reported. The majority of reported events occurred following scheduled maintenance activities. One result of the investigation was that a discrepancy between the drawing and the maintenance manuals was discovered. The maintenance documents were corrected to prevent mis-rigging of the MLG fixed and hinged fairings, which could induce fatigue cracking.
>
> Airbus issued Service Bulletin (SB) A320–52–1083, providing instructions for a one-time inspection of the MLG fixed fairing composite insert and the surrounding area, replacement of the adjustment studs at the lower forward position and adjustment to the new clearance tolerances. That SB was replaced by Airbus SB A320–52–1100 (mod 27716) introducing a re-designed location stud, rod end and location plate at the forward upper and lower leg fixed-fairing

positions. Subsequently, reports were received of post-mod 27716/post-SB A320–52–1100 MLG fixed fairing assemblies with corrosion, which could also induce cracking.

This condition, if not detected and corrected, could lead to further cases of in-flight detachment of a MLG fixed fairing, possibly resulting in injury to persons on the ground and/or damage to the aeroplane.

To address this potential unsafe condition, EASA issued AD 2014–0096 [*http://ad.easa.europa.eu/blob/easa_ad_2014_0096_superseded.pdf/AD_2014–0096_1*] to require [for certain airplanes] repetitive detailed inspections (DET) of the MLG fixed fairings, and, depending on findings, accomplishment of applicable corrective actions. That [EASA] AD also prohibited installation of certain MLG fixed fairing rod end assemblies and studs as replacement parts on aeroplanes incorporating Airbus mod 27716 in production, or modified in accordance with Airbus SB A320–52–1100 (any revision) in service.

Since EASA AD 2014–0096 was issued, Airbus developed an alternative inspection programme to meet the AD requirements. In addition, a terminating action (mod 155648) was developed, which is to be made available for in service aeroplanes through Airbus SB A320–52–1165.

For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2014–0096, which is superseded, and adds an optional terminating action for the repetitive inspections. For post-mod aeroplanes, *i.e.,* incorporating Airbus mod 155648 in production, or modified by Airbus SB A320–52–1165 in service, the only remaining requirement is to ensure that pre-mod components are no longer installed.

Prompted by these developments, EASA issued AD * * *, retaining the requirements of EASA AD 2014–0096, which was superseded, and adding an optional terminating action for the repetitive inspections. For post-mod aeroplanes, *i.e.,* incorporating Airbus mod 155648 in production, or modified by Airbus SB A320–52–1165 in service, the only remaining requirement is to ensure that pre-mod components are no longer installed.

Since that [EASA] AD was issued, it was discovered that a certain plate support, Part Number (P/N) D5285600620000 as listed in Table 3 of the [EASA] AD, remains part of the post SB A320–52–1165 configuration and is therefore not affected by any prohibition of installation—paragraph (11) of the [EASA] AD. In addition, an error was detected in Table 1 of the [EASA] AD (missing P/N plate support) and paragraph (9) was found to be incorrectly worded.

For the reasons described above, this [EASA] AD is revised to introduce the necessary corrections.

Required actions also include, for airplanes in Airbus pre-Airbus Modification 27716 and pre-Airbus Service Bulletin A320–52–1100 configuration on which certain components have been installed, repetitive replacements of the fixed fairing upper and lower attachment studs of both the LH and RH MLG. An optional terminating modification also is provided for the repetitive replacements of the fixed fairing upper and lower attachment studs.

The optional terminating modification includes a resonance frequency inspection for debonding of the composite insert and delamination of the honeycomb area around the insert, and applicable corrective actions if necessary; and installation of new studs, rod ends, and location plates at the forward upper and lower leg fixed-fairing positions.

An additional optional terminating modification, for airplanes in pre-Airbus Modification 27716 and pre-Airbus Service Bulletin A320–52–1100 configuration, includes installation of a locking device, new studs, rod ends, and location plates at the forward upper and lower leg fixed-fairing positions.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2458.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Revise Applicability in **SUMMARY** Section of the NPRM

United Airlines (UAL) requested that we revise the **SUMMARY** section of the NPRM to include Model A320 series airplanes.

We agree with the commenter's request. The published version of the NPRM **SUMMARY** inadvertently did not include Model A320 series airplanes. We have revised the **SUMMARY** section of this final rule accordingly.

Request To Revise Inspection Findings

UAL requested that we revise paragraphs (i), (k), and (m) of the proposed AD, by replacing the term ''fatigue'' with ''deformation.'' UAL stated that the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, dated February 4, 2014, do not provide any specific method for doing a detailed inspection for indications of fatigue.

We disagree with the commenter's Request to replace the term ''fatigue'' with ''deformation.'' The intent of the Airbus service information and the FAA AD is to inspect for ''fatigue cracking.'' For clarity, we have revised the **SUMMARY** and Discussion sections of this final rule, and paragraphs (i), (k), and (m) of this AD, by changing ''fatigue'' to ''fatigue cracking.''

Request To Use Revised Service Information

American Airlines (AAL) requested that we revise the proposed AD to reference Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015.

We agree with the commenter's request. No additional work is required by this revision of the service information. We have revised paragraphs (g), (i), (k), (l), and (m) of this AD to reference Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015. We have added credit for the actions required by paragraphs (g), (i), (k), (l), and (m) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–52–1163, dated February 4, 2014.

Request To Revise Re-Identification of Fairing Part Number

AAL requested that we revise paragraphs (k), (l), (m), and (n) of the proposed AD to remove the re-identification of the fairing part number specified in Airbus Service Bulletin A320–52–1165, including Appendix 01, dated November 3, 2014, on airplanes that are pre-Airbus Modification 27716 and post-modification Airbus Service Bulletin A320–52–1100. AAL stated that a discrepancy in Airbus Service Bulletin A320–52–1165, including Appendix 01, dated November 3, 2014, makes it impossible to re-identify the fairing part number.

We agree with AAL that Airbus Service Bulletin A320–52–1165, including Appendix 01, dated November 3, 2014, has a discrepancy in the re-identification of the fairing part number. Airbus has revised the instructions for re-identification of the fairing part number for pre-Airbus Modification 27716 and post-modification Airbus Service Bulletin A320–52–1100 configuration airplanes in Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015. We have revised paragraphs (k), (l)(1), (m), and (n)(3) of this AD to reference Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015, as the appropriate source of service information for the applicable actions in those paragraphs.

Request To Specify Allowable Corrosion Limits

AAL requested that we specify the allowable corrosion limits that would allow release of the airplane into service with corroded stud assemblies. AAL stated that paragraph (l)(2) of the proposed AD allows an operator to release an airplane into service with corrosion on the stud assembly, without accomplishing any corrective action at the time of the corrosion findings, provided that the stud assembly is not loose.

We disagree with the commenter's request to specify corrosion limits in the AD. The corrosion level(s) and subsequent action(s) in general are defined in the AAL corrosion prevention and corrosion control maintenance program (CPCP). For this AD, operators have an option to either replace the affected stud assemblies (that have corrosion but the corroded stud is not loose) before further flight as specified in paragraph (l)(1) of this AD or perform repetitive inspections as specified in paragraph (l)(2) of this AD until corrective actions are done as specified in paragraph (m) of this AD. We have not changed this AD in this regard.

Request to Add Paragraph To Specify No Reporting Is Required

UAL requested that we add a paragraph in the proposed AD, to remove the Airbus Service Bulletin A320–52–1163, dated February 4, 2014, requirement to report all inspection findings to Airbus.

We agree with the commenter's request. We have added new paragraph (q) to this AD, which states that although Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015, specifies to submit certain information to the manufacturer, and specifies that action as ''RC'' (Required for Compliance), this AD does not include that requirement. We have redesignated subsequent paragraphs accordingly. Although not required to do so by this AD, we recommend that operators submit such information based on the Airbus service information request. This information may be beneficial to Airbus for product improvements.

Request To Clarify Repetitive Inspection Interval

AAL requested clarification of the repetitive inspection interval in paragraph (l)(2) of the proposed AD. AAL stated that, if Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015, was referenced in this AD, this service information includes an option for a repetitive inspection interval of 750 flight cycles.

We agree to clarify the repetitive inspection interval in paragraph (l)(2) of this AD. The 4-month repetitive inspection interval specified in paragraph (l)(2) of this AD has precedence over the 750-flight-cycle interval specified in Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015. We have not changed this AD in this regard.

Request To Revise Corrective Actions

Delta Airlines (DAL) requested that we revise paragraph (k) of the proposed AD to require the replacement of only the affected assembly and not the upper and lower fixed fairing forward attachment assemblies of the LH and RH MLG because of one finding on an affected assembly. DAL stated that paragraph (k) of the proposed AD places an undue burden on operators by having to replace airworthy parts because one of the affected parts was found with a finding of corrosion, wear, fatigue cracking, or loose studs.

We agree with the commenter's request. We agree with DAL that only parts with indication of corrosion, wear, fatigue cracking, or loose studs should be replaced. We have revised paragraph (k) of this AD to require replacing discrepant upper and lower fixed fairing forward attachment stud assemblies of the LH and RH MLG.

Request To Revise Exceptions to AD Actions

DAL requested that we revise paragraph (o) of the proposed AD to indicate that paragraphs (g) through (n) of the proposed AD are not applicable to post-Airbus Modification 155648 configuration airplanes. DAL stated that paragraph (o) of the proposed AD provides relief from the requirements of paragraphs (g) and (i) of the proposed AD, but related paragraphs (h), (j), (k), (l), and (n) of the proposed AD are not included in the relief.

We agree with the commenter that the intent of this AD is to not require paragraphs (g) through (n) of this AD if conditions stated in paragraph (o) of this AD are met. The requirements of paragraphs (k), (l), and (m) of this AD are conditional and will not apply to operators that are not required to do paragraphs (g) and (i) of this AD. Paragraph (n) of this AD is an explanation of terminating actions. We have clarified paragraphs (h) and (j) of this AD to refer to the exempt airplanes.

Request To Delete Paragraph (p)(1) of the Proposed AD, and Change Wording in Paragraphs (p)(1) Through (p)(4) of the Proposed AD

DAL requested that we delete paragraph (p)(1) of the proposed AD. DAL stated that paragraph (p)(1) of the proposed AD applies to pre-Airbus Modification 27716 and pre-Airbus Service Bulletin A320–52–1100 configuration airplanes, but provides a requirement for post-Airbus Modification 27716 or post-Airbus Service Bulletin A320–52–1100 configuration airplanes, which is redundant with the requirements of paragraph (p)(2) of the proposed AD. Delta also requested that we replace the word ''and'' in paragraphs (p)(1) through (p)(4) of the proposed AD with ''or'' to clarify the requirement and be consistent with the wording used in paragraph (i) of the proposed AD.

We partially agree with the commenter's requests. We agree with DAL to revise paragraphs (p)(1) through (p)(4) of this AD to replace ''and'' with ''or.'' We do not agree with deleting paragraph (p)(1) of this AD. Paragraph (p)(1) of this AD is applicable for airplanes in pre-Airbus Modification 27716 or pre-Airbus Service Bulletin A320–52–1100 configuration, and the parts prohibition is effective after doing the actions provided in paragraph (n)(2) of this AD. Paragraph (p)(2) of this AD is applicable for airplanes in post-Airbus Modification 27716 or post-Airbus Service Bulletin A320–52–1100 configuration, and the parts prohibition is effective as of the effective date of this AD. Therefore, paragraphs (p)(1) and (p)(2) of this AD are not redundant. We have not changed this AD in this regard.

Request To Delete Paragraph (p)(3) of the Proposed AD

DAL requested that we delete paragraph (p)(3) of the proposed AD. DAL stated that paragraph (p)(3) of the proposed AD applies to pre-Airbus Modification 155648 and pre-Airbus Service Bulletin A320–52–1165 configuration airplanes, but provides a requirement for post-Airbus Modification 155648 or post-Airbus Service Bulletin A320–52–1165, which is redundant with the requirements of paragraph (p)(4) of the proposed AD.

We do not agree with the commenter's request. Paragraph (p)(3) of this AD is applicable for airplanes which have not been modified to post-Airbus Modification 155648 or post-Airbus Service Bulletin A320–52–1165 configuration. Paragraph (p)(4) of this AD is applicable for airplanes that are in post-Airbus Modification 155648 or

post-Airbus Service Bulletin A320–52–1165 configuration. We have not changed this AD in this regard.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We reviewed the following service information:

- Airbus Service Bulletin A320–52–1100, Revision 01, dated March 12, 1999. This service information describes procedures for modification of the airplane to post-Airbus Modification 27716 configuration (by replacing the location stud, rod end, and location plate at the forward upper and lower leg fixed-fairing positions of the MLG door assemblies). The modification includes a resonance frequency inspection for debonding of the composite insert and delamination of the honeycomb area around the insert, and applicable corrective actions. Corrective actions include repairing the insert. The actions in this service information are an optional terminating modification.
- Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015. This service information describes procedures for inspection of the fixed fairing forward attachments of the MLG door assemblies, and replacement of the fixed fairing upper and lower attachment studs of the LH and RH MLG door assemblies.
- Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015. This service information describes procedures for replacing the fairing attachment stud assemblies of the MLG door assembly with new assemblies. The actions in this service information are an optional terminating modification.

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.

Explanation of ''RC'' (Required for Compliance) (RC) Procedures and Tests in Service Information

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (ARC), to enhance the AD system. One enhancement was a new process for annotating which procedures and tests in the service information are required for compliance with an AD. Differentiating these procedures and tests from other tasks in the service information is expected to improve an owner's/operator's understanding of crucial AD requirements and helps to provide consistent judgment in AD compliance. The procedures and tests identified as RC in any service information have a direct effect on detecting, preventing, resolving, or eliminating an identified unsafe condition.

As specified in a NOTE under the Accomplishment Instructions of the specified service information, procedures and tests that are identified as RC in any service information must be done to comply with the AD. However, procedures and tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an alternative method of compliance (AMOC), provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC will require approval of an AMOC.

Costs of Compliance

We estimate that this AD affects 851 airplanes of U.S. registry.

We also estimate that it will take about 18 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $4,110 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $4,799,640, or $5,640 per product.

We estimate that the optional terminating modification would take about 18 work-hours and require parts costing $4,110, for a cost of $5,640 per product.

In addition, we estimate that any necessary follow-on actions would take about 18 work-hours and require parts costing $4,110, for a cost of $5,640 per product. We have no way of determining the number of aircraft that might need these actions.

According to the manufacturer, some of the costs of this AD might be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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.

We are 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

We 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 that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. 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.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2015-2458;* or in

person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–07–23 Airbus: Amendment 39–18468. Docket No. FAA–2015–2458; Directorate Identifier 2014–NM–122–AD.

(a) Effective Date

This AD becomes effective June 6, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus airplanes identified in paragraphs (c)(1) through (c)(4) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Airbus Model A318–111, –112, –121, and –122 airplanes.

(2) Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Airbus Model A320–211, –212, –214, –231, –232, and –233 airplanes.

(4) Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Reason

This AD was prompted by reports of in-flight loss of fixed and hinged main landing gear (MLG) fairings, and reports of post-modification MLG fixed fairing assemblies that have wear and corrosion. We are issuing this AD to prevent in-flight detachment of an MLG fixed fairing and consequent damage to the airplane.

(f) Compliance

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

(g) Repetitive Replacements

For airplanes in pre-Airbus Modification 27716 and pre-Airbus Service Bulletin A320–52–1100 configuration, with any of the components installed that are identified in paragraphs (g)(1) through (g)(5) of this AD: At the applicable compliance time specified in paragraph (h) of this AD, replace fixed fairing upper and lower attachment studs of both left-hand (LH) and right-hand (RH) MLG, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015. Repeat the replacements thereafter at intervals not to exceed 6,500 flight cycles.

(1) Plate—support having part number (P/N) D5284024820000.

(2) Plate—support P/N D5284024820200.

(3) Stud—adjustment having P/N D5284024420000.

(4) Rod end assembly (lower) having P/N D5284000500000.

(5) Rod end assembly (upper) having P/N D5284000600000.

(h) Compliance Times for the Requirements of Paragraph (g) of This AD

For airplanes identified in paragraph (g) of this AD, except as provided by paragraph (o) of this AD: Do the initial replacement required by paragraph (g) of this AD at the latest of the times specified in paragraphs (h)(1) through (h)(4) of this AD.

(1) Before the accumulation of 6,500 total flight cycles since the airplane's first flight.

(2) Within 6,500 flight cycles since the last installation of a pre-Airbus Modification 27716 stud on the airplane.

(3) Within 1,500 flight cycles after the effective date of this AD.

(4) Within 8 months after the effective date of this AD.

(i) Repetitive Inspections

For airplanes in post-Airbus Modification 27716 or post-Airbus Service Bulletin A320–52–1100 configuration, with any of the components installed that are identified in paragraphs (i)(1), (i)(2), and (i)(3) of this AD: At the applicable compliance time specified in paragraph (j) of this AD, do a detailed inspection of the LH and RH MLG forward stud assemblies of the fixed fairing door upper and lower forward attachments of both LH and RH MLG for indications of corrosion, wear, fatigue cracking, and loose studs, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015. Repeat the inspection thereafter at intervals not to exceed 12 months. Replacement of both LH and RH MLG forward stud assemblies on an airplane, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015, extends the interval for the next detailed inspection to 72 months; and the inspection must be repeated thereafter at intervals not to exceed 12 months.

(1) Stud—adjustment having P/N D5285600720000.

(2) Rod end assembly (lower) having P/N D5285600400000.

(3) Rod end assembly (upper) having P/N D5285600500000.

(j) Compliance Times for the Requirements of Paragraph (i) of This AD

For airplanes identified in paragraph (i) of this AD, except as provided by paragraph (o) of this AD: Do the initial inspection required by paragraph (i) of this AD at the latest of the times specified in paragraphs (j)(1) through (j)(4) of this AD.

(1) Before the accumulation of 72 months since the airplane's first flight.

(2) Within 72 months since the last installation of a post-Airbus Modification 27716 assembly or since accomplishment of the actions specified in Airbus Service Bulletin A320–52–1100.

(3) Within 1,500 flight cycles after the effective date of this AD.

(4) Within 8 months after the effective date of this AD.

(k) Corrective Action

If any discrepancy (including any indication of corrosion, wear, fatigue cracking, or loose studs) of any MLG forward stud assembly is found during any inspection required by paragraph (i) of this AD, except as specified in paragraph (l) of this AD: Before further flight, replace the discrepant upper and lower fixed fairing forward stud assemblies of the LH and RH MLG, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015; or Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015.

(l) Corrective Action or Repetitive Inspections for Certain Corrosion Findings

If any corrosion is found during any inspection required by paragraph (i) of this AD on any MLG fixed fairing forward stud assembly (upper, lower, LH or RH), but the corroded stud is not loose: Do the action specified in paragraph (l)(1) or (l)(2) of this AD.

(1) Before further flight, replace the affected assembly, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015; or Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015.

(2) Within 4 months after finding corrosion, and thereafter at intervals not to exceed 4 months, do a detailed inspection for indications of corrosion, wear, fatigue cracking, and loose studs of the forward stud assembly of the affected (LH or RH) MLG, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015.

(m) Corrective Action for Inspections Specified in Paragraph (l)(2) of This AD

If any indication of wear, fatigue cracking, or loose studs of any forward stud assembly is found during any inspection required by paragraph (l)(2) of this AD: Before further flight, replace the affected (LH or RH) MLG fixed fairing forward stud assembly, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015; or Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015.

(n) Terminating Action

(1) Replacement of parts on an airplane, as required by paragraph (g), (k), (l)(1), or (m) of this AD, does not constitute terminating action for the repetitive inspections required by paragraph (i) of this AD, except as specified in paragraph (n)(3) of this AD.

(2) The repetitive replacements required by paragraph (g) of this AD may be terminated by modification of the airplane to post-Airbus Modification 27716 configuration, including a resonance frequency inspection for debonding of the composite insert and delamination of the honeycomb area around the insert, and all applicable corrective actions, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1100, Revision 01, dated March 12, 1999, provided all applicable corrective actions are done before further flight. Thereafter, refer to paragraph (i) of this AD to determine the compliance time for the next detailed inspection required by this AD.

(3) Modification of an airplane, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015, constitutes terminating action for actions required by paragraphs (g) through (m) of this AD for the airplane on which the modification is done.

(o) Exceptions to Certain AD Actions

An airplane on which Airbus Modification 155648 has been embodied in production is not affected by the requirements of paragraphs (g) and (i) of this AD, provided that no affected component, identified by part number as listed paragraphs (g)(1) through (g)(5) and (i)(1) through (i)(3) of this AD, has been installed on that airplane since first flight of the airplane.

(p) Parts Installation Prohibition

(1) For airplanes in pre-Airbus Modification 27716 or pre-Airbus Service Bulletin A320–52–1100 configuration: No person may install a component identified in paragraphs (g)(1) through (g)(5) of this AD on any airplane after doing the actions provided in paragraph (n)(2) of this AD.

(2) For airplanes in post-Airbus Modification 27716 or post Airbus Service Bulletin A320–52–1100 configuration: As of the effective date of this AD, no person may install a component identified in paragraphs (g)(1) through (g)(5) of this AD on any airplane.

(3) For airplanes in pre-Airbus Modification 155648 or pre-Airbus Service Bulletin A320–52–1165 configuration: No person may install a component identified in paragraphs (g)(1) through (g)(5) and (i)(1) through (i)(3) of this AD on any airplane after doing the actions provided in paragraph (n)(3) of this AD.

(4) For airplanes in post-Airbus Modification 155648 or post-Airbus Service Bulletin A320–52–1165 configuration: As of the effective date of this AD, no person may install a component identified in (g)(1) through (g)(5) and (i)(1) through (i)(3) of this AD on any airplane.

(q) No Reporting Requirement

Although Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015, specifies to submit certain information to the manufacturer, and specifies that action as ''RC'' (Required for Compliance), this AD does not include that requirement.

(r) Credit for Previous Actions

(1) This paragraph provides credit for optional actions provided by paragraph (n)(2) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–52–1100, dated December 7, 1998, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for the actions required by paragraphs (g), (i), (k), (l), and (m) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–52–1163, dated February 4, 2014, which is not incorporated by reference in this AD.

(s) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. 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. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as specified in paragraph (q) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(t) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2015–0001R1, dated January 15, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2458.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (u)(3) and (u)(4) of this AD.

(u) 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) Airbus Service Bulletin A320–52–1100, Revision 01, dated March 12, 1999.

(ii) Airbus Service Bulletin A320–52–1163, Revision 01, including Appendix 01, dated June 22, 2015.

(iii) Airbus Service Bulletin A320–52–1165, Revision 01, dated October 23, 2015, excluding Appendix 01, dated November 3, 2014, and including Appendix 02, dated October 23, 2015.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on April 13, 2016.

Victor Wicklund,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–09119 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3988; Directorate Identifier 2015–NM–005–AD; Amendment 39–18491; AD 2016–08–15]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are superseding Airworthiness Directive (AD) 2014–17–51 for certain Bombardier, Inc. Model CL–600–2B16 airplanes. AD 2014–17–51 required inspecting the inboard flap fasteners of the hinge-box forward fitting at Wing Station (WS) 76.50 and WS 127.25 to determine the orientation and condition of the fasteners, as applicable, and replacement or repetitive inspections of the fasteners if necessary. AD 2014–17–51 also provided for optional terminating action for the requirements of that AD. This new AD requires accomplishment of the previously optional terminating action. This AD was prompted by a determination that that additional action is necessary. We are issuing this AD to detect and correct incorrectly oriented or fractured fasteners, that could result in premature failure of the fasteners attaching the inboard flap hinge-box forward fitting; failure of the fasteners could lead to the detachment of the flap hinge box and the flap surface, and consequent loss of control of the airplane.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of November 12, 2014 (79 FR 64088, October 28, 2014).

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of March 6, 2014 (79 FR 9389, February 19, 2014).

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3988.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3988; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, 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, Aerospace Engineer, Propulsion and Services Branch, ANE–173, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7329; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2014–17–51, Amendment 39–17999 (79 FR 64088, October 28, 2014) (''AD 2014–17–51''). AD 2014–17–51 applied to certain Bombardier, Inc. Model CL–600–2B16 airplanes. The NPRM published in the **Federal Register** on October 19, 2015 (80 FR 63141) (''the NPRM'').

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2014–27R1, dated August 29, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–2B16 airplanes. The MCAI states:

> There have been three in-service reports on 604 Variant aeroplanes of a fractured fastener head on the inboard flap hinge-box forward fitting at Wing Station (WS) 76.50, found during a routine maintenance inspection. Investigation revealed that the installation of these fasteners on the inboard flap hinge-box forward fittings at WS 76.50 and WS 127.25, on both wings, does not conform to the engineering drawings. Incorrect installation may result in premature failure of the fasteners attaching the inboard flap hinge-box forward fitting. Failure of the fasteners could lead to the detachment of the flap hinge box and consequently the detachment of the flap surface. The loss of a flap surface could adversely affect the continued safe operation of the aeroplane.
>
> The original issue of [Canadian] AD CF–2013–39 [*http://www.regulations.gov/#!documentDetail;D=FAA-2014-0054-0002*] [which corresponds to FAA AD 2014–03–17, Amendment 39–17754 (79 FR 9389, February 19, 2014)] mandated a detailed visual inspection (DVI) of each inboard flap hinge-box forward fitting, on both wings, and rectification as required. Incorrectly oriented fasteners require repetitive inspections until the terminating action is accomplished.
>
> After the issuance of [Canadian] AD CF–2013–39, there has been one reported incident on a 604 Variant aeroplane where four fasteners were found fractured on the same flap hinge-box forward fitting. The investigation determined that the fasteners were incorrectly installed.
>
> The original issue of this [Canadian] AD was issued to reduce the initial and repetitive inspection intervals previously mandated in [Canadian] AD CF–2013–39, and to impose replacement of the incorrectly oriented fasteners within 24 months. The CL–600–1A11, –2A12 and –2B16 (601–3A/–3R Variant) aeroplanes are addressed through [Canadian] AD CF–2013–39R1.
>
> Revision 1 of this [Canadian] AD is issued to clarify the requirements for the initial and repetitive inspections.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3988.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Change to Paragraph (k) of This AD

Paragraph (k) of the NPRM specified to do the replacement on ''both'' wings. However, the replacement only needs to be done on the affected wing on which incorrectly oriented fasteners were found but none were found to be fractured. We have revised paragraph (k) of this AD to specify accomplishing the replacement on the affected wings. We

have coordinated this change with TCCA.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD with the change described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Alert Service Bulletins:

- A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; and
- A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013.

The service information describes repetitive detailed visual inspections of each inboard flap fastener of the hinge-box forward fitting at WS 76.50 and WS 127.25, on both wings, and, if necessary, replacement of the fasteners. 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.

Costs of Compliance

We estimate that this AD affects 285 airplanes of U.S. registry.

The actions required by AD 2014–17–51, and retained in this AD take about 1 work-hour per product, at an average labor rate of $85 per work-hour. Required parts cost about $0 per product. Based on these figures, the estimated cost of the actions that are required by AD 2014–17–51 is $85 per product.

We also estimate that it will take about 58 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts cost about $753 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $1,619,655, or $5,683 per product.

In addition, we estimate that any necessary follow-on actions will take about 58 work-hours and require parts costing $753, for a cost of $5,683 per product. We have no way of determining the number of aircraft that might need this action.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

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.

We are 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

We 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 that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

4. 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2014–17–51, Amendment 39–17999 (79 FR 64088, October 28, 2014), and adding the following new AD:

2016–08–15 Bombardier, Inc.: Amendment 39–18491. Docket No. FAA–2015–3988; Directorate Identifier 2015–NM–005–AD.

(a) Effective Date

This AD is effective June 6, 2016.

(b) Affected ADs

(1) This AD replaces AD 2014–17–51, Amendment 39–17999 (79 FR 64088, October 28, 2014) (''AD 2014–17–51'').

(2) This AD affects AD 2014–03–17, Amendment 39–17754 (79 FR 9389, February 19, 2014) (''AD 2014–03–17''), only for the airplanes identified in paragraph (c) of this AD.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B16 airplanes, certificated in any category, serial numbers 5301 through 5665 inclusive, and 5701 through 5920 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Reason

This AD was prompted by reports of fractured fastener heads on the inboard flap hinge-box forward fitting at Wing Station (WS) 76.50 due to incorrect installation. We are issuing this AD to detect and correct incorrectly oriented or fractured fasteners, that could result in premature failure of the fasteners attaching the inboard flap hinge-box forward fitting; failure of the fasteners could lead to the detachment of the flap hinge box and the flap surface, and consequent loss of control of the airplane.

(f) Compliance

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

(g) Retained Inspection, With New Service Information: Airplanes Not Previously Inspected

This paragraph restates the requirements of paragraph (g) of AD 2014–17–51, with new service information. For airplanes on which the actions required by AD 2014–03–17 have not been done as of November 12, 2014 (the effective date of AD 2014–17–51): Within 10

flight cycles after November 12, 2014, or within 100 flight cycles after March 6, 2014 (the effective date of AD 2014–03–17), whichever occurs first, do a detailed visual inspection of each inboard flap fastener of the hinge-box forward fitting at WS 76.50 and WS 127.25, on both wings, to determine if the fasteners are correctly oriented and intact (non-fractured, with intact fastener head). Do the inspection in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A604–57–006, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated September 26, 2013, or Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013 (for serial numbers 5301 through 5665 inclusive); or Bombardier Alert Service Bulletin A605–57–004, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated September 26, 2013, or Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013 (for serial numbers 5701 through 5920 inclusive). As of the effective date of this AD, only use Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; as applicable; for the actions required by this paragraph.

(1) If all fasteners are found intact and correctly oriented, no further action is required by this AD.

(2) If any fastener is found fractured: Before further flight, remove and replace all forward and aft fasteners at WS 76.50 and WS 127.25, regardless of condition or orientation, on both wings, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (g) of this AD. As of the effective date of this AD, only use Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; as applicable; for the actions required by this paragraph. After replacement of all fasteners as required by this paragraph of this AD, no further action is required by this AD.

(3) If any incorrectly oriented but intact fastener is found, and no fractured fastener is found, repeat the inspection required by paragraph (g) of this AD thereafter at intervals not to exceed 10 flight cycles, until the requirements of paragraph (i)(1) or (k) of this AD have been done.

(h) Retained Actions, With New Service Information: Airplanes Previously Inspected, Having Incorrectly Oriented Fastener(s)

This paragraph restates the requirements of paragraph (h) of AD 2014–17–51, with new service information. For airplanes on which an inspection required by paragraph (g) or (j) of AD 2014–03–17 has been done as of November 12, 2014 (the effective date of AD 2014–17–51), and on which any incorrectly oriented fastener, but no fractured fastener, was found: Except as provided by paragraph (i)(3) of this AD, do a detailed visual inspection of all inboard flap fasteners of the hinge-box forward fitting at WS 76.50 and WS 127.25, on both wings, to determine if the fasteners are intact (non-fractured, with intact fastener head). Inspect within 10 flight cycles after November 12, 2014, or within 100 flight cycles after the most recent inspection done as required by AD 2014–03–17, whichever occurs first. Inspect in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (g) of this AD. As of the effective date of this AD, only use Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; as applicable; for the actions required by this paragraph.

(1) If all fasteners are found intact, repeat the inspection thereafter at intervals not to exceed 10 flight cycles, until the requirements of paragraph (i)(1) or (k) of this AD have been done.

(2) If any fastener is found fractured: Before further flight, remove and replace all forward and aft fasteners at WS 76.50 and WS 127.25, regardless of condition or orientation, on both wings, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (g) of this AD. As of the effective date of this AD, only use Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; as applicable; for the actions required by this paragraph. After replacement of all fasteners as required by this paragraph, no further action is required by this AD.

(i) Retained Terminating Action, With New Service Information

This paragraph restates the terminating action specified in paragraph (i) of AD 2014–17–51), with new service information.

(1) Replacement of all forward and aft fasteners at WS 76.50 and WS 127.25, on both wings, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (g) of this AD, terminates the requirements of this AD. As of the effective date of this AD, only use Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013; as applicable; for the actions specified in this paragraph.

(2) Accomplishment of the applicable requirements of this AD constitutes terminating action for the requirements of AD 2014–03–17 for that airplane only.

(3) Replacement of all fractured and incorrectly oriented fasteners before November 12, 2014 (the effective date of AD 2014–17–51), as provided by paragraph (i) or (k) of AD 2014–03–17, is acceptable for compliance with the requirements of this AD.

(j) Retained Special Flight Permit Prohibition

This paragraph restates the requirements of paragraph (j) of AD 2014–17–51. Special flight permits to operate the airplane to a location where the airplane can be repaired in accordance with 14 CFR 21.197 and 21.199 are not allowed.

(k) New Requirement of This AD: Post-Inspection Fastener Replacement

For airplanes on which incorrectly oriented fasteners were found during any inspection required by paragraph (g), (g)(3), (h), or (h)(1) of this AD, but none were found to be fractured: Within 24 months after the effective date of this AD, remove and replace all forward and aft fasteners at WS 76.50 and WS 127.25, regardless of condition or orientation, on affected wings, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013 (for serial numbers 5301 through 5665 inclusive); or Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013 (for serial numbers 5701 through 5920 inclusive). Accomplishing the requirements of this paragraph terminates the requirements of this AD.

(l) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraphs (g), (h), and (i)(1) of this AD, if those actions were performed before the effective date of this AD using the applicable service information identified in paragraphs (l)(1)(i) and (l)(1)(ii) of this AD, which are not incorporated by reference in this AD.

(i) Bombardier Alert Service Bulletin A604–57–006, Revision 03, dated August 19, 2014, including Appendices 1 and 2, dated September 26, 2013.

(ii) Bombardier Alert Service Bulletin A605–57–004, Revision 03, dated August 19, 2014, including Appendices 1 and 2, dated September 26, 2013.

(2) This paragraph provides credit for actions required by paragraph (k) of this AD, if those actions were done before the effective date of this AD using the applicable service information identified in paragraphs (l)(2)(i) through (l)(2)(iv) of this AD.

(i) Bombardier Alert Service Bulletin A604–57–006, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013, which is incorporated by reference in AD 2014–03–17.

(ii) Bombardier Alert Service Bulletin A604–57–006, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated

September 26, 2013, which was incorporated by reference in AD 2014–17–51.

(iii) Bombardier Alert Service Bulletin A605–57–004, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013, which is incorporated by reference in AD 2014–03–17.

(iv) Bombardier Alert Service Bulletin A604–57–004, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated September 26, 2013, which was incorporated by reference in AD 2014–17–51.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531.

(i) 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. The AMOC approval letter must specifically reference this AD.

(ii) AMOCs previously approved for AD 2014–17–51 are acceptable for the corresponding requirements of this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, Engine and Propeller Directorate, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Emergency Airworthiness Directive CF–2014–27R1, dated August 29, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3988.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (o)(6) and (o)(7) of this AD.

(o) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on June 6, 2016.

(i) Bombardier Alert Service Bulletin A604–57–006, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013.

(ii) Bombardier Alert Service Bulletin A605–57–004, Revision 04, dated November 12, 2014, including Appendices 1 and 2, dated September 26, 2013.

(4) The following service information was approved for IBR on November 12, 2014 (79 FR 64088, October 28, 2014).

(i) Bombardier Alert Service Bulletin A604–57–006, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated September 26, 2013.

(ii) Bombardier Alert Service Bulletin A605–57–004, Revision 02, dated January 22, 2014, including Appendices 1 and 2, dated September 26, 2013.

(5) The following service information was approved for IBR on March 6, 2014 (79 FR 9389, February 19, 2014).

(i) Bombardier Alert Service Bulletin A604–57–006, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013.

(ii) Bombardier Alert Service Bulletin A605–57–004, Revision 01, dated September 26, 2013, including Appendices 1 and 2, dated September 26, 2013.

(6) For service information identified in this AD, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(7) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(8) 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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on April 8, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–08959 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–1130; Directorate Identifier 2015–CE–008–AD; Amendment 39–18492; AD 2015–09–04 R1]

RIN 2120–AA64

Airworthiness Directives; DG Flugzeugbau GmbH Gliders

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are revising Airworthiness Directive (AD) 2015–09–04 for DG Flugzeugbau GmbH Model DG–1000T gliders equipped with a Solo Kleinmotoren Model 2350 C engine. This AD results from mandatory continuing airworthiness information (MCAI) issued 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 engine shaft failure and consequent propeller detachment. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of June 6, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of May 26, 2015 (80 FR 25591, May 5, 2015).

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1130; or in person at the Docket Management Facility, 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 service information identified in this AD, contact Solo Kleinmotoren GmbH, Postfach 600152, 71050 Sindelfingen, Germany; telephone: +49 7031 301–0; fax: +49 7031 301–136; email: *aircraft@solo-germany.com;* Internet: *http://aircraft.solo-online.com* and DG Flugzeugbau GmbH, Otto Lilienthal Weg 2/Am Flugplatz, 76646 Bruchsal, Germany; telephone: +49 7251 3020–0; fax: +49 7251 3020–200; email: *wassenaar@dg-flugzeugbau.de;* Internet: *http://www.dg-flugzeugbau.de/*index.php?id=1329. You may view this

referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the Internet at *http://www.regulations.gov* by searching for Docket No. FAA–2015–1130.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to DG Flugzeugbau GmbH Model DG–1000T gliders equipped with a Solo Kleinmotoren Model 2350 C engine. The NPRM was published in the **Federal Register** on February 4, 2016 (81 FR 5944), and proposed to revise AD 2015–09–04, Amendment 39–18150 (80 FR 25591, May 5, 2015).

Since we issued AD 2015–09–04, Amendment 39–18150 (80 FR 25591, May 5, 2015), new service information has been issued that includes procedures for replacement of the excenter axle-pulley assembly and installation of an elastomeric damper element between the propeller and upper pulley. This optional modification will allow resuming engine operation.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2015–0052R1, dated November 19, 2015 (referred to after this as ''the MCAI''), to correct the above-referenced unsafe condition for the specified products. The MCAI states:

> An occurrence of engine shaft failure and consequent propeller detachment was reported on a Solo 2350 C engine.
>
> This condition, if not corrected, could lead to additional cases of release of the propeller from the engine, possibly resulting in damage to the sailplane, or injury to persons on the ground.
>
> To address this unsafe condition, EASA issued Emergency AD 2013–0217–E to prohibit operation of the engine. That AD was later revised to introduce an optional modification, through Solo Kleinmotoren Service Bulletin (SB) 4603–14, to install a modified excenter axle-pulley assembly, allowing to resume operation of the engine.
>
> Since EASA AD 2013–0217R1 was issued, another occurrence of engine shaft failure and propeller detachment was reported on a Solo 2350 C engine which had been modified in accordance with Solo Kleinmotoren SB 4603–14.
>
> Consequently, EASA issued Emergency AD 2015–0052–E, which superseded AD 2013–0217R1, to prohibit operation of all Solo 2350 C engines, including those engines which had been modified in accordance with Solo Kleinmotoren SB 4603–14. That AD also required a one-time inspection of the propeller shaft to detect cracks and the reporting of findings.
>
> Since that AD was issued, Solo Kleinmotoren GmbH developed modification drawing nb. 2031211–V2 available for in service application through Solo SB 4603–17 and DG Flugzeugbau GmbH developed modifications drawing nb. 10 M 067, available for in service application through DG Flugzeugbau Technical Note (TN) 1000/26 which include replacement of excenter axle-pulley assembly and installation of an elastomeric damper element between the propeller and upper pulley.
>
> This AD is revised to introduce optional modifications to allow resuming operation of an engine.

You may examine the MCAI on the Internet at *https://www.regulations.gov/#!documentDetail;D=FAA-2015-1130-0002.*

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 5944, February 4, 2016) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (81 FR 5944, February 4, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (81 FR 5944, February 4, 2016).

Related Service Information Under 1 CFR 51

We reviewed Solo Kleinmotoren GmbH Anleitung zur Inspektion (English translation: Inspection Instruction), Nr. 4603–1, Ausgabe (English translation: Dated) March 26, 2015; Solo Kleinmotoren GmbH Technische Mitteilung (English translation: Service Bulletin) Nr. 4603–17, Ausgabe (English translation: Dated) July 15, 2015; and DG Flugzeugbau GmbH Technical note No. 1000/26, dated September 23, 2015, with 10M072 titled Propellermontage nach TM 1000–26 (English translation: Propeller assembly TN 1000–26), dated July 14, 2015. Solo Kleinmotoren GmbH Anleitung zur Inspektion (English translation: Inspection Instruction), Nr. 4603–1, Ausgabe (English translation: Dated) March 26, 2015, describes procedures for inspecting the propeller shaft for cracking and reporting the results to the manufacturer. Solo Kleinmotoren GmbH Techniseche Mitteilung (English translation: Service Bulletin) Nr. 4603–17, Ausgabe (English translation: Dated) July 15, 2015, describes procedures for replacement of the excenter axle-pulley assembly. DG Flugzeugbau GmbH Technical note No. 1000/26, dated September 23, 2015, describes procedures for removing the excenter axle-pulley assembly and sending it to Solo Kleinmotoren GmbH for modification with a new rear bearing, axle, and elastomeric damper element. 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.

Costs of Compliance

We estimate that this AD will affect 2 products of U.S. registry. We also estimate that it will take about .5 work-hour per product to comply with the basic operational limitation requirement of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of this portion of this AD on U.S. operators to be $85, or $42.50 per product.

We also estimate that it will take about 1.5 work-hours per product to comply with the basic axle inspection (remove, inspect, and reinstall) requirement of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of this portion of this AD on U.S. operators to be $255, or $127.50 per product.

We also estimate that it will take about 2 work-hours per product to comply with the optional axle with drive belt pulley unit replacement and engine test run of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $100 per product.

Based on these figures, we estimate the cost of this optional AD action on U.S. operators to be $540, or $270 per product.

We also estimate that it will take about .5 work-hour per product to comply with the removal of the operational limitation requirement after doing the optional replacement of this

AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of this AD action on U.S. operators to be $85, or $42.50 per product.

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 penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591. ATTN: Information Collection Clearance Officer, AES–200.

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.

We are 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

We 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 AD:

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

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

(4) 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.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1130; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–18150 (80 FR 25591, May 5, 2015) and adding the following new AD:

2015–09–04 R1 DG Flugzeugbau GmbH: Amendment 39–18492; Docket No. FAA–2015–1130; Directorate Identifier 2015–CE–008–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective June 6, 2016.

(b) Affected ADs

This AD replaces AD 2015–09–04, Amendment 39–18150 (80 FR 25591, May 5, 2015) (''AD 2015–09–04'').

(c) Applicability

This AD applies to DG Flugzeugbau GmbH Model DG–1000T gliders, all serial numbers, that are:

(1) Equipped with a Solo Kleinmotoren Model 2350 C engine; and

(2) Certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 72: Engine.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as engine shaft failure with consequent propeller detachment. We are issuing this AD to prevent failure of the engine shaft with consequent propeller detachment, which could result in damage to the glider or injury of persons on the ground.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) As of November 25, 2013 (the effective date retained from AD 2013–22–14, Amendment 39–17646 (78 FR 65869, November 4, 2013)), do not operate the engine unless the engine is modified following instructions that are FAA-approved specifically for this AD.

(2) Modification of an engine following the instructions in Solo Kleinmotoren Service Bulletin 4603–14, dated April 28, 2014, is not an acceptable modification to comply with paragraph (f)(1) of this AD.

(3) As of May 26, 2015 (the effective date retained from AD 2015–09–04), place a copy of this AD into the Limitations section of the aircraft flight manual (AFM).

(4) Within the next 30 days after May 26, 2015 (the effective date retained from AD 2015–09–04), do a one-time inspection (magnetic particle or dye penetrant) of the propeller shaft following Solo Kleinmotoren GmbH Anleitung zur Inspektion (English translation: Inspection Instruction), Nr. 4603–1, Ausgabe (English translation: dated) March 26, 2015.

Note 1 to paragraph (f)(4) of this AD: This service information contains German to English translation. The EASA used the English translation in referencing the document. For enforceability purposes, we will refer to the Solo Kleinmotoren service information as it appears on the document.

(5) Within the next 30 days after May 26, 2015 (the effective date retained from AD 2015–09–04), report the results of the inspection required in paragraph (f)(4) of this AD to Solo Kleinmotoren GmbH. Include the serial number of the engine and the operational time since change of the axle in your report. You may find contact information for Solo Kleinmotoren GmbH in paragraph (i)(5) of this AD.

(6) At any time after June 6, 2016 (the effective date of this AD), you may modify the engine following Solo Kleinmotoren GmbH Techniseche Mitteilung (English translation: Service Bulletin) Nr. 4603–17,

Ausgabe (English translation: Dated) July 15, 2015; and DG Flugzeugbau GmbH Technical note No. 1000/26, dated September 23, 2015, with 10M072 titled Propellermontage nach TM 1000–26 (English translation: Propeller assembly TN 1000–26), dated July 14, 2015. This modification allows engine operation.

Note 2 to paragraph (f)(6) of this AD: This service information contains German to English translation. The EASA used the English translation in referencing the document. For enforceability purposes, we will refer to the Solo Kleinmotoren service information and the DG Flugzeugbau GmbH as it appears on the document.

(7) Before further flight after doing the modification allowed in (f)(6) of this AD, remove the AD placed into the Limitations section of the AFM as required in paragraph (f)(3) of this AD.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2015–0052R1, dated November 19, 2015, for related information. You may examine the MCAI on the Internet at *https://www.regulations.gov/#!documentDetail;D=FAA-2015-1130-0002.*

(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.

(3) The following service information was approved for IBR on June 6, 2016.

(i) Solo Kleinmotoren GmbH Techniseche Mitteilung (English translation: Service Bulletin) Nr. 4603–17, Ausgabe (English translation: Dated) July 15, 2015.

Note 3 to paragraphs (i)(3)(i) and (i)(3)(ii) of this AD: This service information contains German to English translation. The EASA used the English translation in referencing the document. For enforceability purposes, we will refer to the Solo Kleinmotoren service information and the DG Flugzeugbau GmbH as it appears on the document.

(ii) DG Flugzeugbau GmbH Technical note No. 1000/26, dated September 23, 2015, with 10M072 titled Propellermontage nach TM 1000–26 (English translation: Propeller assembly TN 1000–26), dated July 14, 2015.

(4) The following service information was approved for IBR on May 26, 2015 (80 FR 25591, May 5, 2015).

(i) Solo Kleinmotoren GmbH Anleitung zur Inspektion (English translation: Inspection Instruction), Nr. 4603–1, Ausgabe (English translation: Dated) March 26, 2015.

Note 4 to paragraph (i)(4)(i) of this AD: This service information contains German to English translation. The EASA used the English translation in referencing the document. For enforceability purposes, we will refer to the Solo Kleinmotoren service information as it appears on the document.

(ii) Reserved.

(5) For service information identified in this AD, contact Solo Kleinmotoren GmbH, Postfach 600152, 71050 Sindelfingen, Germany; telephone: +49 7031 301–0; fax: +49 7031 301–136; email: *aircraft@solo-germany.com;* Internet: *http://aircraft.solo-online.com/com.*

(6) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. In addition, you can access this service information on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1130.

(7) 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, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on April 11, 2016.

Melvin Johnson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–08961 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

RAILROAD RETIREMENT BOARD

20 CFR Part 356

RIN 3220–AB68

Civil Monetary Penalty Inflation Adjustment

AGENCY: Railroad Retirement Board.

ACTION: Interim final rule.

SUMMARY: As required by Section 701 of the Bipartisan Budget Act of 2015, entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Railroad Retirement Board (Board) hereby amends its regulations to provide for adjustments in the minimum and maximum amounts of civil monetary penalties under the Board's jurisdiction. The amendment will increase the amount of penalties to adjust for inflation since the Board last adjusted its penalty amounts, and will provide the formula to be used for required annual adjustments in the penalty amounts.

DATES: Effective August 1, 2016. Comments must be received on or before July 1, 2016.

ADDRESSES: You may submit comments, identified by RIN 3220–AB68, by any of the following methods:

1. *Internet*—Send comments via email to *SecretarytotheBoard@rrb.gov.*

2. *Fax*—(312) 751–3336.

3. *Mail*—Secretary to the Board, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092.

Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to RIN 3220–AB68.

Caution: You should be careful to include in your comments only information that you wish to make publicly available as comments are posted without change, with any personal information provided. The Board strongly urges you not to include in your comments any personal information, such as Social Security numbers or medical information.

FOR FURTHER INFORMATION CONTACT: Marguerite P. Dadabo, Assistant General Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611–2092, (312) 751–4945, TTD (312) 751–4701.

SUPPLEMENTARY INFORMATION: Section 701 of the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015), entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) (Inflation Adjustment Act) to require agencies to publish regulations adjusting the amount of civil monetary penalties provided by law within the jurisdiction of the agency not later than July 1, 2016. The penalties authorized by the Program Fraud Civil Remedies Act, 31 U.S.C. 3801 *et seq.* (PFCRA), and the False Claims Act provisions at 31 U.S.C. 3729(a), are within the Board's jurisdiction, and the Board accordingly publishes this interim final rule in compliance with the 2015 Act.

This interim final rule is being issued without prior public notice or opportunity for public comments. The 2015 Act's amendments to the Inflation Adjustment Act require the agency to adjust penalties initially through an interim final rulemaking, which does not require the agency to complete a notice and comment process prior to promulgating the interim final rule. The amendments also explicitly require the agency to make subsequent annual adjustments notwithstanding 5 U.S.C. 553 (the section of the Administrative Procedure Act that normally requires agencies to engage in notice and comment). Additionally, the formula used for adjusting the amount of civil penalties is given by statute, with no discretion provided to the Board regarding the substance of the adjustments. The Board is charged only with performing ministerial computations to determine the amount of adjustment to the civil penalties due to increases in the Consumer Price Index for all Urban Consumers (CPI–U).

Prior Adjustment History

The Board last adjusted the civil penalties under its jurisdiction effective October 23, 1996, pursuant to the Inflation Adjustment Act, when the maximum penalty under the PFCRA was adjusted from $5,000 to $5,500 and the minimum and maximum penalties under 31 U.S.C. 3729 were adjusted from $5,000 to $5,500 and from $10,000 to $11,000, respectively. While the formula used to calculate these adjustments initially yielded higher final penalty amounts, the Debt Collection Improvement Act of 1996, Public Law 104–134, limited the amount of these previous adjustments to no more than 10 percent of the penalty amount or range, as appropriate. Therefore, the penalties were increased by the statutory maximum of 10 percent. Prior to the October 23, 1996 adjustment, the Board last set or adjusted these penalty levels in 1986.

Initial Adjustment Under the 2015 Act

For the first adjustment made in accordance with the 2015 Act, the amount of the adjustment is calculated based on the percent change between the CPI–U for October of the last year in which penalties were previously adjusted (not including any adjustment made pursuant to the Inflation Adjustment Act before November 2, 2015), and the CPI–U for October 2015. The 10 percent cap on adjustments imposed by the Debt Collection Improvement Act of 1996 has been eliminated by the 2015 Act. Instead, the 2015 Act imposes a cap on the amount of this initial adjustment, such that the amount of the increase may not exceed 150 percent of the pre-adjustment penalty amount or range. As a result, the total penalty amount or range after the initial adjustment under the 2015 Act may not exceed 250 percent of the pre-adjustment penalty amount or range.

For purposes of the initial adjustment under the 2015 Act, the Board last set or adjusted the amount of civil penalties in 1986. The 1996 adjustment must be disregarded for these calculations because that adjustment was made pursuant to the Inflation Adjustment Act and subject to the 10 percent cap imposed by the Debt Collection Improvement Act of 1996. Between October 1986 and October 2015, the CPI–U has increased by 215.628 percent. The post-adjustment penalty amount or range is obtained by multiplying the pre-adjustment penalty amount or range by the percent change in the CPI–U over the relevant time period, and rounding to the nearest dollar. Therefore, the new, post-adjustment maximum penalty under the PFCRA is $5,000 × 2.15628 = $10,781.40, which rounds to $10,781. The new, post-adjustment minimum penalty under 31 U.S.C. 3729 is $5,000 × 2.15628 = $10,781.40, which rounds to $10,781. The new, post-adjustment maximum penalty under 31 U.S.C. 3729 is $10,000 × 2.15628 = $21,562.80, which rounds to $21,563. The new, post-adjustment penalties are less than 250 percent of the pre-adjustment penalties, so the limitation on the amount of the adjustment is not implicated. Therefore, the maximum penalty under the PFRCA for claims or statements made after August 1, 2016 will be $10,781, and the minimum and maximum penalties for false claims under 31 U.S.C. 3729 will be $10,781 and $21,563 respectively.

Subsequent Annual Adjustments

The 2015 Act also requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the initial adjustment described above. The 2015 Act requires that these subsequent annual adjustments shall be made ''notwithstanding section 553 of title 5, United States Code.'' As noted earlier, this provision in the 2015 Act eliminates the requirement for public notice or opportunity for public comment prior to the publication of the final adjustment.

For subsequent adjustments made in accordance with the 2015 Act, the amount of the adjustment is based on the percent increase between the CPI–U for the month of October preceding the date of the adjustment and the CPI–U for the October one year prior to the October immediately preceding the date of the adjustment. If there is no increase, there is no adjustment of civil penalties. Therefore, if the Board adjusts penalties in January 2017, the adjustment will be calculated based on the percent change between the CPI–U for October 2016 (the October immediately preceding the date of adjustment) and October 2015 (the October one year prior to October 2016). The Board will publish the amount of these annual inflation adjustments in the **Federal Register** no later than January 15 of each year, starting in 2017.

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

The Board, with the concurrence of the Office of Management and Budget, has determined that this is not a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Act

The Board certifies that this rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

This interim final rule imposes no reporting or recordkeeping requirements subject to OMB clearance.

List of Subjects in 20 CFR Part 356

Claims, Penalties.

For the reasons set out in the preamble, the Railroad Retirement Board revises title 20, chapter II, subchapter E, part 356 of the Code of Federal Regulations to read as follows:

PART 356—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

Sec.
356.1 Introduction.
356.2 Penalties under the Program Fraud Civil Remedies Act of 1986.
356.3 False claims.

Authority: 28 U.S.C. 2461; 31 U.S.C. 3729, 3809.

§ 356.1 Introduction.

(a) The Federal Civil Penalties Inflation Adjustment Act, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. 2461 note), requires that civil monetary penalties be adjusted on an annual basis by the percentage by which the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October preceding the adjustment exceeds the CPI–U for the month of October of the calendar year prior to the October preceding the adjustment, with final amounts rounded to the nearest dollar. That Act also requires a one-time catch up adjustment in the amount of the percentage by which the CPI–U for October 2015 exceeds the CPI–U for the month of October of the calendar year during which the amount of civil monetary penalty was established or adjusted under a provision of law other than the Federal Civil Penalties Inflation Adjustment Act.

(b) Other than adjustments under the Federal Civil Penalties Inflation Adjustment Act, the Board last established or adjusted civil monetary penalties in 1986. The CPI–U increased by 215.628 percent between October 1986 and October 2015.

(c) Imposition of the increased civil monetary penalties are limited to actions occurring after the effective date of the increases.

(d) The amount of the one-time catch up adjustment may not exceed 150 percent of the penalty amount or range as of November 2, 2015. The ten percent cap on increases imposed by the Debt Collection Improvements Act of 1996 was eliminated in the 2015 amendments to the Federal Civil Penalties Inflation Adjustment Act, and is no longer applicable.

§ 356.2 Penalties under the Program Fraud Civil Remedies Act of 1986.

(a) For claims or statements made on or before October 23, 1996, the maximum penalty which may be assessed under part 355 of this chapter is $5,000.

(b) For claims or statements made after October 23, 1996, but before August 1, 2016, the maximum penalty which may be assessed under part 355 of this chapter is $5,500.

(c) For claims or statements made on or after August 1, 2016, but before January 1, 2017, the maximum penalty which may be assessed under part 355 of this chapter is $10,781.

(d) For claims or statements made on or after January 1, 2017, the maximum penalty which may be assessed under part 355 of this chapter is the larger of:

(1) The amount for the previous calendar year; or

(2) An amount adjusted for inflation, calculated by multiplying the amount for the previous calendar year by the percentage by which the CPI–U for the month of October preceding the current calendar year exceeds the CPI–U for the month of October of the calendar year two years prior to the current calendar year, adding that amount to the amount for the previous calendar year, and rounding the total to the nearest dollar.

(e) Notice of the maximum penalty which may be assessed under part 355 of this chapter for calendar years after 2016 will be published by the Board in the **Federal Register** on an annual basis on or before January 15 of each calendar year.

§ 356.3 False claims.

(a) For claims or statements made on or before October 23, 1996, the minimum penalty which may be assessed under 31 U.S.C. 3729 is $5,000 and the maximum penalty is $10,000.

(b) For claims or statements made after October 23, 1996, but before August 1, 2016, the minimum penalty which may be assessed under 31 U.S.C. 3729 is $5,500 and the maximum penalty is $11,000.

(c) For claims or statements made on or after August 1, 2016, but before January 1, 2017, the minimum penalty which may be assessed under 31 U.S.C. 3729 is $10,781 and the maximum penalty is $21,563.

(d) For claims or statements made on or after January 1, 2017, the minimum and maximum penalty amounts which may be assessed under 31 U.S.C. 3729 is the larger of:

(1) The amount for the previous calendar year; or

(2) An amount adjusted for inflation, calculated by multiplying the amount for the previous calendar year by the percentage by which the CPI–U for the month of October preceding the current calendar year exceeds the CPI–U for the month of October of the calendar year two years prior to the current calendar year, adding that amount to the amount for the previous calendar year, and rounding the total to the nearest dollar.

(e) Notice of the minimum and maximum penalty which may be assessed under 31 U.S.C. 3729 for calendar years after 2016 will be published by the Board in the **Federal Register** on an annual basis on or before January 15 of each calendar year.

By Authority of the Board.

Martha P. Rico,

Secretary to the Board.

[FR Doc. 2016–09959 Filed 4–29–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0139]

Drawbridge Operation Regulation; Long Creek & Sloop Channel, Hempstead, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation; modification.

SUMMARY: The Coast Guard has modified a temporary deviation from the operating schedule that governs the Loop Parkway Bridge, mile 0.7, across Long Creek, and the Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel, both at Hempstead, New York. This modified deviation is necessary to facilitate the Dee Snider's Motorcycle Ride to Fight Hunger on Long Island.

DATES: This modified deviation is effective from 11 a.m. to 1 p.m. on October 2, 2016.

ADDRESSES: The docket for this modified deviation, [USCG–2016–0139] is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Ms. Judy K. Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 514–4330, email *judy.k.leung-yee@uscg.mil.*

SUPPLEMENTARY INFORMATION: On February 29, 2016, the Coast Guard published a temporary deviation entitled ''Drawbridge Operation Regulation; Long Creek & Sloop Channel, Hempstead, NY'' in the

Federal Register (81 FR 10086). The sponsor, Long Island Cares, Inc., has rescheduled the event from its original date of September 18, 2016 to October 2, 2016.

Long Island Cares, Inc. requested and the bridge owner for both bridges, the State of New York Department of Transportation, concurred with this modified temporary deviation from the normal operating schedule to facilitate a public event, the Dee Snider's Motorcycle Ride to Fight Hunger.

The Loop Parkway Bridge, mile 0.7, across Long Creek has a vertical clearance in the closed position of 21 feet at mean high water and 25 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.799(f).

The Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel has a vertical clearance in the closed position of 22 feet at mean high water and 25 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.799(h).

Long Creek and Sloop Channel are transited by commercial fishing and recreational vessel traffic.

Under this modified temporary deviation, the Loop Parkway and the Meadowbrook State Parkway Bridges may remain in the closed position between 11 a.m. and 1 p.m. on October 2, 2016.

Vessels able to pass under the bridge in the closed position may do so at anytime. The bridges will not be able to open for emergencies and there are no immediate alternate routes for vessels to pass.

The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 27, 2016.

C.J. Bisignano,

Supervisory Bridge Management Specialist, First Coast Guard District.

[FR Doc. 2016–10204 Filed 4–29–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AP65

Technical Corrections—VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs is amending its regulations by making nonsubstantive changes to ensure consistency within its regulations regarding a nomenclature change in the title of a Vocational Rehabilitation and Employment position.

DATES: *Effective Date:* This final rule is effective May 2, 2016.

FOR FURTHER INFORMATION CONTACT: C.J. Riley, Policy Analyst, Vocational Rehabilitation and Employment Service (28), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–9600. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: In January 2000, the name of VA's program, Vocational Rehabilitation and Counseling (VR&C), responsible for assisting veterans with service-connected disabilities to obtain and maintain suitable employment and achieve maximum independence in daily living was changed to Vocational Rehabilitation and Employment (VR&E). This change reflects the major goal of the program by focusing on employment. As outlined by VA's Office of Field Operations (OFO) in OFO Letter 20F–11–09, a National Journey-Level Counseling Psychologist (CP)/ Vocational Rehabilitation Counselor (VRC) Performance Plan was implemented on December 16, 2003. The performance plan described how the job duties and qualifications for a CP and VRC were the same. As a result, the position description for CP was amended to include the synonymous title of VRC. Since this change, VA has updated several regulations to include this synonymous title. To ensure consistency within the regulations, this final rule amends VA regulations to reflect this nomenclature change in the title for this VR&E position.

VA is also correcting two spelling mistakes. In 38 CFR 21.94(b), VA corrects the spelling of the word ''statement.'' The current text misspells ''statement'' as ''staement.'' In § 21.4232(a)(2)(i), VA corrects the spelling of ''Rehabilation'' to read ''Rehabilitation''. No substantive changes are intended by these amendments.

Administrative Procedure Act

This final rule concerns only agency organization, procedure, or practice and, therefore, is not subject to the notice and comment provisions of 5 U.S.C. 553(b). *See* 38 U.S.C. 553(b)(A). This final rule consists of only nonsubstantive changes that will make the regulations more accurate and less confusing to readers. For this reason, VA has also determined that there is good cause to waive the 30-day delay effective date requirement under 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order

12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the regulatory flexibility analysis requirements of section 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this final rule is 64.116, Vocational Rehabilitation for Disabled Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert D. Snyder, Chief of Staff, Department of Veterans Affairs, approved this document on April 21, 2016, for publication.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Dated: April 26, 2016.

William F. Russo,

Director, Office of Regulation Policy & Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 21 as follows:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

■ 1. The authority citation for part 21, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

§ 21.53 [Amended]

■ 2. Amend § 21.53 by:
■ a. In the first sentence of paragraph (f), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In the last sentence of paragraph (f), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.
■ c. In paragraph (g) introductory text, removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.57 [Amended]

■ 3. Amend § 21.57(d) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.60 [Amended]

■ 4. Amend § 21.60 by:
■ a. In paragraph (b)(1), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (e)(1), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.72 [Amended]

■ 5. Amend § 21.72 by:
■ a. In the first sentence of paragraph (c)(1), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In the second sentence of paragraph (c)(2), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.
■ c. In paragraph (d)(2), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.74 [Amended]

■ 6. Amend § 21.74 by:
■ a. In paragraph (c)(1), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraphs (c)(2) and (c)(3), removing all references to ''counseling psychologist'' and adding, in each place, ''CP or VRC''.

§ 21.76 [Amended]

■ 7. Amend the first sentence of § 21.76(b) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.78 [Amended]

■ 8. Amend the first sentence of § 21.78(d) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.92 [Amended]

■ 9. Amend § 21.92 by:
■ a. In paragraph (b), removing ''counseling psychologist,'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (c), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.
■ c. In paragraph (d), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.94 [Amended]

■ 10. Amend § 21.94 by:
■ a. In paragraph (a), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP), Vocational Rehabilitation Counselor (VRC),''.
■ b. In the first sentence of paragraph (b) introductory text, removing ''staement'' and adding, in its place, ''statement'', and removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.98 [Amended]

■ 11. Amend § 21.98(b) introductory text by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP), the Vocational Rehabilitation Counselor (VRC),''.

§ 21.100 [Amended]

■ 12. Amend § 21.100 by:
■ a. In paragraph (d)(1), removing ''counseling psychologists'' and adding, in its place, ''Counseling Psychologists (CP) or Vocational Rehabilitation Counselors (VRC)''.
■ b. In paragraph (d)(3)(ii), removing ''counseling psychologists'' and adding, in its place, ''a CP or VRC''.
■ c. In paragraph (d)(4), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.180 [Amended]

■ 13. Amend the second sentence of § 21.180(c) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP), Vocational Rehabilitation Counselor (VRC),''.

§ 21.274 [Amended]

■ 14. Amend § 21.274(e)(1) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP), Vocational Rehabilitation Counselor (VRC),''.

§ 21.299 [Amended]

■ 15. Amend the second sentence of § 21.299(a) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.364 [Amended]

■ 16. Amend the second sentence of § 21.364(a) introductory text by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.380 [Amended]

■ 17. Amend § 21.380(a)(1) by removing ''Counseling psychologists'' and adding, in its place, ''Counseling Psychologists (CP) or Vocational Rehabilitation Counselors (VRC)''.

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

■ 18. The authority citation for part 21, subpart C, continues to read as follows:

Authority: 38 U.S.C. 501(a), 512, 3500–3566, and as noted in specific sections.

§ 21.3102 [Amended]

■ 19. Amend § 21.3102(a) by removing ''VA counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.3301 [Amended]

■ 20. Amend § 21.3301(e) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

Subpart D—Administration of Educational Assistance Programs

■ 21. The authority citation for part 21, subpart D, continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

§ 21.4232 [Amended]

■ 22. Amend § 21.4232 by:
■ a. In paragraph (a)(2) introductory text, removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (a)(2)(i), removing ''Rehabilation'' and adding, in its place, ''Rehabilitation''.
■ c. In paragraphs (a)(3) and (d), removing all references to ''counseling psychologist'' and adding, in each place, ''CP or VRC''.

Subpart I—Temporary Program of Vocational Training for Certain New Pension Recipients

■ 23. The authority citation for part 21, subpart I, continues to read as follows:

Authority: Pub. L. 98–543, 38 U.S.C. 501 and chapter 15, sections specifically cited, unless otherwise noted.

■ 24. Amend § 21.6005 by adding a paragraph (j)(10) to read as follows:

§ 21.6005 Definitions.

* * * * *

(j) * * *

(10) Vocational Rehabilitation Counselor.

§ 21.6052 [Amended]

■ 25. Amend § 21.6052 by:
■ a. In paragraph (b)(1), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (c), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.6056 [Amended]

■ 26. Amend § 21.6056 by:
■ a. In the last sentence of paragraph (a), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In the first sentence in paragraph (b), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.
■ c. In the first sentence in paragraph (c), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.6059 [Amended]

■ 27. Amend § 21.6059 by:
■ a. In paragraph (b)(1), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (b)(2), removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.6070 [Amended]

■ 28. Amend § 21.6070 by:
■ a. In the first sentence in paragraph (b), removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.
■ b. In paragraph (e) introductory text, removing ''counseling psychologist'' and adding, in its place, ''CP or VRC''.

§ 21.6072 [Amended]

■ 29. Amend § 21.6072(d)(2) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.6080 [Amended]

■ 30. Amend § 21.6080(d) introductory text by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

Subpart J—Temporary Program of Vocational Training and Rehabilitation

■ 31. The authority citation for part 21, subpart J, continues to read as follows:

Authority: Pub. L. 98–543, sec. 111; 38 U.S.C. 1163; Pub. L. 100–687, sec. 1301, unless otherwise noted.

§ 21.6509 [Amended]

■ 32. Amend § 21.6509(d) by removing ''counseling psychologist'' and adding, in its place, ''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

§ 21.6515 [Amended]

■ 33. Amend the first sentence of § 21.6515(a) by removing ''counseling psychologist'' and adding, in its place,

''Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC)''.

[FR Doc. 2016–10112 Filed 4–29–16; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0127; FRL–9945–44–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; State Board Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Maryland State Implementation Plan (SIP). The SIP revision removes the current SIP approved state board requirements and replaces them with an updated version of the requirements. The new provisions continue to address state board requirements for all the National Ambient Air Quality Standards (NAAQS). The revision is being done because the Maryland legislature revised Maryland's statutory requirements related to state boards and the State wants the most recent version in its SIP. EPA is approving these revisions to state board requirements in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on July 1, 2016 without further notice, unless EPA receives adverse written comment by June 1, 2016. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0127 at *http://www.regulations.gov,* or via email to *fernandez.cristina@epa.gov.* For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ruth Knapp, (215) 814–2191, or by email at *knapp.ruth@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 128 of the CAA requires SIPs to comply with requirements for state boards. Section 128(a) requires SIPs to contain provisions that: (1) Any board or body which approves permits or enforcement orders under the CAA shall have at least a majority of its members represent the public interest and not derive any significant portion of their income from persons subject to permits or enforcement orders under the CAA; and (2) any potential conflict of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed. The requirements of section 128(a)(1) are not applicable to Maryland because it does not have any board or body which approves air quality permits or enforcement orders. The requirements of section 128(a)(2), however, are applicable because the heads of the Maryland Department of the Environment (MDE) and the Maryland Public Service Commission (PSC) or their designees approve permits or enforcement orders.

II. Summary of SIP Revision

On February 17, 2016, the State of Maryland submitted a formal revision (#16–03) to its SIP. The SIP revision submittal requests EPA to remove the currently approved state board statutory provisions and replace them in the Maryland SIP with the updated statutory provisions so that the SIP includes the most recent state statutes that are applicable to the section 128 CAA requirements pertaining to state boards.

On December 6, 2013 (78 FR 73442), EPA approved a Maryland SIP revision which addressed the requirements of section 128 of the CAA. The 2013 revision incorporated portions of the Annotated Code of Maryland Title 15 (Public Ethics) into the Maryland SIP. Subsequently, Maryland made revisions to its Annotated Code which included relocating the ethics provisions from Title 15 to Title 5, as well as minor wording changes. Maryland is requesting that EPA remove the previously approved portions of Title 15 from its SIP and replace those provisions with the most recent portions of the Annotated Code of Maryland Title 5 (Maryland Public Ethics Laws) which address CAA section 128 requirements. The Secretary of MDE and the state employees subordinate to that position, as well as state employees at the PSC are subject to the requirements of Title 5.

EPA is removing the previously approved portions of Title 15, including these portions of: Subtitle 1, sections 15–102 and 15–103; and subtitle 6, sections 15–601, 15–602, 15–607, and 15–608. In order to continue to meet the requirements of CAA section 128, EPA is incorporating as requested by Maryland the relevant ethics provisions of Title 5 (Maryland Public Ethics Laws) including portions of: Subtitle 1, sections 5–101, 5–103; Subtitle 2, section 5–208; Subtitle 5, section 5–501; and Subtitle 6, sections 5–601, 5–602, 5–606, 5–607, and 5–608. The State effective date for all these provisions in Title 5 of the Maryland Annotated Code subsections is October 1, 2014.

III. EPA's Analysis of Maryland's SIP Revision

Section 128(a)(2) requires that each state SIP demonstrate that the head of all boards, bodies or heads of executive agencies which approve CAA permits or enforcement orders disclose any potential conflicts of interest. The Secretary of MDE or his/her designee approves all CAA permits or enforcement orders in Maryland with the exception of pre-construction permits for electric generating stations that receive a Certificate of Public Convenience and Necessity (CPCN) from the PSC. MDE is an executive agency that acts through its Secretary or a delegated subordinate employee. The PSC also acts through its Commissioners or delegated subordinates to approve permits. In the February 17, 2016 SIP revision submittal, Maryland requested removal of outdated provisions of Title 15 of the Annotated Code which address disclosure of conflicts of interest as required by section 128 of the CAA and submitted recently revised provisions of Title 5 of the Annotated Code of Maryland for inclusion into the SIP as required to continue to address

requirements in section 128 of the CAA. Title 5 of the Annotated Code of Maryland applies to state employees including the head of the Maryland executive agencies or their delegatees who approve CAA permits or enforcement orders and requires the disclosure of relevant financial information including the disclosure of any potential conflicts of interest. The February 17, 2016 SIP revision submittal reflects existing Maryland law and demonstrates that Maryland complies with the requirements of section 128 of the CAA through the Maryland Title 5 requirements for adequate disclosure of potential conflicts of interest. The revisions made only minor wording changes to the Maryland disclosure of conflict of interest provisions and moved these disclosure provisions from Title 15 to Title 5 of the Annotated Code.

IV. Final Action

EPA is approving Maryland's SIP revision that removes outdated state board provisions addressing disclosure of conflicts of interest by persons or entities within Maryland who approve permits and enforcement orders with recently revised and currently effective similar statutory provisions also addressing state board requirements for section 128 of the CAA including disclosure of conflicts of interest. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on July 1, 2016 without further notice unless EPA receives adverse comment by June 1, 2016. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Incorporation by Reference

In this rulemaking action, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the relevant portions of Title 5 of the Annotated Code of Maryland as described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or may be viewed at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 1, 2016. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the

comment in the proposed rulemaking action. This action updating the Maryland SIP provisions to address state board requirements in section 128 of the CAA for all the NAAQS 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: April 8, 2016,

Shawn M. Garvin,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by:

■ a. Removing the entries under heading ''State Government Article of the Annotated Code of Maryland'' for Sections 15–102, 15–103, 15–601, 15–602, 15–607, 15–608; and

■ b. Adding entries under heading ''State Government Article Annotated Code of Maryland'' for Sections 5–101, 5–103, 5–208, 5–501, 5–601, 5–602, 5–606, 5–607, and 5–608.

The additions read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS, TECHNICAL MEMORANDA, AND STATUTES IN THE MARYLAND SIP

Annotated Code of Maryland Citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
*	*	*	*	*
State Government Article of the Annotated Code of Maryland				
Section 5–101 (a),(e),(f), (g)(1)and (2), (h), (i), (j), (m), (n), (p), (s),(t),(bb), (ff),(gg), (ll).	Definitions	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–103(a) through (c)	Designation of Individuals as Public Officials.	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–208(a)	Determination of public official in executive agency.	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–501(a) and (c)	Restrictions on participation	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–601(a)	Individuals required to file statement.	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–602(a)	Financial Disclosure Statement—Filing Requirements.	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–606(a)	Public Records	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–607(a) through (j)	Content of statements	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.
Section 5–608(a) through (c)	Interests attributable to individual filing statement.	10/01/14	05/02/16 [Insert **Federal Register** citation].	Added; addresses CAA section 128.

* * * * *

[FR Doc. 2016–09438 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0030; FRL–9942–47]

Carfentrazone-ethyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of Carfentrazone-ethyl in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 2, 2016. Objections and requests for hearings must be received on or before July 1, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0030, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone

number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2015–0030 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 1, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2015–0030, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html*. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets*.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of May 20, 2015 (80 FR 28925) (FRL–9927–39), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 4E8337) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the herbicide carfentrazone-ethyl, (ethyl-alpha-2-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-,2,4-triazol-1-yl]-4-fluorobenzenepropanoate) and the metabolite carfentrazone-ethyl chloropropionic acid (a, 2-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2,4-triazol-1-yl]-4-fluorobenzenepropanoic acid), in or on the raw agricultural commodity artichoke at 0.10 parts per million (ppm); asparagus at 0.25 ppm; peppermint, tops at 0.25 ppm; spearmint, tops at 0.25 ppm; teff, grain at 0.25 ppm; teff, forage at 1.00 ppm; teff, hay at 0.30 ppm; teff, straw at 0.10 ppm; vegetable, bulb, group 3–07 at 0.10 ppm; vegetable, fruiting, group 8–10 at 0.10 ppm; fruit, citrus, group 10–10 at 0.10 ppm; fruit, pome, group 11–10 at 0.10 ppm; fruit, stone, group 12–12 at 0.10 ppm; caneberry subgroup 13–07A at 0.10 ppm; bushberry subgroup 13–07B at 0.10 ppm; fruit, small vine climbing, subgroup 13–07F, except fuzzy kiwi fruit at 0.10 ppm; berry, low growing, subgroup 13–07G at 0.10 ppm; nut, tree, group 14–12 at 0.10 ppm; oilseed group 20 at 0.20 ppm; grain, cereal forage group 16 at 1.0 ppm; grain, cereal, hay, group 16 at 0.30 ppm; grain cereal, stover, group 16 at 0.80 ppm; and grain, cereal, straw, group 16 at 3.0 ppm.

The petitioner also proposed to amend the tolerance for banana from 0.20 ppm to 0.10 ppm and to remove the following established tolerances: Vegetable, bulb group 3 at 0.10 ppm; vegetable, fruiting, group 8 at 0.10 ppm; fruit, citrus, group 10 at 0.10 ppm; fruit, pome, group 11 at 0.10 ppm; fruit, stone, group 12 at 0.10 ppm; berry group 13 at 0.10 ppm; borage at 0.10 ppm; grape at 0.10 ppm; caneberry subgroup 13A at 0.10 ppm; nut, tree group 14 at 0.10 ppm; pistachio at 0.10 ppm; pummelo at 0.10 ppm; kiwi fruit at 0.10 ppm; canola at 0.10 ppm; cotton, undelinted seed at 0.20 ppm; crambe, seed at 0.10 ppm; flax, seed at 0.10 ppm; rapeseed, seed at 0.10 ppm; okra at 0.10 ppm; safflower seed at 0.10 ppm; salal at 0.10 ppm; sunflower seed at 0.10 ppm; strawberry at 0.10 ppm; juneberry at 0.10 ppm; lingonberry at 0.10 ppm; mustard, seed at 0.10 ppm; barley bran at 0.80 ppm; barley, flour at 0.80 ppm; corn, field, forage at 0.20 ppm; corn, sweet, forage at 0.20 ppm, corn, sweet, kernel plus cob with husk removed at 0.10 ppm; grain, cereal, forage, fodder and straw group 16, except corn and sorghum; forage at 1.0 ppm; grain, cereal, forage, fodder and straw, group 16, hay at 0.30 ppm; grain, cereal, forage, fodder and straw, group 16, stover at 0.30 ppm; grain, cereal, forage, fodder and straw, group 16, except rice; straw at 0.10 ppm; grain, cereal, group 15 at 0.10 ppm; grain, cereal, stover at 0.80 ppm; grain, cereal, straw at 3.0 ppm; millet, flour at 0.80 ppm; oat, flour at 0.80 ppm; rice, straw at 1.0 ppm; rye, bran at 0.80 ppm; rye, flour at 0.80 ppm; sorghum, forage at 0.20 ppm; sorghum, sweet at 0.10 ppm; wheat, bran at 0.80 ppm; wheat, flour at 0.80 ppm; wheat, germ at 0.80 ppm; wheat, middlings at 0.80 ppm; and wheat, shorts at 0.80 ppm.

In the **Federal Register** of October 21, 2015 (80 FR 63731) (FRL–9935–29), EPA amended the initial notice of filing for pesticide petition (PP 4E8337) to include a proposal to also establish a tolerance in or on the raw agricultural commodity quinoa, grain at 0.10 ppm and psyllium, seed at 0.10 ppm. That document referenced a summary of the petition prepared by FMC Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* EPA received two comments on the notice of filing that supported the establishment of these tolerances.

Based upon review of the data supporting the petition, EPA has changed some of the levels proposed.

The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for carfentrazone-ethyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with carfentrazone-ethyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

In mammals, protoporphyrinogen oxidase, (PPO) is an important enzyme in heme biosynthesis and its inhibition can lead to toxic effects where heme is utilized (*e.g.,* red blood cells). The mammalian toxicity database for carfentrazone-ethyl indicates that effects observed following repeated oral exposures are consistent with those expected from PPO inhibition, toxicity of the hematopoietic system and liver.

Subchronic oral toxicity studies in rats, mice, and dogs demonstrated that the primary effects were on hematopoietic system (decreased mean corpuscular hemoglobin and mean corpuscular volume). There was also increased urinary porphyrin excretion, increased liver weights, and alterations in liver histopathology consisting of: Hepatic pigment deposition, hepatocytomegaly, single cell necrosis, and cell mitosis. Similarly, chronic toxicity studies in rats and dogs demonstrated increased urinary porphyrin excretion. Chronic studies in rats and mice found liver histopathology (pigment deposits) and fluorescence microscopy of liver sections revealed red fluorescent granules consistent with porphyrin deposits. There were no indicators of targeted effects on the immune system. The results of the acute neurotoxicity study indicated clinical signs (*i.e.,* salivation) and mild decreases in motor activity but only at the limit dose and only on the treatment day. However, there were no other signs of neurotoxicity in the rest of the database.

There was no evidence of increased susceptibility in prenatal developmental toxicity studies (rats and rabbits) or the multigenerational reproductive toxicity study in rats. Fetal effects in the rat developmental study (increase in litter incidence of wavy and thickened ribs) and offspring effects in the rat reproduction toxicity study (decreased pup body weights) were seen at or above doses eliciting blood and liver effects in maternal/parental animals, effects that are consistent with those observed in the hazard database. No developmental effects were seen in the rabbits.

Carfentrazone-ethyl has been classified as ''not likely to be carcinogenic'' based on the lack of evidence for carcinogenicity in mice and rats; therefore, a quantitative cancer risk assessment was not conducted.

Specific information on the studies received and the nature of the adverse effects caused by carfentrazone-ethyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Carfentrazone-ethyl. Human Health Risk Assessment in Support of Application to Globe Artichoke, Asparagus, Mint, Psyllium, Quinoa, and Teff and Updates to Several Crop Group (CG) or Subgroup (CSG) Designations'' on pages 31–35 in docket ID number EPA–HQ–OPP–2015–0030.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides.*

A summary of the toxicological endpoints for carfentrazone-ethyl used for human risk assessment is discussed in Unit III.B., of the final rule published in the **Federal Register** of May 4, 2012 (77 FR 26456) (FRL–9346–5).

All of the toxicological endpoints remain the same except the acute dietary endpoint has been removed. The Agency reevaluated the points of departure and available data. Previously, the acute neurotoxicity study in rats was used to evaluate acute dietary exposures; however, effects (salivation and decreased motor activity) were only seen at the LOAEL of 1000 mg/kg/day which is not considered relevant for human health risk assessment. There were no other effects seen in the database attributable to a single dose. Therefore, the previous acute dietary endpoint is no longer considered valid.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to carfentrazone-ethyl, EPA considered exposure under the petitioned-for tolerances as well as all existing carfentrazone-ethyl tolerances in 40 CFR 180.515. EPA assessed dietary exposures from carfentrazone-ethyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No such effects were identified in the toxicological studies for carfentrazone-ethyl; therefore, a quantitative acute dietary exposure assessment was not conducted.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the Dietary Exposure Evaluation Model with the Food Commodity Intake Database (DEEM–FCID). This software incorporates 2003–2008 food consumption data from the U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA assumed tolerance-level residues or, if necessary, tolerance-level residues adjusted to account for the residues of concern for risk assessment and 100 percent crop treated (PCT). Since adequate processing studies have been submitted which indicate that tolerances in/on apple juice, citrus juice, grape juice, grape raisin, dried potato, dried prune, prune juice, tomato paste, and tomato puree are unnecessary, the DEEM™ (ver 7.81) default processing factors for these commodities were reduced to 1. The DEEM™ (ver 7.81) default processing factors were retained for the remaining relevant commodities.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that carfentrazone-ethyl does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk was not conducted.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue or PCT information in the dietary assessment for carfentrazone-ethyl. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for carfentrazone-ethyl in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of carfentrazone-ethyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Tier 1 Rice Model and Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of carfentrazone-ethyl for chronic exposures for non-cancer assessments are estimated to be 86 ppb for surface water and 43.9 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 86 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Carfentrazone-ethyl is currently registered for the following uses that could result in residential exposures: Golf courses, residential lawns, and aquatic areas. EPA assessed residential exposure using the following assumptions: That homeowner handlers wear shorts, short-sleeved shirts, socks, and shoes, and that they complete all tasks associated with the use of a pesticide product including mixing/loading, if needed, as well as the application. Residential handler exposure scenarios for residential lawn applications are considered to be short-term only, due to the infrequent use patterns associated with homeowner products. Therefore, short-term inhalation risk was assessed for residential handlers; however, since no hazard was identified via the dermal route of exposure, a dermal risk assessment was not conducted for residential handlers. Aquatic applications by homeowners are not permitted by the label directions for use, therefore no residential handler exposure from the aquatic application scenario is anticipated.

EPA uses the term ''post-application'' to describe exposure to individuals that occur as a result of being in an environment that has been previously treated with a pesticide. Carfentrazone-ethyl can be used in many areas that can be frequented by the general population including home lawns, golf courses and aquatic recreational areas such as ponds and lakes that have been treated for removal of aquatic vegetation. As a result, individuals can be exposed by entering these areas if they have been previously treated. Therefore, short-term post-application exposure and risk are also assessed for carfentrazone-ethyl.

The Agency assessed residential handler (adult) exposure for the turf application scenario and adult post-application exposure for the aquatic exposure scenario. The most conservative exposure scenario for adults, the aquatic exposure scenario-swimmer exposure assessment (combined incidental oral and inhalation), was used to estimate post-application risk. Dermal risks assessments were not conducted because no hazard was identified via the dermal route of exposure. For children, the aquatic exposure scenario-swimmer exposure assessment was used. Since the incidental oral and inhalation PODs are based on the same study, the exposures from these routes were combined. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found carfentrazone-ethyl to share a common mechanism of toxicity with any other substances, and carfentrazone-ethyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that carfentrazone-ethyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the

FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no evidence of increased pre- and/or postnatal susceptibility following carfentrazone-ethyl exposure.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for carfentrazone-ethyl is complete. Since the last risk assessment, an immunotoxicity study has been submitted and the results of the study incorporated into the current assessment.

ii. Although effects were seen in the acute neurotoxicity study (clinical signs and mild decreases in motor activity), concern is low since: (a) The effects are minimal; (b) the effects were seen at the highest doses tested (≥1000 mg/kg); and (c) there is no evidence of neurotoxicity in the rest of the carfentrazone-ethyl database, including the subchronic neurotoxicity study.

iii. There is no evidence that carfentrazone-ethyl results in increased susceptibility in rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to carfentrazone-ethyl in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by carfentrazone-ethyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, carfentrazone-ethyl is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to carfentrazone-ethyl from food and water will utilize 78% of the cPAD for children 1–2 years old the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of carfentrazone-ethyl is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Carfentrazone-ethyl is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to carfentrazone-ethyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 7,500 for adults (residential handlers) and 2,100 for children (1–2 years old) (hand-to-mouth exposures). Because EPA's level of concern for carfentrazone-ethyl is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). An intermediate-term adverse effect was identified; however carfentrazone-ethyl is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risks for carfentrazone-ethyl.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, carfentrazone-ethyl is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to carfentrazone-ethyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. This analytical enforcement method involves separate analyses for parent and the metabolite. The parent is analyzed by evaporation and reconstitution of the sample prior to analysis by liquid chromatography/mass spectrometry/gas chromatography/electron capture detection (LC/MS/MS GC/ECD). The metabolite is refluxed in the presence of acid and cleaned up with solid phase extraction prior to analysis by LC/MS/MS.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for carfentrazone-ethyl for these crops.

C. Revisions to Petitioned-For Tolerances

The Agency is revising the petitioned-for tolerance requests for asparagus, peppermint, and spearmint from the proposed 0.25 ppm to 0.10 ppm. The residue field trials for these commodities resulted in residues that are less than 0.05 ppm, the limit of quantitation (LOQ). Using the Organization for Economic Co-operation and Development (OECD) tolerance-calculation procedures, the Agency modified the requested tolerance levels from 0.25 ppm to 0.10 ppm. In an effort to not create a potential trade irritant, the Agency also determined that the requested tolerance amendment in or on oilseed subgroup 20 at 0.20 ppm should be established on the separate subgroups for rapeseed subgroup 20A and sunflower subgroup 20B at 0.10 ppm to align with the MRLs for rapeseed and sunflower at 0.10 ppm in Canada and establish a cottonseed subgroup 20C at 0.20 ppm. Coconut will be removed and superseded by nut, tree, group 14–12. EPA also determined that the tolerance for teff straw should be 3.0 ppm based on available residue data.

Further, on November 20, 2015, the **Federal Register** published a final rule (80 FR 72599) that removed the entries in paragraph (a) in 180.515, for caneberry subgroup 13A; cotton, hulls; cotton, meal; cotton, refined oil and rice, straw, effective on May 18, 2016. Therefore, these commodities will not be removed under this action.

V. Conclusion

Therefore, tolerances are established for residues of carfentrazone-ethyl, (ethyl-alpha-2-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2,4-triazol-1-yl]-4-fluorobenzenepropanoate) and the metabolite carfentrazone-ethyl chloropropionic acid (a, 2-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2 ,4-triazol-1-yl]-4-fluorobenzenepropanoic acid), in or on the raw agricultural commodity artichoke, globe 0.10 ppm; asparagus at 0.10 ppm; banana at 0.10 ppm; berry, low growing, subgroup 13–07G at 0.10 ppm; bushberry, subgroup 13–07B at 0.10 ppm; caneberry subgroup 13–07A at 0.10 ppm; cottonseed subgroup 20C at 0.20 ppm; fruit, citrus, group 10–10 at 0.10 ppm; fruit, pome, group 11–10 at 0.10 ppm; fruit, small, vine climbing, subgroup 13–07F, except Fuzzy kiwifruit at 0.10 ppm; fruit, stone, group 12–12 at 0.10 ppm; grain, cereal, group 16, forage at 1.0 ppm; grain, cereal, group 16, hay at 0.30 ppm; grain, cereal, group 16, stover at 0.80 ppm; grain, cereal, group 16, straw at 3.0 ppm; nut, tree, group 14–12 at 0.10 ppm; peppermint, tops at 0.10 ppm; psyllium, seed at 0.10 ppm; quinoa, grain at 0.10 ppm; rapeseed subgroup 20A at 0.10 ppm; spearmint, tops at 0.10 ppm; sunflower subgroup 20B at 0.10 ppm; teff, forage at 1.0 ppm; teff, grain at 0.25 ppm; teff, hay at 0.30 ppm; teff, straw at 3.0 ppm; vegetable, bulb, group 3–07 at 0.10 ppm; and vegetable, fruiting, group 8–10 at 0.10 ppm.

Additionally, tolerances are removed, for barley, bran at .80 ppm; barley, flour at 0.80 ppm; berry group 13 at 0.10 ppm; borage at 0.10 ppm; canola at 0.10 ppm; coconut at 0.10 ppm; corn, field, forage at 0.20 ppm; corn, sweet, forage at 0.20 ppm; corn, sweet, kernel plus cob with husk removed at 0.10 ppm; cotton, undelinted seed at 0.20 ppm; crambe, seed at 0.10 ppm; flax, seed at 0.10 ppm; fruit, citrus, group 10 at 0.10 ppm; fruit, pome, group 11 at 0.10 ppm; fruit, stone, group 12 at 0.10 ppm; grain, cereal, forage, fodder and straw group 16, except corn and sorghum, forage at 1.0 ppm; grain, cereal, forage, fodder and straw group 16, hay at 0.30 ppm; grain, cereal, forage, fodder and straw group 16, stover at 0.30 ppm; grain, cereal, forage, fodder and straw, group 16 except rice, straw at 0.10 ppm; grain, cereal, group 15 at 0.10 ppm; grain, cereal, stover at 0.80 ppm; grain, cereal, straw at 3.0 ppm; grape at 0.10 ppm; juneberry at 0.10 ppm; lingonberry at 0.10 ppm; millet, flour at .80 ppm; mustard, seed at 0.10 ppm; nut, tree, group 14 at 0.10 ppm; oat, flour at 0.80 ppm; okra at 0.10; pistachio at 0.10 ppm; pummelo at 0.10 ppm; rapeseed, seed at 0.10 ppm; rice, hulls at 3.5 ppm; rye, bran at 0.80 ppm; rye, flour at 0.80 ppm; safflower, seed at 0.10 ppm; salal at 0.10 ppm; sorghum, forage at 0.20 ppm; sorghum, sweet at 0.10 ppm; strawberry at 0.10 ppm; sunflower, seed at 0.10 ppm; vegetable, bulb, group 3 at 0.10 ppm; vegetable, fruiting, group 8 at 0.10 ppm; wheat, bran at 0.80 ppm; wheat, flour at 0.80 ppm; wheat, germ at 0.80 ppm; wheat middlings at 0.80 ppm; and wheat, shorts at 0.80 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and

other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 25, 2016.

Susan Lewis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.515, the table in paragraph (a) is revised to read as follows:

§ 180.515 Carfentrazone-ethyl; tolerance for residues.

(a) * * *

Commodity	Parts per million
Acerola	0.10
Almond, hulls	0.20
Animal feed, nongrass, crop group 18, forage	2.0
Animal feed, nongrass, crop group 18, hay	5.0
Animal feed, nongrass, crop group 18, seed	15.0
Artichoke, globe	0.10
Asparagus	0.10
Atemoya	0.10
Avocado	0.10
Banana	0.10
Berry, low growing, subgroup 13–07G	0.10
Birida	0.10
Bushberry subgroup 13–07B	0.10
Cacao bean, bean	0.10
Cactus	0.10
Caneberry subgroup 13A [1]	0.1
Caneberry subgroup 13–07A	0.10
Canistel	0.10
Cattle, fat	0.10
Cattle, meat	0.10
Cattle, meat byproducts	0.10
Cherimoya	0.10
Coffee, bean, green	0.10
Cotton, gin byproducts	10
Cotton, hulls [1]	0.60
Cotton, meal [1]	0.35
Cotton, refined oil [1]	1.0
Cottonseed subgroup 20C	0.20
Custard apple	0.10
Date, dried fruit	0.10
Feijoa	0.10
Fig	0.10
Fish	0.30
Fruit, citrus, group 10–10	0.10
Fruit, pome, group 11–10	0.10
Fruit, small vine climbing, subgroup 13–07F, except Fuzzy kiwifruit	0.10
Fruit, stone, group 12–12	0.10
Goat, fat	0.10
Goat, meat	0.10
Goat, meat byproducts	0.10
Grain, aspirated grain fractions	1.8
Grain, cereal, group 15 (except rice grain and sorghum grain)	0.10
Grain, cereal, group 16, forage	1.0
Grain, cereal, group 16, hay	0.30
Grain, cereal, group 16, stover	0.80
Grain, cereal, group 16, straw	3.0
Grass, forage	5.0
Grass, hay	8.0
Guava	0.10
Herbs and spices group 19	2.0
Hog, fat	0.10
Hog, meat	0.10
Hog, meat byproducts	0.10
Hop, dried cones	0.10
Horse, fat	0.10
Horse, meat	0.10
Horse, meat byproducts	0.10
Horseradish	0.10
Ilama	0.10
Jaboticaba	0.10
Kava, roots	0.10
Kiwifruit	0.10
Longan	0.10
Lychee	0.10
Mango	0.10
Milk	0.05
Noni	0.10
Nut, tree, group 14–12	0.10
Olive	0.10
Palm heart	0.10
Palm heart, leaves	0.10
Papaya	0.10
Passionfruit	0.10
Pawpaw	0.10
Peanut	0.10
Peanut, hay	0.10
Peppermint, tops	0.10
Persimmon	0.10
Pomegranate	0.10
Poultry, meat byproducts	0.10
Psyllium, seed	0.10
Pulasan	0.10
Quinoa, grain	0.10
Rambutan	0.10
Rapeseed, forage	0.10
Rapeseed subgroup 20A	0.10
Rice, grain	1.3
Rice, straw [1]	1.0
Sapodilla	0.10
Sapote, black	0.10
Sapote, mamey	0.10
Sheep, fat	0.10
Sheep, meat	0.10
Sheep, meat byproducts	0.10
Shellfish	0.30
Sorghum, grain	0.25
Soursop	0.10
Soybean, seed	0.10
Spanish lime	0.10
Spearmint, tops	0.10
Star apple	0.10
Starfruit	0.10
Stevia	0.10
Strawberrypear	0.10
Sugar apple	0.10
Sugarcane	0.15
Sunflower, subgroup 20B	0.10
Tea, dried	0.10
Teff, forage	1.0
Teff, grain	0.25
Teff, hay	0.30
Teff, straw	3.0
Ti, leaves	0.10
Ti, roots	0.10
Vanilla	0.10
Vegetable, brassica, leafy, group 5	0.10
Vegetable, bulb, group 3–07	0.10
Vegetable, cucurbit, group 9	0.10
Vegetable, foliage of legume, except soybean, subgroup 7A	0.10
Vegetable, fruiting, group 8–10	0.10
Vegetable, leafy, except brassica, group 4	0.10
Vegetable, leaves of root and tuber, group 2	0.10
Vegetable, legume, group 6	0.10
Vegetable, root and tuber, group 1	0.10
Wasaba, roots	0.10
Wax jambu	0.10

[1] Effective Date to be removed: May 18, 2016.

* * * * *

[FR Doc. 2016–10235 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0524; FRL–9944–10]

Propanamide, 2-hydroxy-N, N-dimethyl- ; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of propanamide, 2-hydroxy-*N, N*-dimethyl- (CAS Reg. No. 35123–06–9) when used as an inert ingredient (solvent/co-solvent) in pesticides applied to growing crops and raw agricultural commodities after harvest under 40 CFR 180.910 or in pesticides applied to animals under 40 CFR 180.930 limited to maximum concentration of 20% by weight in the pesticide formulation. Spring Trading Company, LLC on behalf of BASF Corporation submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the

requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of propanamide, 2-hydroxy-*N, N*-dimethyl-.

DATES: This regulation is effective May 2, 2016. Objections and requests for hearings must be received on or before July 1, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0524, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl*.

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2015–0524 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 1, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2015–0524, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html*.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets*.

II. Petition for Exemption

In the **Federal Register** of September 9, 2015 (80 FR 54257) (FRL–9933–26), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–10782) by Spring Trading Company, LLC (10805 W. Timberwagon Circle Spring, TX 77380) on behalf of BASF Corporation (100 Campus Drive, Florham Park, NJ 07932). The petition requested that 40 CFR 180.910 and 40 CFR 180.930 be amended by establishing exemptions from the requirement of a tolerance for residues of propanamide, 2-hydroxy-*N, N*-dimethyl- (CAS Reg. No. 35123–06–9) when used as an inert ingredient (solvent/co-solvent) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest or in pesticides applied to animals, respectively. That document referenced a summary of the petition prepared by Spring Trading Company, LLC on behalf of BASF Corporation, the petitioner, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has limited the maximum concentration of propanamide, 2-hydroxy-*N, N*-dimethyl to 20% by weight in pesticide formulations. The reasons for this change are explained in Unit V.B. below.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will

result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for propanamide, 2-hydroxy-*N, N*-dimethyl- including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with propanamide, 2-hydroxy-*N, N*-dimethyl- follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by propanamide, 2-hydroxy-*N, N*-dimethyl- as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

Propanamide, 2-hydroxy-*N, N*-dimethyl- is of low acute oral, dermal and inhalation toxicity in rats; all lethal dose $(LD)_{50s}$ are greater than 1,000 mg/kg. Dermal irritation is not observed in rabbits. It is mildly irritating to the eyes of rabbits. It is not a dermal sensitizer in mice in the lymph node assay.

The toxicity studies summarized below were all conducted with propanamide, 2-hydroxy-*N, N*-dimethyl- except the chronic toxicity study. That study was conducted with *N, N*-dimethylacetamide, a structurally similar chemical. The only difference between the two chemicals is that *N, N*-dimethylacetamide is missing a hydroxyl group on a carbon atom. Both compounds are expected to undergo similar metabolism (in this case, N-oxidation) by cytochrome P450 enzymes and have similar toxicological profiles; therefore, the Agency has determined the data to be suitable for evaluating propanamide.

In rats, 90 days of oral exposure to propanamide, 2-hydroxy-*N, N*-dimethyl- results in increased cholesterol and triglyceride levels, increased liver weights and centrilobular hypertrophy at 1,000 milligrams/kilogram/day (mg/kg/day), the limit dose. The NOAEL is 500 mg/kg/day. Reproduction parameters, estrus cyclicity and sperm parameters were also evaluated in this study and were found to be unaffected at 1,000 mg/kg/day.

A developmental toxicity study in rats showed no maternal toxicity at 500 mg/kg/day, the highest dose tested. Quantitative fetal susceptibility was observed as reduced body weight in pups at 500 mg/kg/day. The developmental NOAEL was 200 mg/kg/day.

Propanamide, 2-hydroxy-*N, N*-dimethyl- was not mutagenic in the Chinese hamster ovary (CHO) cells HGPRT locus gene mutation assay or the micronucleus test.

Propanamide, 2-hydroxy-*N, N*-dimethyl- is not expected to be carcinogenic based on the absence of structural alerts using Deductive Estimation of Risk from Existing Knowledge (Derek) Nexus program and the lack of mutagenicity. It is not expected to be neurotoxic based on the functional observation battery or on motor activity in the 90-day oral toxicity study in rats.

Immunotoxicity studies for propanamide, 2-hydroxy-*N, N*-dimethyl- were not available for review. However, evidence of immunotoxicity was not observed in the submitted studies.

Chronic studies with propanamide, 2-hydroxy-*N, N*-dimethyl- are not available for review. However, a chronic study conducted for 12 months in rats treated with *N, N*-dimethylacetamide, a structurally similar chemical, was used as surrogate data. In this study toxicity manifested as reduced bodyweight was observed at 300 mg/kg/day. The NOAEL is 100 mg/kg/day.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

An acute effect was not found in the database therefore an acute dietary assessment is not necessary. The chronic reference dose (cRfD) as well as the toxicity endpoint applicable to all exposure scenarios was based on the 12-month chronic toxicity study in rats. In this study, the NOAEL was 100 mg/kg/day based on reduced bodyweights at 300 mg/kg/day, the LOAEL. This represents the lowest NOAEL in the most sensitive species in the toxicity database. The standard uncertainty factors were applied to account for interspecies (10x) and intraspecies (10x) variations. The Food Quality Protection

Act Safety Factor (FQPA SF) was reduced to 1x. Default values of 100% absorption were used in dermal and inhalation toxicity endpoint selection.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to propanamide, 2-hydroxy-*N, N*-dimethyl-, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from propanamide, 2-hydroxy-*N, N*-dimethyl- in food as follows:

Dietary exposure (food and drinking water) to propanamide, 2-hydroxy-*N, N*-dimethyl- can occur following ingestion of foods with residues from treated crops and animals. Because no adverse effects attributable to a single exposure of propanamide, 2-hydroxy-*N, N*-dimethyl- are seen in the toxicity databases, an acute dietary risk assessment is not necessary. For the chronic dietary risk assessment, EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID™, Version 3.16, and food consumption information from the U.S. Department of Agriculture's (USDA's) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, no residue data were submitted for propanamide, 2-hydroxy-*N, N*-dimethyl-. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high use insecticides, herbicides, and fungicides. One hundred percent crop treated (PCT) was assumed, default processing factors, and tolerance-level residues for all foods and use limitations of not more than 20% by weight in pesticide formulations. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled ''Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts,'' (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

2. *Dietary exposure from drinking water.* For the purpose of the screening-level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for propanamide, 2-hydroxy-*N, N*-dimethyl-, a conservative drinking water concentration value of 100 parts per billion (ppb) based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Propanamide, 2-hydroxy-*N, N*-dimethyl- may be used in inert ingredients in products that are registered for specific uses that may result in residential exposure, such as pesticides used in and round the home. The Agency conducted an assessment to represent worst-case residential exposure by assessing propanamide, 2-hydroxy-*N, N*-dimethyl- in pesticide formulations (outdoor scenarios) and in disinfectant-type uses (indoor scenarios).

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found propanamide, 2-hydroxy-*N, N*-dimethyl- to share a common mechanism of toxicity with any other substances, and propanamide, 2-hydroxy-*N, N*-dimethyl- does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that propanamide, 2-hydroxy-*N, N*-dimethyl- does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA SF. In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

The toxicity database for propanamide, 2-hydroxy-*N, N*-dimethyl- contains a subchronic, developmental, chronic and mutagenicity studies. There is no indication of neurotoxicity or immunotoxicity in the available studies; therefore, there is no need to require neurotoxicity or immunotoxicity studies. Quantitative fetal susceptibility was observed in the developmental study in rats. Fetal toxicity (reduced bodyweight) was observed at 500 mg/kg/day, the highest dose tested, while toxicity was not observed in maternal animals. The developmental NOAEL was 200 mg/kg/day. However, fetal effects are not of concern since the cRfD (1mg/kg/day) will be protective of effects seen at 500 mg/kg/day. In addition, the Agency used conservative exposure estimates, with 100 PCT, tolerance-level residues, conservative drinking water modeling numbers, and a worst-case assessment of potential residential exposure for infants and children. Based on the adequacy of the toxicity and exposure databases and the lack of concern for prenatal and postnatal sensitivity, the Agency has concluded that there is reliable data to determine that infants and children will be safe if the FQPA SF of 10x is reduced to 1x.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified

and no acute dietary endpoint was selected.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to propanamide, 2-hydroxy-*N, N*-dimethyl- from food and water will utilize 28.4% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Propanamide, 2-hydroxy-*N, N*-dimethyl- may be used as an inert ingredient in pesticide products that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to propanamide, 2-hydroxy-*N, N*-dimethyl-. Using the exposure assumptions described above, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in MOEs of 115 for both adult males and females. Adult residential exposure combines high-end dermal and inhalation handler exposure from liquids/trigger sprayer/home garden with a high-end post-application dermal exposure from contact with treated lawns. Adult residential exposure combines high-end dermal and inhalation handler exposure from liquids/trigger sprayer/home garden with a high-end post-application dermal exposure from contact with treated lawns. EPA has concluded the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 154 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Propanamide, 2-hydroxy-*N, N*-dimethyl- may be used as an inert ingredient in pesticide products that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to propanamide, 2-hydroxy-*N, N*-dimethyl-. Using the exposure assumptions described above, EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in aggregate MOEs of 591 for adult males and females. Adult residential exposure combines indoor hard surface, wiping with a high-end post-application dermal exposure from contact with treated lawns. As the level of concern is for MOEs that are lower than 100, this MOE is not of concern. EPA has concluded the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of 214 for children. Children's residential exposure includes total exposures associated with contact with treated surfaces (dermal and hand-to-mouth exposures). As the level of concern is for MOEs that are lower than 100, this MOE is not of concern.

5. *Aggregate cancer risk for U.S. population.* Based on a DEREK structural alert analysis, the lack of mutagenicity and the lack of specific organ toxicity in the chronic toxicity study, propanamide, 2-hydroxy-*N, N*-dimethyl- is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to propanamide, 2-hydroxy-*N, N*-dimethyl-.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residues of propanamide, 2-hydroxy-*N, N*-dimethyl- in or on any food commodities. EPA is establishing a limitation on the amount of propanamide, 2-hydroxy-*N, N*-dimethyl- that may be used in pesticide formulations applied to growing crops. That limitation will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA''), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide formulation for use on growing crops for sale or distribution that exceeds 20% by weight of propanamide, 2-hydroxy-*N, N*-dimethyl-.

B. Revisions to Petitioned-For Tolerance Exemptions

Based upon an evaluation of the data included in the petition, EPA is establishing an exemption from the requirement of a tolerance for residues of propanamide, 2-hydroxy-*N, N*-dimethyl when used in pesticide formulations as an inert ingredient (solvent/co-solvent), not to exceed 20% by weight of the formulation, instead of the unlimited use requested. When considering unlimited use resulted in aggregate risks of concern, the petitioner revised their request to seek a 20% limitation by weight of formulation. The basis for this revision can be found at *http://www.regulations.gov in document* ''Propanamide, 2-hydroxy-*N, N*-dimethyl-; Human Health Risk Assessment and Ecological Effects Assessment to Support Proposed Exemption From the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations'' in docket ID number EPA–HQ–OPP–2015–0524.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.910 for residues of propanamide, 2-hydroxy-*N, N*-dimethyl- (Reg. No. 35123–06–9) when used as an inert ingredient (solvent/co-solvent) at a maximum concentration of 20% by weight in pesticide formulations applied to growing crops or raw agricultural commodities after harvest and under 40 CFR 180.930 when used in pesticide formulations applied to animals.

VII. Statutory and Executive Order Reviews

This action establishes exemptions to the requirement for a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the exemptions in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 21, 2016.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, add alphabetically the inert ingredient to the table to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
* * *	* *	* *
Propanamide, 2-hydroxy-*N*, *N*-dimethyl- (CAS Reg. No. 35123–06–9)	Not to exceed 20% by weight in pesticide formulation.	Solvent/co-solvent.
* * *	* *	* *

■ 3. In § 180.930, add alphabetically the inert ingredient to the table to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
* * *	* *	* *
Propanamide, 2-hydroxy-*N*, *N*-dimethyl- (CAS Reg. No. 35123–06–9)	Not to exceed 20% by weight in pesticide formulation.	Solvent/co-solvent
* * *	* *	* *

[FR Doc. 2016–10227 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2013–0428; FRL–9945–29]

Abamectin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of abamectin in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4), Syngenta Crop Protection, and Y–TEX Corporation requested these tolerances in four separate petitions under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 2, 2016. Objections and requests for hearings must be received on or before July 1, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2013–0428, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2013–0428 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 1, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2013–0428, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerances

In the **Federal Register** of September 12, 2013 (78 FR 56185) (FRL–9399–7), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3) announcing the filing of pesticide petitions by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W., Princeton, NJ 08540 (PP 3E8175) and Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419 (PP 3F8184). The petitions requested that 40 CFR 180.449 be amended by establishing tolerances for residues of the insecticide avermectin (abamectin) determined by measuring only avermectin B_1, a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-*O*-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-*O*-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1), and its delta-8,9-isomer in or on caneberry subgroup 13–07A at 0.20 parts per million (ppm) (PP 3E8175), and corn, field, sweet, and pop at 0.01 ppm; corn, field and pop, forage at 0.2 ppm; corn, field and pop, grain at 0.01 ppm; corn, field and pop, stover at 0.6 ppm; corn, sweet, forage at 0.2 ppm; corn, sweet, kernel plus cob with husk removed at 0.01 ppm; corn, sweet, stover at 0.5 ppm; soybean at 0.01 ppm; soybean, forage at 0.3 ppm; soybean, hay at 1 ppm; and soybean, seed at 0.01 ppm (PP 3F8184). That document referenced summaries of the petitions prepared by Syngenta Crop Protection, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notices of filing.

In the **Federal Register** of February 25, 2014 (79 FR 10458) (FRL–9906–77), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3) announcing the filing of pesticide petition by Y-TEX Corporation, 1825 Big Horn Avenue, P.O. Box 1450, Cody, WY 82414 (PP 3F8200). The petition requested that 40 CFR 180.449 be amended by increasing an established tolerance for the combined residues of the insecticide

avermectin B_1 (a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-O-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-O-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1)) and its delta-8,9-isomer, in or on milk from 0.005 ppm to 0.01 ppm. That document referenced a summary of the petition prepared by Y–TEX Corporation, the registrant, which is available in the docket for docket ID number EPA–HQ–OPP–2013–0264, *http://www.regulations.gov.* There were no FFDCA-related comments received in response to the notice of filing.

In the **Federal Register** of February 11, 2015 (80 FR 7559) (FRL–9921–94), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3) announcing the filing of a pesticide petition by IR–4, 500 College Road East, Suite 201 W., Princeton, NJ 08540 (PP 4E8309). The petition requested that 40 CFR 180.449 be amended by establishing tolerances for residues of the insecticide avermectin (abamectin) determined by measuring only avermectin B_1, a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-*O*-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-*O*-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1), and its delta-8,9-isomer in or on fruit, stone, group 12–12 at 0.09 ppm, fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.02 ppm, nut, tree, group 14–12 at 0.01 ppm, vegetable, fruiting, group 8–10 at 0.07 ppm, fruit, citrus, group 10–10 at 0.02 ppm, berry, low growing, subgroup 13–07G at 0.05 ppm, fruit, pome, group 11–10 at 0.02 ppm, papaya at 0.40 ppm, star apple at 0.40 ppm, black sapote at 0.40 ppm, sapodilla at 0.40 ppm, canistel at 0.40 ppm, mamey sapote at 0.40 ppm, guava at 0.015 ppm, feijoa at 0.015 ppm, jaboticaba at 0.015 ppm, wax jambu at 0.015 ppm, starfruit at 0.015 ppm, passionfruit at 0.015 ppm, acerola at 0.015 ppm, lychee 0.01 ppm, longan at 0.01 ppm, Spanish lime at 0.01 ppm, rambutan at 0.01 ppm, pulasan at 0.01 ppm, pineapple at 0.015 ppm, bean at 0.015 ppm, and onion, green, subgroup 3–07B at 0.08 ppm. Upon the approval of the aforementioned tolerances, IR–4 requested removal of established tolerances of abamectin, including its metabolites and degradates, in or on the following commodities: Bean, dry, seed at 0.01 ppm, citrus at 0.02 ppm, apple at 0.02 ppm, pear at 0.02 ppm, fruit, stone, group 12 at 0.09 ppm, nut, tree, group 14 at 0.01 ppm, pistachio at 0.01 ppm, grape at 0.02 ppm, strawberry at 0.05 ppm and vegetable, fruiting, group 8 at 0.02 ppm. That document referenced summaries of the petitions prepared by Syngenta Crop Protection, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA has modified the level at which tolerances are being established for some commodities. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for abamectin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with abamectin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Abamectin is a mixture of avermectin B_1 [a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-*O*-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-*O*-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1)] and its delta-8,9-isomer. Avermectins are macrocyclic lactones produced as natural fermentation products of the soil bacterium *Streptomyces avermitilis.* Currently, abamectin and emamectin are the only members of this group with active pesticide registrations. The two components of abamectin, B_{1a} and B_{1b}, have very similar biological and toxicological properties. Emamectin, which is a derivative of abamectin, is a structurally and toxicologically related chemical. The only difference between abamectin and emamectin is that abamectin has a hydroxyl moiety at the 4″ position of the tetrahydropyrane ring, whereas in emamectin the hydroxyl group is replaced by a methylamine.

Since the last time the EPA assessed abamectin (**Federal Register** of March 27, 2013 (78 FR 18519) (FRL–9379–1)), the Agency has re-evaluated the entire abamectin and emamectin toxicological database along with currently available literature information on the toxicity of the abamectin and emamectin to ensure consistent hazard evaluation for these structurally related pesticides. This hazard characterization and dose-response assessment represents a more refined analysis than previous assessments, using the literature data to enhance the characterization of the studies submitted to the Agency.

Available toxicity data show that, with single dose or repeated dose administration, the primary target organ of abamectin is the nervous system, and that decreased body weight is also one of the most frequent findings. Neurotoxicity (including tremors, mydriasis, ataxia, and death) was seen in mice, dogs, and rats. Developmental effects such as cleft palate were reported in rabbits. Abamectin was shown to bind to the gamma aminobutyric acid (GABA) receptors, and this interaction was believed to result in neurotoxicity. The GABA receptor interaction also plays a role in development; cleft palate findings may reflect the interaction of abamectin on the GABA receptor. Generally the finding of cleft palate was seen at higher dose levels than those for neurotoxicity.

Integral to the dose response assessment in mammals for this class of compounds is P-glycoprotein (P-gp). P-gp is a member of adenosine triphosphate (ATP) binding cassette transporter proteins, which reside in the plasma membrane and function as a transmembrane efflux pump, moving

xenobiotics from the intracellular to the extracellular domain. P-gp is found in the canallicular surface of hepatocytes, the apical surface of proximal tubular cells in the kidneys, the brush border surface of enterocytes, and the luminal surface of blood capillaries of the brain (blood brain barrier), placenta, ovaries, and the testes. As an efflux transporter, P-gp acts as a protective barrier to keep xenobiotics out of the body by excreting them into bile, urine, and intestinal lumen and prevents accumulation of these compounds in the brain and gonads, as well as in the fetus. Therefore, test animals with genetic polymorphisms that compromise P-gp expression, are particularly susceptible to abamectin-induced neurotoxicity (Lankas et al., 1997). An example is the rat. P-gp is undetectable in the neonatal rat brain; the first detection of P-gp is on post-natal day (PND) 7 and does not reach adult levels until approximately PND 28 (Matsuoka, 1999). As shown in the reproductive and developmental neurotoxicity (DNT) studies, neonatal rats are sensitive to the effects of abamectin-induced pup body weight reductions and death. In contrast, in the developing human fetus, P-gp was found as early as 22 weeks of gestation (Daood, MJ, 2008; van Kalken, et al., 1991). Based on the difference in the ontogeny of P-gp in neonatal rat and human newborn, the Agency, at this time, does not believe that the early post-natal findings in the rat to be relevant to human newborns or young children.

Similarly, the CF-1 mouse is also uniquely sensitive to the neurotoxic effects of abamectin and its derivative, emamectin. Some CF-1 mice have a polymorphism for the gene encoding P-gp and are either devoid (homozygous) or have diminished (heterozygous) level of P-gp. The Agency does not consider the results of studies with CF-1 mice to be relevant for human health risk assessment because there is a lack of convincing evidence from the literature on human polymorphism of human multidrug resistance (*MDR-1*) gene resulting in diminished P-gp function. Although many studies on human multidrug resistance (*MDR-1*) gene encoding P-gp and polymorphism of *MDR-1* gene are available, the data are inconclusive with respect to the functional significance of the genetic variance in P-gp in human. At the present, the reported cases of polymorphism of the *MDR-1* gene in human populations have not been shown to result in a loss of P-gp function similar to that found in CF-1 mice (Macdonald & Gledhill, 2007). As a result, the Agency does not consider the toxic effects observed in CF-1 mouse studies to be representative of abamectin (and emamectin) effects in humans.

Therefore, the Agency is using results from toxicological studies conducted in the species (rats, CD-1 mice, rabbits, and dogs) that do not have diminished P-gp function for selecting toxicity endpoints and points of departure for risk assessment. Among the test animals with fully functional P-gp, the beagle dog is the most sensitive species.

For various durations of treatment (subchronic (12- and 18-weeks) and chronic oral toxicity studies in dogs), clinical signs [tremors and mydriasis (decreased pupillary light response)] of neurotoxicity were observed in the at the lowest observed adverse effect level (LOAEL) of 0.5 milligram/kilogram (mg/kg); the no observed adverse effect level (NOAEL) was 0.25 mg/kg. Tremors and mydriasis were observed as early as the first week of exposure. The Agency assumes that these clinical signs could result from a single dose for the following reasons:

1. Kinetic data demonstrates rapid absorption/excretion. With oral dosing in rats and mice, abamectin was absorbed rapidly, and maximum concentration in blood was achieved within 4-8 hours after administration. It was rapidly eliminated from the body, almost exclusively in the feces, and did not accumulate in the body after repeated exposure.

2. In an acute neurotoxicity study (ACN) in rat (range finding and main studies), clinical signs of neurotoxicity such as reduced foot splay reflex, ataxia, tremors, and mydriasis (decreased pupillary light response) were observed from a single dose. Most of the effects observed in the rat ACN were consistent with those seen in the subchronic and chronic dog studies.

3. The neurotoxic effects produced by abamectin in beagle dogs did not progress with time. The effects seen in the subchronic (gavage) and chronic dog studies were similar despite the varied durations of treatment, suggesting the response could be due to each individual exposure rather than to accumulation of abamectin in tissues. Clinical signs such as ataxia and or whole body tremors were reported within 3 hours of the first dose at higher dose levels.

Based on these considerations, 0.25 mg/kg/day was selected as a point of departure for risk assessment for all the exposure scenarios, and the toxicity endpoints were clinical signs of neurotoxicity.

Carcinogenicity studies in rats and mice (CD-1) and mutagenicity studies provide no indication that abamectin is carcinogenic or mutagenic.

Specific information on the studies received and the nature of the adverse effects caused by abamectin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''*Abamectin. Human Health Risk Assessment for Uses on Caneberry Subgroup 13–07A; Soybean; Sweet Corn; Ear Tags for Lactating Dairy Cattle; Golf Course Turf; Bean; Onion, Green, Subgroup 3–07B; Fruit, Pome, Group 11–10; Fruit, Small Vine Climbing, Except Fuzzy Kiwifruit, Subgroup 13–07F; Berry, Low Growing, Subgroup 13–07G; Vegetable, Fruiting, Group 8–10; Greenhouse Tomato; Fruit, Citrus, Group 10–10; Fruit, Stone, Group 12–12; and Nut, Tree, Group 14–12; and Various Tropical Fruits''* on page 53 in docket ID number EPA–HQ–OPP–2013–0428.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides.*

A summary of the toxicological endpoints for abamectin used for human

risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ABAMECTIN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary and Chronic dietary (All populations).	NOAEL = 0.25 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.0025 mg/kg/day. aPAD = 0.0025 mg/kg/day Chronic RfD = 0.0025 mg/kg/day cPAD = 0.0025 mg/kg/day	Subchronic & chronic oral toxicity studies in dogs. Chronic LOAEL = 0.50 mg/kg/day based on body tremors, one death, liver pathology, decreased body weight. Mydriasis was seen during week one in one dog. Subchronic LOAEL = 0.5 mg/kg/day based on mydriasis during week one, death at 1.0 mg/kg/day.
Dermal short-term (1 to 30 days).	Oral study NOAEL = 0.25 mg/kg/day (dermal absorption rate = 1%. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic & chronic oral toxicity studies in dogs. Chronic LOAEL = 0.50 mg/kg/day based on body tremors, one death, liver pathology, decreased body weight. Mydriasis was seen during week one in one dog. Subchronic LOAEL = 0.5 mg/kg/day based on mydriasis during week one, death at 1.0 mg/kg/day.
Inhalation short-term (1 to 30 days).	Oral study NOAEL = 0.25 mg/kg/day (Toxicity via the inhalation route assumed to be equivalent) to oral route. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic & chronic oral toxicity studies in dogs. Chronic LOAEL = 0.50 mg/kg/day based on body tremors, one death, liver pathology, decreased body weight. Mydriasis was seen during week one in one dog. Subchronic LOAEL = 0.5 mg/kg/day based on mydriasis during week one, death at 1.0 mg/kg/day.
Cancer (Oral, dermal, inhalation).	Classification: ''Not likely to be Carcinogenic to Humans'' based on the absence of significant tumor increases in two adequate rodent carcinogenicity studies.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to abamectin, EPA considered exposure under the petitioned-for tolerances as well as all existing abamectin tolerances in 40 CFR 180.449. EPA assessed dietary exposures from abamectin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for abamectin. In estimating acute dietary exposure, EPA used food consumption information from the 2003–2008 United States Department of Agriculture (USDA) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, a refined acute dietary exposure assessment was conducted for all proposed and established food uses of abamectin. Anticipated residues derived from field trial data for most plant commodities were used in the acute dietary exposure assessment. Tolerance-level residues were used for poultry and swine livestock commodities. Because cattle may be exposed to residues of abamectin through diet and ear tag, upper-bound anticipated residues were estimated from the maximum values found in cattle feeding studies and dermal magnitude of residue studies. For all other livestock commodities, upper-bound anticipated residues were estimated from secondary residues from consuming treated feed. Empirical and default processing factors and maximum percent crop treated (PCT) estimates were used, as available.

ii. *Chronic exposure.* The Agency selected a point of departure for chronic effects that is the same as the point of departure for acute effects and so is relying on the acute assessment to be protective of chronic effects. So, the Agency assessed chronic exposure for purposes of providing background dietary exposure for use in the residential short-term assessments. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the 2003–2008 USDA NHANES/WWEIA. As to residue levels in food, a refined chronic dietary exposure assessment was conducted for all proposed and established food uses of abamectin. Average residues for plant commodities from field trials were used. Residue levels based on maximum reasonable dietary burden for secondary residues in livestock (beef and dairy cattle) and the highest residues found in the magnitude of residue studies for cattle ear tags were used in the chronic assessment for livestock commodities. Tolerance values were used for poultry and swine to account for poultry and swine consuming treated feed. Residues from use in food handling establishments were included. Empirical and default processing factors and average PCT estimates were used, as available.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that abamectin does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The following maximum PCT estimates were used in the acute dietary risk assessment for the following crops that are currently registered for abamectin: Almond: 80%; apple: 30%; apricot: 30%; avocado: 60%; bean, dry: 2.5%; cantaloupe: 45%; celery: 70%; cherry: 20%; cotton: 30%; cucumber: 10%; grape: 35%; grapefruit: 90%; hazelnut: 2.5%; honeydew: 35%; lemon: 55%; lettuce: 45%; nectarine: 20%; onion, bulb: 10%; orange: 70%; peach: 25%; pear: 85%; pecan: 2.5%; pepper: 30%; pistachio: 2.5%; plum/prune: 35%; potato: 20%; pumpkin: 10%; spinach: 45%; squash: 15%; strawberry: 45%; tangerine: 55%; tomato: 25%; walnut: 55%; and watermelon: 15%.

The PCT values that were used to refine the livestock commodities for the acute assessment were based on: Sweet corn (44%) for beef, goat, horse, and sheep commodities; and the food handling establishment uses (5%) for hog and poultry meat and meat byproducts.

The following average PCT estimates were used in the chronic dietary risk assessment for the following crops that are currently registered for abamectin: Almond: 70%; apple: 10%; apricot: 15%; avocado: 35%; bean, dry: 2.5%; cantaloupe: 25%; celery: 45%; cherry: 5%; cotton: 20%; cucumber: 5%; grape: 15%; grapefruit: 70%; hazelnut: 2.5%; honeydew: 20%; lemon: 40%; lettuce: 20%; nectarine: 20%; onion, bulb: 2.5%; orange: 40%; peach: 10%; pear: 70%; pecan: 1%; pepper: 15%; pistachio: 2.5%; plum/prune: 10%; potato: 5%; pumpkin: 5%; spinach: 25%; squash: 5%; strawberry: 30%; tangerine: 35%; tomato: 10%; walnuts: 25%; and watermelons: 5%.

The PCT values that were used to refine the livestock commodities (cattle, goats, horses, and sheep) for the chronic assessment were based on: Cotton (30%), soybean (8%), and sweet corn (38%). The PCT for poultry and hog commodities is based on the food handling establishment PCT since the tolerances for food handling establishment uses result in residues considerably higher than secondary residues from hogs and poultry consuming treated feed. All commodities included for food handling residues were assigned the value of 5%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The following maximum PCT estimates were used in the acute dietary risk assessment for the following new uses of abamectin:

Blackberries: 68%; boysenberry: 68%; corn, sweet 57%; loganberry: 68%; raspberries: 68%; soybeans: 11%.

The following average PCT estimates were used in the chronic dietary risk assessment for the following new uses of abamectin:

Blackberries: 56%; boysenberry: 56%; corn, sweet 45%; loganberry: 68%; raspberries: 56%; soybeans: 8%.

EPA estimates of the PCTn of abamectin represents the upper bound of use expected during the pesticide's initial five years of registration; that is, PCTn for abamectin is a threshold of use that EPA is reasonably certain will not be exceeded for each registered use site. The PCTn recommended for use in the chronic dietary assessment is calculated as the average PCT of the market leader or leaders, (*i.e.,* the one(s) with the greatest PCT) on that site over the three most recent years of available data. The PCTn recommended for use in the acute dietary assessment is the maximum observed PCT over the same period. Comparisons are only made among pesticides of the same pesticide types (*e.g.,* the market leader for insecticides on the use site is selected for comparison with a new insecticide). The market leader included in the estimation may not be the same for each year since different pesticides may dominate at different times.

Typically, EPA uses USDA/NASS as the source data because it is publicly available and directly reports values for PCT. When a specific use site is not reported by USDA/NASS, EPA uses proprietary data and calculates the PCT given reported data on acres treated and acres grown. If no data are available, EPA may extrapolate PCTn from other crops, if the production area and pest spectrum are substantially similar.

A retrospective analysis to validate this approach shows few cases where the PCT for the market leaders were exceeded. Further review of these cases identified factors contributing to the exceptionally high use of a new pesticide. To evaluate whether the PCTn for abamectin could be exceeded, EPA considered whether there may be unusually high pest pressure, as indicated in emergency exemption requests for abamectin; the pest spectrum of the new pesticide in comparison with the market leaders and whether the market leaders are well-established for that use; and whether pest resistance issues with past market leaders provide abamectin with significant market potential. Given

currently available information, EPA concludes that it is unlikely that actual PCT for abamectin will exceed the estimated PCT for new uses during the next five years.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which abamectin may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for abamectin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of abamectin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide*.

Based on the Tier II surface water concentration calculator (SWCC) computer model and Tier I Screening Concentration in Ground Water (SCI–GROW) model and Tier I Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of abamectin for acute exposures are estimated to be 0.76 parts per billion (ppb) for surface water and 0.074 ppb for ground water and for chronic exposures are estimated to be 0.30 ppb for surface water and ≤0.0031 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model either via point estimates or using residue distribution files.

For acute dietary risk assessment, a drinking water residue distribution file was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration of value 0.30 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Abamectin is currently registered for the following uses that could result in residential exposures: Homeowner bait and bait station products that include an outdoor granular bait formulation for use on fire ant mounds, and several indoor ready-to-use baits of both dust and gel formulations. In addition, as part of the current request, the registrant has proposed a use on golf course turf.

EPA assessed residential exposure using the following assumptions: For residential handlers, both dermal and inhalation short-term exposure is expected from the currently registered bait and bait station uses. Quantitative exposure/risk assessment considered the following scenarios: Loading/applying granular bait outdoor via (1) push-type spreaders, (2) belly grinders, (3) spoons, (4) hand, and (5) cup or shaker; and (6) applying granular bait indoor by hand (as a surrogate for a ready-to-use dust bait).

Post-application residential exposure for adults and children (1 to <2) is unlikely for the currently registered uses of abamectin. For currently registered outdoor treatments, adults and children are not expected to directly contact fire ant mounds. For currently registered indoor pest control, bait placements are intended to be placed in cracks and crevices where direct contact by adults and children (1 to <2) is unlikely.

However, residential post-application exposure for adults and children (6 to <11 and 11 to <16) is possible for the newly proposed use of abamectin on golf courses. Adults and children (6 to <11 and 11 to <16) performing physical post-application activities on golf course turf may receive dermal exposure to abamectin residues. The scenarios, lifestages, and routes of exposure include: Golfing for adults (dermal), children 11 to <16 years old (dermal), and children 6 to <11 years old (dermal).

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide*.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA's Office of Pesticide Programs (OPP) has previously developed guidance documents for establishing common mechanism groups (CMGs) (*Guidance for Identifying Pesticide Chemicals and Other Substances that have a Common Mechanism of Toxicity* (1999)) and conducting cumulative risk assessments (CRAs) (*Guidance on Cumulative Risk Assessment of Pesticide Chemicals that have a Common Mechanism of Toxicity* (2002)). In 2016, EPA's Office of Pesticide Programs released another guidance document entitled *Pesticide Cumulative Risk Assessment: Framework for Screening Analysis.* All three of these documents can be found at *http://www.regulations.gov* in docket ID EPA–HQ–OPP–2015–0422.

The Agency has utilized this 2016 screening framework for abamectin and determined that abamectin along with emamectin form a candidate CMG. This group of pesticides is considered a candidate CMG because they share characteristics to support a testable hypothesis for a common mechanism of action. Following this determination, the Agency conducted a screening-level cumulative risk assessment consistent with the 2016 guidance document. This screening assessment indicates that that cumulative dietary and residential aggregate exposures for abamectin and emamectin are below the Agency's levels of concern. No further cumulative evaluation is necessary for abamectin and emamectin.

The Agency's screening-level cumulative analysis can be found at *http://www.regulations.gov* in the document titled ''*Abamectin. Human Health Risk Assessment for Uses on Caneberry Subgroup 13–07A; Soybean; Sweet Corn; Ear Tags for Lactating Dairy Cattle; Golf Course Turf; Bean; Onion, Green, Subgroup 3–07B; Fruit, Pome, Group 11–10; Fruit, Small Vine Climbing, Except Fuzzy Kiwifruit, Subgroup 13–07F; Berry, Low Growing, Subgroup 13–07G; Vegetable, Fruiting, Group 8–10; Greenhouse Tomato; Fruit, Citrus, Group 10–10; Fruit, Stone, Group*

12–12; and Nut, Tree, Group 14–12; and Various Tropical Fruits'' on page 74 (Appendix H) in docket ID number EPA–HQ–OPP–2013–0428.

Additionally, when the Agency issued the notice in the **Federal Register** announcing the availability of the draft framework guidance, the EPA also received comments on the draft human health risk assessment for abamectin, which was included in that docket as an example of how EPA would implement the draft framework guidance. The response to those comments can be found in docket ID number EPA–HQ–OPP–2013–0428.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10x) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10x, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* An increase in qualitative susceptibility was seen in the rabbit developmental toxicity study, where decreases in body weight and food consumption were seen in maternal animals at 2.0 mg/kg/day. In contrast, the fetal effects were much more severe, consisting of cleft palate, clubbed foot, and death at 2.0 mg/kg/day. The point of departure (0.25 mg/kg/day) selected from the dog studies is more than 8x lower than the dose where rabbit fetal effects were seen. Therefore, it is protective of fetal effects seen in the rabbit developmental toxicity study.

The rat reproduction toxicity and developmental neurotoxicity studies demonstrated both qualitative and quantitative susceptibility in the pups to the effects of abamectin (decrease pup weights and increased postnatal pup mortality). This observation is consistent with the finding that P-gp is not fully developed in rat pups until postnatal day 28. Therefore, during the period from birth to postnatal day 28, the rat pups are substantially more susceptible to the effects of abamectin than adult rats. However, in humans, P-gp has been detected in the fetus at 22 weeks of pregnancy, and the human newborns have functioning P-gp. Therefore, human infants and children are not expected to have enhanced sensitivity as seen in rat pups.

3. *Conclusion.* Currently, the toxicity endpoints and points of departure for all exposure scenarios are selected from the subchronic and chronic oral toxicity studies in the dogs. The points of departure selected from the dog studies are based on clear NOAELs and protective of all the adverse effects seen in the studies conducted in human relevant studies with rats, CD–1 mice, and rabbits. Therefore, EPA has determined that the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for abamectin is complete.

ii. The proposed mode of action (MOA) is interaction with GABA receptors leading to neurotoxicity. The findings of neurotoxic signs observed in the abamectin database are consistent with the proposed MOA. Signs of neurotoxicity ranging from decreases in foot splay reflex, mydriasis (*i.e.,* excessive dilation of the pupil), curvature of the spine, decreased fore- and hind-limb grip strength, tip-toe gate, tremors, ataxia, or spastic movements of the limbs are reported in various studies with different durations of abamectin exposure. In dogs, mydriasis was the most common finding at doses as low as 0.5 mg/kg/day at one week of treatment. No neuropathology was observed. Because the PODs used for assessing aggregate exposure to abamectin and the PODs for assessing cumulative exposure for abamectin and emamectin are protective of these neurotoxic effects in the U.S. population, as well as infants and children, no additional data concerning neurotoxicity is needed at this time to be protective of potential neurotoxic effects.

iii. As explained in Unit III.D.2 ''*Prenatal and postnatal sensitivity''*, the enhanced susceptibility seen in the rabbit developmental toxicity, the rat reproduction, and the rat developmental neurotoxicity studies do not present a risk concern.

iv. There are no residual uncertainties identified in the exposure databases. The chronic and acute dietary food exposure assessment are refined including use of anticipated residues, default processing factors, and percent crop treated; however, these refinements are considered protective because field trials are conducted to represent use conditions leading to the maximum residues in food when the product is used in accordance with the label and do not underestimate exposures. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to abamectin in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children. These assessments will not underestimate the exposure and risks posed by abamectin.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to abamectin will occupy 88% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions discussed in this unit for chronic exposure, the chronic dietary exposure from food and water to abamectin will occupy 11% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of abamectin is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Abamectin is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to abamectin.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 4,400 for adults, 3,600 for children 11 to <16 years old, and 2,100 for children 6 to <11 years old. Because EPA's level of concern for abamectin is

a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, abamectin is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and the acute dietary risk assessment is protective of all exposure durations (since the point of departure is the same for all exposure durations), no further assessment of intermediate-term risk is necessary.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, abamectin is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to abamectin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methods for abamectin in plant and livestock commodities are available in the Pesticide Analytical Manual, Volume II (PAM II).

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for abamectin on sweet corn, soybean, papaya, star apple, black sapote, sapodilla, canistel, mamey sapote, guava, feijoa, jaboticaba, wax jambu, starfruit, passionfruit, acerola, lychee, longan, Spanish lime, rambutan, pulasan, pineapple, bean or green onion commodities. Additionally, there are no Codex MRLs for abamectin on the commodities in the caneberry subgroup 13–07A; fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F; or fruit, stone, group 12–12.

The following U.S. tolerances are harmonized with established, related Codex MRLs: Fruit, pome, group 11–10; and nut, tree, group 14–12.

The Codex MRL on citrus is not harmonized with the U.S. tolerance on fruit, citrus, group 10–10, and the Codex MRL on strawberry is not harmonized with the recommended U.S. tolerance on berry, low-growing, subgroup 13–07G. Residue data underlying these U.S. tolerances supports tolerances that are higher than the established Codex MRLs on these related commodities.

Codex MRLs for abamectin on fruiting vegetable commodities are not harmonized with the U.S. tolerance on vegetable, fruiting, group 8–10. The residue data underlying the U.S. fruiting vegetable tolerance resulted in a tolerance that is higher than the established Codex MRL on sweet peppers. Codex has also established a separate tolerance on dried chili pepper that is higher than the U.S. fruiting vegetable tolerance.

There are some Codex MRLs on livestock commodities, but none of the Codex MRLs are set at the same level as the tolerance levels EPA is establishing today; however, the U.S. cannot harmonize with the Codex MRLs on livestock commodities since the Codex MRLs reflect different uses (*i.e.,* different dietary burdens) as compared to the uses in the United States, which also reflect the direct treatment of cattle via ear tags. Setting U.S. tolerances at Codex MRL levels would result in tolerance violations for some livestock commodities.

C. Revisions to Petitioned-For Tolerances

Although not requested, EPA is establishing a tolerance of 0.40 ppm for ''grain, aspirated grain fractions'' since aspirated grain fractions are associated with soybeans. The recommended tolerance of 0.40 ppm for ''grain, aspirated grain fractions'' is based on residues of <0.006 ppm in soybean seed and a concentration factor of 59X in aspirated grain fractions.

EPA is also increasing some of the established livestock tolerances based on a new dietary burden calculation that includes the proposed uses on soybeans and sweet corn as well as a proposed use for ear tags for lactating dairy cattle. Because of these calculations, EPA is increasing the established tolerances on cattle fat from 0.03 to 0.05 ppm; cattle meat byproducts from 0.06 to 0.09 ppm; fat of goat, horse and sheep from 0.01 to 0.03 ppm; meat byproducts of goat, horse, and sheep from 0.02 to 0.04 ppm; and milk from 0.005 to 0.015 ppm.

Finally, EPA is not establishing tolerances for ''corn, field, sweet, and pop; corn, field and pop, forage; corn, field and pop, grain; corn, field and pop, stover'' because the petitioner withdrew those tolerance requests.

D. Literature References

Daood., MJ, Tsai, C., Ahdab-Barmada, M., and Watchko, JF (2008). ABC transporter (P-gp/ABCB1, MRP1/ABCC1, BCRP/ABCG2) expression in the developing Human CNS. *Neuropediatrics.* 2008 August; 39(4): 211.

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van Kalken, CK, Giaccone, G., van der Valk, P., Kuiper, CM, Hadisaputro, MMN, Bosma, SAA, Scheper, RJ, Meijer, CJLM, and Pinedo, HM (1992). Multidrug resistance gene (P-glycoprotein) expression in the human fetus. *American Journal of Pathology,* vol 141 No.5, November 1992.

V. Conclusion

Therefore, tolerances are established for residues of abamectin in or on acerola at 0.015 ppm; bean at 0.015 ppm; berry, low growing, subgroup 13–07G at 0.05 ppm; black sapote at 0.40 ppm; caneberry subgroup 13–07A at 0.20 ppm; canistel at 0.40 ppm; corn, sweet, forage at 0.20 ppm; corn, sweet, kernel plus cob with husk removed at 0.01 ppm; corn, sweet, stover at 0.50 ppm; feijoa at 0.015 ppm; fruit, citrus, group 10–10 at 0.02 ppm; fruit, pome, group 11–10 at 0.02 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F 0.02 ppm; fruit, stone, group 12–12 at 0.09 ppm; grain, aspirated grain fractions at 0.40 ppm; guava at 0.015 ppm; jaboticaba at 0.015 ppm; longan at 0.01 ppm; lychee at 0.01 ppm; mamey sapote at 0.40 ppm; nut,

tree, group 14–12 at 0.01 ppm; onion, green, subgroup 3–07B at 0.08 ppm; papaya at 0.40 ppm; passionfruit at 0.015 ppm; pineapple at 0.015 ppm; pulasan at 0.01 ppm; rambutan at 0.01 ppm; sapodilla at 0.40 ppm; soybean, forage at 0.30 ppm; soybean, hay at 1.0 ppm; soybean, seed at 0.01 ppm; Spanish lime at 0.01 ppm; star apple at 0.40 ppm; starfruit at 0.015 ppm; vegetable, fruiting, group 8–10 at 0.07 ppm; and wax jambu at 0.015 ppm.

In addition, EPA is increasing the established tolerances on cattle, fat from 0.03 to 0.05 ppm; cattle, meat byproducts from 0.06 to 0.09 ppm; fat of goat, horse, and sheep from 0.01 to 0.03 ppm; meat byproducts of goat, horse, and sheep from 0.02 to 0.04 ppm; and milk from 0.005 to 0.015 ppm.

And lastly EPA is removing the following tolerances as unnecessary due to the establishment of the aforementioned tolerances: Apple at 0.02 ppm; bean, dry, seed at 0.01 ppm; citrus at 0.02 ppm; fruit, stone, group 12 at 0.09 ppm; grape at 0.02 ppm; nut, tree, group 14 at 0.01 ppm; pear at 0.02 ppm; pistachio at 0.01 ppm; strawberry at 0.05 ppm; and vegetable, fruiting, group 8 at 0.020 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 22, 2016.

Susan Lewis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.449, the table in paragraph (a) is revised to read as follows:

§ 180.449 Avermectin B_1 and its delta-8,9-isomer; tolerances for residues.

(a) * * *

Commodity	Parts per million
Acerola	0.015
Almond, hulls	0.10
Apple, wet pomace	0.10
Avocado	0.020
Bean	0.015
Berry, low growing, subgroup 13–07G	0.05
Black sapote	0.40
Caneberry subgroup 13–07A	0.20
Canistel	0.40
Cattle, fat	0.05
Cattle, meat	0.02
Cattle, meat byproducts	0.09
Celeriac, roots	0.05
Celeriac, tops	0.05
Chive, dried leaves	0.02
Chive, fresh leaves	0.01
Citrus, dried pulp	0.10

Commodity	Parts per million
Citrus, oil	0.10
Corn, sweet, forage	0.20
Corn, sweet, kernel plus cob with husk removed	0.01
Corn, sweet, stover	0.50
Cotton, gin byproducts	1.0
Cotton, undelinted seed	0.02
Feijoa	0.015
Food products in food handling establishments (other than those already covered by higher tolerances as a result of use on growing crops, and other than those already covered by tolerances on milk, meat, and meat byproducts)	0.01
Fruit, citrus, group 10–10	0.02
Fruit, pome, group 11–10	0.02
Fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F	0.02
Fruit, stone, group 12–12	0.09
Goat, fat	0.03
Goat, meat	0.02
Goat, meat byproducts	0.04
Grain, aspirated grain fractions	0.40
Guava	0.015
Herb subgroup 19A, except chive	0.030
Hog, fat	0.01
Hog, meat	0.02
Hog, meat byproducts	0.02
Hop, dried cones	0.20
Horse, fat	0.03
Horse, meat	0.02
Horse, meat byproducts	0.04
Jaboticaba	0.015
Longan	0.01
Lychee	0.01
Mamey sapote	0.40
Milk	0.015
Nut, tree, group 14–12	0.01
Onion, bulb, subgroup 3–07A	0.01
Onion, green, subgroup 3–07B	0.08
Papaya	0.40
Passionfruit	0.015
Peppermint, tops	0.010
Pineapple	0.015
Plum, prune, dried	0.025
Poultry, meat	0.02
Poultry, meat byproducts	0.02
Pulasan	0.01
Rambutan	0.01
Sapodilla	0.40
Sheep, fat	0.03
Sheep, meat	0.02
Sheep, meat byproducts	0.04
Soybean, forage	0.30
Soybean, hay	1.0
Soybean, seed	0.01
Spanish lime	0.01
Spearmint, tops	0.010
Star apple	0.40
Starfruit	0.015
Vegetable, cucurbit, group 9	0.005
Vegetable, fruiting, group 8–10	0.07
Vegetable, leafy, except brassica, group 4	0.10
Vegetable, tuberous and corm, subgroup 01C	0.01
Wax jambu	0.015

* * * * *

[FR Doc. 2016–10230 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 151117999–6370–01]

RIN 0648–BF56

Fisheries Off West Coast States; West Coast Salmon Fisheries; 2016 Management Measures and a Temporary Rule

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

ACTION: Final rule; and a temporary rule for emergency action.

SUMMARY: Through this final rule, NMFS establishes fishery management measures for the 2016 ocean salmon fisheries off Washington, Oregon, and California and the 2017 salmon seasons opening earlier than May 1, 2017. The temporary rule for emergency action (emergency rule), under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), implements the 2016 annual management measures for the West Coast ocean salmon fisheries for the area from the U.S./Canada border to Cape Falcon, OR from May 1, 2016, through October 28, 2016. The emergency rule is required because preseason forecast abundance of several stocks of coho from the Washington coast and Puget Sound is below the stock-specific spawning escapement goals (*i.e.,* conservation objective) specified in the Pacific Coast Salmon Fishery Management Plan (FMP) and allocation of coho harvest in the recreational fishery will not be distributed consistent with the FMP in order to limit fishery impacts on these weak coho stocks. The fishery management measures for the area from Cape Falcon, OR, to the U.S./Mexico border are consistent with the FMP and are implemented through a final rule. Specific fishery management measures vary by fishery and by area. The measures establish fishing areas, seasons, quotas, legal gear, recreational fishing days and catch limits, possession and landing restrictions, and minimum lengths for salmon taken in the U.S. exclusive economic zone (EEZ) (3–200 NM) off Washington, Oregon, and California. The management measures are intended to prevent overfishing and to apportion the ocean harvest equitably among treaty Indian, non-treaty commercial, and recreational fisheries. The measures are also intended to allow a portion of the salmon runs to escape the ocean fisheries in order to provide for spawning escapement and inside fisheries (fisheries occurring in state internal waters).

DATES: Final rule covering fisheries south of Cape Falcon, Oregon, is effective from 0001 hours Pacific Daylight Time, May 1, 2016, until the effective date of the 2017 management measures, which will be published in the **Federal Register**. Temporary rule covering fisheries north of Cape Falcon, Oregon, is effective from 0001 hours Pacific Daylight Time, May 1, 2016, through 2400 hours Pacific Daylight Time, October 28, 2016, or the attainment of the specific quotas listed below in section two of this rule.

ADDRESSES: The documents cited in this document are available on the Pacific Fishery Management Council's (Council's) Web site (*www.pcouncil.org*).

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323.

SUPPLEMENTARY INFORMATION:

Background

The ocean salmon fisheries in the EEZ off Washington, Oregon, and California are managed under a ''framework'' FMP. Regulations at 50 CFR part 660, subpart H, provide the mechanism for making preseason and inseason adjustments to the management measures, within limits set by the FMP, by notification in the **Federal Register**.

The management measures for the 2016 and pre-May 2017 ocean salmon fisheries that are implemented in this final rule were recommended by the Council at its April 9 to 14, 2016, meeting.

Process Used To Establish 2016 Management Measures

The Council announced its annual preseason management process for the 2016 ocean salmon fisheries in the **Federal Register** on December 31, 2015 (80 FR 81806), and on the Council's Web site at (*www.pcouncil.org*). NMFS published an additional notice of opportunities to submit public comments on the 2016 ocean salmon fisheries in the **Federal Register** on February 1, 2016 (81 FR 5101). These notices announced the availability of Council documents, the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures, and instructions on how to comment on the development of the 2016 ocean salmon fisheries. The agendas for the March and April Council meetings were published in the **Federal Register** (81 FR 8047, February 17, 2016, and 81 FR 15045, March 21, 2016, respectively) and posted on the Council's Web site prior to the actual meetings.

In accordance with the FMP, the Council's Salmon Technical Team (STT) and staff economist prepared four reports for the Council, its advisors, and the public. All four reports were made available on the Council's Web site upon their completion. The first of the reports, ''Review of 2015 Ocean Salmon Fisheries,'' was prepared in February when the scientific information necessary for crafting management measures for the 2016 and pre-May 2017 ocean salmon fisheries first became available. The first report summarizes biological and socio-economic data for the 2015 ocean salmon fisheries and assesses how well the Council's 2015 management objectives were met. The second report, ''Preseason Report I Stock Abundance Analysis and Environmental Assessment Part 1 for 2016 Ocean Salmon Fishery Regulations'' (PRE I), provides the 2016 salmon stock abundance projections and analyzes the impacts on the stocks and Council management goals if the 2015 regulations and regulatory procedures were applied to the projected 2016 stock abundances. The completion of PRE I is the initial step in developing and evaluating the full suite of preseason alternatives.

Following completion of the first two reports, the Council met in Sacramento, CA, from March 9 to 14, 2016, to develop 2016 management alternatives for proposal to the public. The Council proposed three alternatives for commercial and recreational fisheries management for analysis and public comment. These alternatives consisted of various combinations of management measures designed to protect weak stocks of coho and Chinook salmon, and to provide for ocean harvests of more abundant stocks. After the March Council meeting, the Council's STT and staff economist prepared a third report, ''Preseason Report II Proposed Alternatives and Environmental Assessment Part 2 for 2016 Ocean Salmon Fishery Regulations'' (PRE II), which analyzes the effects of the proposed 2016 management alternatives.

Public hearings, sponsored by the Council, to receive testimony on the proposed alternatives were held on March 28, 2016, in Westport, WA, and Coos Bay, OR; and on March 29, 2016, in Fort Bragg, CA. The States of

Washington, Oregon, and California sponsored meetings in various forums that also collected public testimony, which was then presented to the Council by each state's Council representative. The Council also received public testimony at both the March and April meetings and received written comments at the Council office.

The Council met from April 9 to 14, 2016, in Vancouver, WA, to adopt its final 2016 salmon management recommendations. Following the April Council meeting, the Council's STT and staff economist prepared a fourth report, ''Preseason Report III Analysis of Council-Adopted Management Measures for 2016 Ocean Salmon Fisheries'' (PRE III), which analyzes the environmental and socio-economic effects of the Council's final recommendations. After the Council took final action on the annual ocean salmon specifications in April, it transmitted the recommended management measures to NMFS, published them in its newsletter, and also posted them on the Council Web site (*www.pcouncil.org*).

National Environmental Policy Act (NEPA)

The EA for this action comprises the Council's documents described above (PRE I, PRE II, and PRE III), providing analysis of environmental and socioeconomic effects under NEPA. The EA and its related Finding of No Significant Impact (FONSI) are posted on the NMFS West Coast Region Web site (*www.westcoast.fisheries.noaa.gov*).

Resource Status

Stocks of Concern

The need to meet Endangered Species Act (ESA) consultation requirements and obligations of the Pacific Salmon Treaty (PST) between the U.S. and Canada for several stocks, as well as conservation objectives detailed in the FMP, will shape salmon fisheries in 2016, and several stocks will constrain fishing in 2016.

Fisheries south of Cape Falcon, OR, are limited in 2016 primarily by the low abundance forecast of Klamath River fall Chinook salmon (KRFC) and concern for the status of ESA-listed Sacramento River winter Chinook salmon (SRWC). Fisheries north of Cape Falcon are limited primarily by the extremely low abundance forecasts for several stocks of coho salmon, primarily from the Washington coast and Puget Sound. At the start of the preseason planning process for the 2016 management season, NMFS provided a letter to the Council, dated March 7, 2016, summarizing limits to impacts on ESA-listed species for 2016, based on existing biological opinions and 2016 abundance information, as required by the Salmon FMP. The limitations imposed in order to protect these stocks are described below. The alternatives and the Council's recommended management measures for 2015 were designed to avoid exceeding these limitations.

Sacramento River winter Chinook salmon (SRWC): In 2010, NMFS consulted under ESA section 7 and provided guidance to the Council regarding the effects of Council area fisheries on SRWC, ESA-listed as endangered. NMFS completed a biological opinion that includes a reasonable and prudent alternative (RPA) to avoid jeopardizing the continued existence of this evolutionarily significant unit (ESU). The RPA included management-area-specific fishing season openings and closures, and minimum size limits for both commercial and recreational fisheries. It also directed NMFS to develop a second component to the RPA—an abundance-based management (ABM) framework. In 2012, NMFS implemented this ABM framework which supplements the above management restrictions with maximum allowable impact rates that apply when abundance is low, based on the three-year geometric mean spawning escapement of SRWC. Using the methodology specified in the ABM framework, the age-3 impact rate on SRWC in 2016 fisheries south of Point Arena recommended by NMFS would be limited to a maximum of 19.9 percent. However, as in 2015, the Council expressed concern that the methodology used to recommend that impact rate is retrospective in nature and may not be responsive to the affects of recent environmental events on salmon survival and productivity, including the perilously high mortality rates of out-migrating SRWC smolts in recent years due to warm water conditions caused by drought in California. The Council has formed a workgroup to develop new scientific methodology to incorporate information about future SRWC abundance into fishery management; however, that new methodology is not yet available. For 2016, the Council recommended precautionary management measures including time and area restrictions based on data presented by the California Department of Fish and Wildlife (CDFW) regarding SRWC encounters in the fishery resulting in an impact rate for SRWC of 12.8 percent. Conservation measures for SRWC will constrain 2016 salmon fisheries south of Cape Falcon.

California Coastal Chinook salmon (CCC): NMFS last consulted under ESA section 7 regarding the effects of Council area fisheries on CCC in 2005. Klamath River fall Chinook (KRFC) are used as a surrogate to set limits on ocean harvest impacts on CCC. The biological opinion requires that management measures result in a KRFC age-4 ocean harvest rate of no greater than 16 percent. Conservation measures for CCC will not constrain 2016 salmon fisheries south of Cape Falcon.

Klamath River fall Chinook salmon (KRFC): KRFC is not an ESA-listed stock; however, forecast abundance for this stock in 2016 is one-third of the 2015 forecast. To comply with the FMP's harvest control rule for this stock, fisheries south of Cape Falcon will be constrained in 2016 to meet the *de minimis* exploitation rate of 0.25 on KRFC.

Lower Columbia River Chinook salmon (LCR Chinook): In 2012, NMFS consulted under ESA section 7 and issued a biological opinion that applies to fisheries beginning in 2012, concluding that the proposed fisheries, if managed consistent with the terms of the biological opinion, are not likely to jeopardize the continued existence of LCR Chinook salmon. The LCR Chinook salmon ESU is comprised of a spring component, a ''far-north'' migrating bright component, and a component of north migrating tules. The bright and tule components both have fall run timing. There are twenty-one separate populations within the tule component of this ESU. Unlike the spring or bright populations of the ESU, LCR tule populations are caught in large numbers in Council fisheries, as well as fisheries to the north and in the Columbia River. Therefore, this component of the ESU is the one most likely to constrain Council fisheries in the area north of Cape Falcon, Oregon. Under the 2012 biological opinion, NMFS uses an ABM framework to set annual exploitation rates for LCR tule Chinook salmon below Bonneville Dam. Applying the ABM framework to the 2016 preseason abundance forecast, the LCR tule exploitation rate is limited to a maximum of 41 percent. In 2016, LCR Chinook will not constrain salmon fisheries.

Lower Columbia River natural coho (LCR coho): In 2015, NMFS conducted an ESA section 7 consultation and issued a biological opinion regarding the effects of Council fisheries and fisheries in the Columbia River on LCR coho. The opinion analyzed the use of

a harvest matrix to manage impacts to LCR coho. Under the matrix the allowable harvest in a given year depends on indicators of marine survival and parental escapement to spawning. In 2016, the marine survival indicator is in the ''medium'' category, while parental escapement is in the ''normal'' category. Under these circumstances, ocean salmon fisheries under the Council's jurisdiction in 2016, and commercial and recreational salmon fisheries in the mainstem Columbia River below Bonneville Dam, including select area fisheries (*e.g.,* Youngs Bay), must be managed subject to a total exploitation rate limit on LCR coho not to exceed 18 percent. In 2016, LCR coho will somewhat constrain salmon fisheries.

Thompson River coho: Interior Fraser (Thompson River) coho, a Canadian stock, continues to be depressed, remaining in the ''low'' status category under the PST; under these circumstances, the PST and Salmon FMP require a maximum 10.0 percent total U.S. exploitation rate on this stock. Meeting PST and Salmon FMP conservation requirements for Thompson River coho will not constrain 2016 salmon fisheries north of Cape Falcon.

Puget Sound Chinook salmon: Impacts on threatened Puget Sound Chinook from Council-managed fisheries are addressed through a 2004 biological opinion. Generally, these impacts are quite low and well within the range contemplated in the 2004 opinion. However, because Puget Sound Chinook are also impacted by fisheries in Puget Sound and associated freshwater fisheries (collectively referred to as ''inside'' fisheries), the Council and NMFS usually consider the impacts of Council-area and inside fisheries on Puget Sound Chinook together, and they base their analysis of the combined impacts on a package of Puget Sound fisheries to which the State of Washington and Indian tribes with treaty rights to fish in Puget Sound have agreed through a negotiation process that runs concurrent with the Council's salmon season planning process. In 2016, the state and tribes with treaty rights to fish for salmon in Puget Sound have been unable to agree to a package of Puget Sound fisheries. However, the State and tribes did agree to conservation objectives for each stock of salmon included in the Puget Sound Chinook ESU. These conservation objectives are very similar to those for past years; and NMFS has determined in biological opinions covering Puget Sound fisheries in recent years that fisheries with impacts that do not exceed those past conservation objectives are not likely to jeopardize the continued existence of the ESU. The state and tribes provided a commitment to the Council during its deliberation on the final ocean package that they would manage Puget Sound fisheries in combination with ocean fishery impacts to stay within these conservation objectives. Given this commitment, and the relatively minor impacts of Council-area fisheries on Puget Sound Chinook stocks consistent with the 2004 opinion, it is highly likely that the combined fishery impacts will be within NMFS' ESA guidance as described in NMFS' March 7, 2016, letter to the Council outlining the ESA requirements for 2016.

Queets River coho: Queets River coho are not ESA-listed. However, the 2016 abundance forecast for this stock is below the FMP conservation objective for escapement (projected abundance of 3,500, conservation objective is escapement of 5,800). Queets River coho, and in combination with other Washington coastal coho stocks, will severely constrain all salmon fisheries north of Cape Falcon, Oregon.

Grays Harbor natural coho: Grays Harbor coho are not ESA-listed. However, the 2016 abundance forecast for this stock is very close to the FMP conservation objective for escapement (projected abundance of 35,694, conservation objective is escapement of 35,400); therefore, it is likely that this stock will not meet the FMP conservation objective for escapement in 2016. Grays Harbor coho, in combination with other Washington coastal coho stocks, will severely constrain all salmon fisheries north of Cape Falcon, Oregon.

Hoh coho: Hoh coho are not ESA-listed. However, projected abundance of this stock is extremely close to the FMP conservation objective for escapement in 2016 (projected abundance of 2,100, conservation objective is escapement of 2,000). Hoh coho, in combination with other Washington coastal coho stocks, will severely constrain all salmon fisheries north of Cape Falcon, Oregon.

Quillayute fall coho: Quillayute fall coho are not ESA-listed. However, the 2016 abundance forecast for this stock is below the FMP conservation objective for escapement (projected abundance of 4,500, conservation objective is escapement of 6,300). Quillayute fall coho, in combination with other Washington coastal coho stocks, will severely constrain all salmon fisheries north of Cape Falcon, Oregon.

Puget Sound coho: Coho stocks from Puget Sound are impacted by fisheries in marine and inland waters including British Columbia, Washington coast, Salish Sea (including the Strait of Juan de Fuca and Puget Sound), and rivers that connect to Puget Sound. These fisheries are managed by multiple entities including the Pacific Salmon Commission, the Council, and the State of Washington and Treaty Tribes through the North of Falcon process. The Council considers the impacts of all fisheries on these stocks to avoid exceeding the exploitation rates allowed under the Salmon FMP. Abundance forecasts for four stocks of coho from Puget Sound in 2016 place these stocks in the Critical abundance-based status category, which results in an exploitation rate ceiling for southern U.S. fisheries of 10 percent under both the salmon FMP and the provisions of the PST. Therefore, the Council adopted management measures that would limit impacts from U.S. ocean and inside fisheries to 10 percent exploitation rate for the following Puget Sound coho stocks in 2016: Skagit, Stillaguamish, Snohomish, and Strait of Juan de Fuca. The state and tribes provided a commitment to the Council during its deliberation on the final ocean package that they would manage Puget Sound fisheries in combination with ocean fishery impacts to stay within the 10 percent exploitation rate in 2016. These stocks are not ESA-listed, and fisheries north of Cape Falcon, OR, will not be constrained to meet conservation objectives for Puget Sound coho stocks due to the low impact of Council-area fisheries on these stocks.

Annual Catch Limits and Status Determination Criteria

Annual Catch Limits (ACLs) are set for two Chinook salmon stocks, Sacramento River fall Chinook (SRFC) and KRFC, and one coho stock, Willapa Bay natural coho. The Chinook salmon stocks are indicator stocks for the Central Valley Fall Chinook complex and the Southern Oregon/Northern California Chinook complex, respectively. The Far North Migrating Coastal Chinook complex includes a group of Chinook salmon stocks that are caught primarily in fisheries north of Cape Falcon, Oregon, and other fisheries that occur north of the U.S./Canada border. No ACL is set for these stocks because they are managed according to the PST with Canada. Other Chinook salmon stocks caught in fisheries north of Cape Falcon are ESA-listed or hatchery produced, and are managed consistent with ESA consultations or hatchery goals. Willapa Bay natural coho is the only coho stock for which an ACL is set, as the other coho stocks in the FMP are either ESA-listed,

hatchery produced, or managed under the PST.

ACLs for salmon stocks are escapement-based, which means they establish a number of adults that must escape the fisheries to return to the spawning grounds. ACLs are set based on the annual abundance projection and a fishing rate reduced to account for scientific uncertainty. The abundance forecasts for 2016 are described in more detail below in the ''Management Measures for 2016 Fisheries'' section of this final rule. For SRFC in 2016, the overfishing limit (OFL) is S_{OFL} = 299,609 (projected abundance) multiplied by 1 − F_{MSY} (1 − 0.78) or 65,914 returning spawners (F_{MSY} is the fishing mortality rate that would result in maximum sustainable yield − MSY). S_{ABC} is 299,609 multiplied by 1 − F_{ABC} (1 − 0.70) (F_{MSY} reduced for scientific uncertainty = 0.70) or 89,883. The S_{ACL} is set equal to $S_{ABC,}$ *i.e,* 89,883 spawners. For KRFC in 2016, S_{OFL} is 41,211 (abundance projection) multiplied by 1 − F_{MSY} (1 − 0.71), or 11,951 returning spawners. S_{ABC} is 41,211 multiplied by 1 − F_{ABC} (1 − 0.68) (F_{MSY} reduced for scientific uncertainty = 0.68) or 13,188 returning spawners. S_{ACL} is set equal to $S_{ABC,}$ *i.e.,* 13,188 spawners. For Willapa Bay natural coho in 2016, the overfishing limit (OFL) is S_{OFL} = 39,516 (projected abundance) multiplied by 1 − F_{MSY} (1 − 0.74) or 10,274 returning spawners. S_{ABC} is 39,516 multiplied by 1 − F_{ABC} (1 − 0.70) (F_{MSY} reduced for scientific uncertainty = 0.70) or 11,854. S_{ACL} is set equal to $S_{ABC,}$ *i.e.,* 11,854 spawners.

As explained in more detail above under ''Stocks of Concern,'' fisheries north and south of Cape Falcon, are constrained by impact limits necessary to protect ESA-listed salmon stocks including SRWC and Puget Sound Chinook, as well as KRFC, Queets, Grays Harbor, Hoh, Quillayute fall, Skagit, Stillaguamish, Snohomish and Strait of Juan de Fuca coho which are not ESA-listed. For 2016, projected abundance of the three stocks with ACLs (SRFC, KRFC, and Willapa Bay natural coho), in combination with the constraints for ESA-listed and non-ESA-listed stocks, are expected to result in escapements greater than required to meet the ACLs for all three stocks with defined ACLs.

Emergency Rule

The Council's final recommendation for the ocean salmon fishing seasons that commence May 1, 2016, deviate from the FMP specifically with regard to not meeting FMP escapement goals for several stocks of coho and in setting the recreational fishery allocations north and south of Leadbetter Point, Oregon. As discussed above, two coastal coho stocks have abundance projections that do not meet FMP conservation objectives for escapement, even without fishing. Two additional coastal coho stocks have abundance forecasts that are extremely close to the FMP conservation objective for escapement. To respond to this circumstance, the Council has recommended fisheries that would prohibit coho retention north of Leadbetter Point, Washington (about 10 miles north of the Columbia River) and would allow only limited fisheries targeting Chinook in that area, well below what might be allowed if coho stocks were healthy. The following stocks will not meet their FMP conservation objectives for escapement, even without fishing impacts:

- *Queets:*
  FMP conservation objective: 5,800 − 14,500 escapement (S_{MSY} = 5,800)
  Preseason abundance estimate: 3,500
- *Quillayute fall:*
  FMP conservation objective: 6,300 − 15,800 escapement (S_{MSY} = 6,300)
  Preseason abundance estimate: 4,500

The preseason forecasts for these stocks are at unprecedented low levels. The Council's Salmon Technical Team (STT) expressed concern that unusually warm ocean temperatures are affecting ocean productivity, leading to adverse impacts to coho stocks. Coastal and Puget Sound Chinook stocks and Columbia River coho stocks do not appear to be affected to the same extent, and are projected to return in harvestable numbers.

The Council considered three alternative fishery management schemes for the fisheries north of Cape Falcon. One alternative would have allowed coho retention north of Leadbetter Point, one alternative would have allowed Chinook fishing only north of Leadbetter Point, with incidental impacts to coho, and one alternative would have closed fisheries north of Leadbetter Point completely. The Council's state and tribal representatives, and industry advisory committee, supported consideration of these three alternatives. The Council's final recommended management measures fall between the second and third alternatives in terms of impacts to coho. These management measures reflect agreement between the State of Washington and coastal treaty tribes on temporary escapement goals for combined ocean fisheries and fisheries landward of the EEZ; the projected impacts of the combined fisheries are managed such that the affected stocks meet these escapement goals. The Council's recommended management measures would allow very limited Chinook fishing north of Leadbetter Point—approximately 50 percent of the Chinook quota for 2015 despite projected Chinook abundance similar to 2015. Retention of coho would be prohibited, thus impacts to coho would be incidental to fishing for Chinook. The Council voted unanimously to adopt these measures, and members spoke at length about the need to conserve coho stocks while mitigating to the extent possible the otherwise severe impacts on coastal communities.

The proposed fisheries have minimal impacts on the affected coho stocks and are not expected to jeopardize the capacity of the fishery to produce maximum sustainable yield on a continuing basis. The FMP defines overfishing and overfished status for these stocks. None would be subject to overfishing under the proposed management measures, in fact the overfishing limits in the FMP are much higher than the expected impact rates (50–60 percent MFMTs as opposed to 1–10 percent projected fishery impacts). All but one of the stocks are expected to avoid ''overfished'' or ''approaching overfished'' status with the proposed fisheries. The FMP defines ''overfished'' status in terms of a three year geometric mean escapement level and whether it is above the minimum stock sized threshold (MSST). Queets, Hoh, and Grays Harbor coho are all expected to have three year geometric mean escapement levels above MSST, when the projected impacts of the Council's recommended fisheries and fisheries landward of the EEZ are taken into account. One stock, Quillayute fall coho, is likely to meet the definition of ''overfished'' in 2017, but this is the case whether or not there are any fishery impacts. The marginal decreases in the abundance of all four stocks expected from the proposed fisheries (*e.g.,* for Quillayute fall, approximately 66 fish out of the forecasted abundance of 4,500 fish may be taken by the proposed fisheries) are not expected to affect the ability of the fisheries to produce MSY on a continuing basis.

The temporary rule for emergency action implements the 2016 annual management measures for the West Coast ocean salmon fisheries for the area from the U.S./Canada border to Cape Falcon, OR, for 180 days, from May 1, 2016, through October 28, 2016 (16 U.S.C. 1855(c)).

Public Comments

The Council invited written comments on developing 2016 salmon management measures in their notice

announcing public meetings and hearings (80 FR 81806, December 31, 2015). At its March meeting, the Council adopted three alternatives for 2016 salmon management measures having a range of quotas, season structure, and impacts, from the least restrictive in Alternative I to the most restrictive in Alternative III. These alternatives are described in detail in PRE II. Subsequently, comments were taken at three public hearings held in March, staffed by representatives of the Council and NMFS. The Council received several written comments directly. The three public hearings were attended by a total of 119 people; 37 people provided oral comments. Comments came from individual fishers, fishing associations, fish buyers, and processors. Written and oral comments addressed the 2016 management alternatives described in PRE II, and generally expressed preferences for a specific alternative or for particular season structures. All comments were included in the Council's briefing book for their April 2016 meeting and were considered by the Council, which includes a representative from NMFS, in developing the recommended management measures transmitted to NMFS on April 22, 2016. In addition to comments collected at the public hearings and those submitted directly to the Council, several people provided oral comments at the April 2016 Council meeting; two further comments were received via email to the Council and to NMFS during and following the April 2016 Council meeting. NMFS also invited comments to be submitted directly to the Council or to NMFS, via the Federal Rulemaking Portal (*www.regulations.gov*) in a notice (81 FR 5101, February 1, 2016). Eight comments were submitted via *www.regulations.gov;* one of which did not address salmon management.

C*omments on alternatives for fisheries north of Cape Falcon.* For fisheries north of Cape Falcon, Alternative I quota levels were favored by commercial and recreational fishery commenters at the public hearing in Westport, WA. Comments on both commercial and recreational fisheries support consistent openings. The economic impacts and opportunities associated with salmon fisheries were stressed by several commenters. Alternative III, which would have closed all fisheries north of Cape Falcon received no support.

Comments on alternatives for fisheries south of Cape Falcon. Most comments that expressed support for a specific alternative supported Alternative I, for both commercial and recreational fisheries. A couple of groups presented new alternatives, each receiving a share of support from those attending the public hearings. The seven relevant comments submitted via the Federal Rulemaking Portal all opposed Alternative III for the recreational fishery in the Monterey area. Public testimony at the April Council meeting was largely opposed to additional conservation restrictions over what were implemented in 2015 to limit fishery impacts on SRWC.

Comments on incidental halibut retention in the commercial salmon fisheries. At its March meeting, the Council identified three alternatives for landing limits for incidentally caught halibut that are retained in the salmon troll fishery. Alternatives I and II each received a single testimony of support at the public hearings.

Comments on NEPA. The Council and NMFS received two emailed comments, one near the end of the April Council meeting and the other after the Council meeting had ended that suggested the action of adopting the 2016 ocean salmon management measures might require analysis in an environmental impact statement. NMFS took these comments into consideration in our NEPA analysis and when finalizing the EA and FONSI. In summary, NMFS disagrees with the commenter's assertions that the impacts of the proposed fisheries are ''significant'' and require an EIS, because these impacts are very low relative to stock abundance and are not expected to jeopardize the ability of the fisheries to produce maximum sustainable yield on a continuing basis. Further, future fisheries will be shaped to respond to new information about the impacts of environmental conditions and human activities on the stocks in the FMP.

The Council, including the NMFS representative, took all of these comments into consideration. The Council's final recommendation generally includes aspects of all three alternatives, while taking into account the best available scientific information and ensuring that fisheries are consistent with ESA consultation standards, ACLs, PST obligations, and tribal fishing rights. These management tools assist the Council in meeting impact limits on weak stocks. The Council adopted alternative III for incidental halibut retention, this alternative provides for more liberal landing limits for halibut than were adopted for 2015 salmon fisheries and April 2016 salmon fisheries (80 FR 25611, May 5, 2015).

Management Measures for 2016 Fisheries

The Council's recommended ocean harvest levels and management measures for the 2016 fisheries are designed to apportion the burden of protecting the weak stocks identified and discussed in PRE I equitably among ocean fisheries and to allow maximum harvest of natural and hatchery runs surplus to inside fishery and spawning needs. NMFS finds the Council's recommendations responsive to the goals of the FMP, the requirements of the resource, and the socioeconomic factors affecting resource users. The recommendations are consistent with the requirements of the MSA, U.S. obligations to Indian tribes with federally recognized fishing rights, and U.S. international obligations regarding Pacific salmon. The Council's recommended management measures also comply with NMFS ESA consultation standards and guidance, for those ESA-listed salmon species that may be affected by Council fisheries. Accordingly, NMFS, through this final rule and temporary rule, approves and implements the Council's recommendations.

North of Cape Falcon, 2016 management measures for non-Indian commercial troll and recreational fisheries have greatly reduced quotas for Chinook and coho salmon compared to 2015. This is due to the fact that Washington coast and Puget Sound coho are forecast to have extremely low abundance and conservation measures are being implemented in all salmon fishing sectors north of Cape Falcon to limit impacts on these stocks. North of Cape Falcon in 2016, commercial fisheries will have no retention of coho salmon and recreational fisheries will have no retention of coho salmon north of Leadbetter Point, WA. Chinook harvest north of Cape Falcon will be approximately one half of the 2015 level for both commercial and recreational fisheries. Chinook impacts in Alaskan and Canadian fisheries on salmon stocks originating north of Cape Falcon are expected to increase slightly for Chinook in 2016 compared with 2015; coho impacts are essentially the same. As noted previously, ESA-listed Puget Sound Chinook will not be constraining to this year's fisheries. Impacts to Thompson River coho from Canada and Puget Sound coho will also not be constraining, due to conservation measures in place to limit fishery impacts to Washington coast coho. The Council recommended a provision prohibiting retention of chum salmon in the ocean salmon fisheries north of Cape

Alava, WA, during August and September to protect ESA-listed Hood Canal summer chum. The Council has recommended such a prohibition since 2002 (67 FR 30616, May 7, 2002). The projected abundance of Willapa Bay natural coho in 2016 is similar to the 2015 projection. Under the management measures in this final rule, and including anticipated in-river impacts, spawning escapement for Willapa Bay natural coho is projected at 37,400, well above the S_{ACL} for this stock.

Recreational fisheries south of Cape Falcon will be directed primarily at Chinook salmon, with opportunity for coho limited to the area between Cape Falcon and the Oregon/California border. Commercial fisheries south of Cape Falcon will be directed at Chinook and have no coho retention. The projected abundance of SRFC in 2016 is about half of the 2015 projection. Under the management measures in this final rule, and including anticipated in-river impacts, spawning escapement for SRFC is projected at 151,100, well above the S_{ACL} for this stock. Projected abundance for KRFC in 2016 is about one-third of 2015, and harvest will be constrained to a *de minimis* level of 25 percent by the harvest control rule. Under the management measures in this final rule, and including anticipated in-river fishery impacts, spawning escapement for KRFC is projected at 30,909, well above the S_{ACL} for this stock.

As discussed above in ''Stocks of Concern,'' NMFS' 2012 RPA for SRWC, together with projected abundance for 2016, limits Council-area fishery impacts to SRWC to 19.9 percent. In deciding on the recommended management measures, the Council additionally considered information on the impacts of ongoing drought on California salmon stocks, particularly SRWC, including the California Department of Fish and Wildlife's (CDFW) estimate of greater than 95 percent mortality of juvenile SRWC from brood years 2014 and 2015 prior to downstream emigration, information developed by CDFW on time and area vulnerability of SRWC to commercial and recreational fisheries, and public testimony on proposed season structure. In response to the information presented by CDFW on the time and area vulnerability of SRWC, the final management measures include specific limits on the fishing seasons south of Pigeon Point, CA, and result in an age-3 ocean impact rate of 12.8 percent in 2016, compared with 17.5 percent in 2015.

The treaty-Indian commercial troll fishery quotas for 2016 are 40,000 Chinook salmon and no coho in ocean management areas and Washington State Statistical Area 4B combined. These quotas are lower than the 60,000 Chinook and 42,500 coho quotas in 2015, for the same reasons discussed above for the non-tribal fishery. The treaty-Indian fishery commercial fisheries include a May and June fishery and a July and August fishery, with a quota of 20,000 Chinook in each fishery.

Management Measures for 2017 Fisheries

The timing of the March and April Council meetings makes it impracticable for the Council to recommend fishing seasons that begin before May 1 of the same year. Therefore, this action also establishes the 2017 fishing seasons that open earlier than May 1. The Council recommended, and NMFS concurs, that the commercial season off Oregon from Cape Falcon to the Oregon/California border, the commercial season off California from Horse Mountain to Point Arena, the recreational season off Oregon from Cape Falcon to Humbug Mountain, and the recreational season off California from Horse Mountain to the U.S./Mexico border will open in 2017 as indicated in the ''Season Description'' section of this document. At the March 2017 meeting, the Council may consider inseason recommendations to adjust the commercial and recreational seasons prior to May 1 in the areas off Oregon and California.

The following sections set out the management regime for the ocean salmon fishery. Open seasons and days are described in Sections 1, 2, and 3 of the 2016 management measures. Inseason closures in the commercial and recreational fisheries are announced on the NMFS hotline and through the U.S. Coast Guard (USCG) Notice to Mariners as described in Section 6. Other inseason adjustments to management measures are also announced on the hotline and through the Notice to Mariners. Inseason actions will also be published in the **Federal Register** as soon as practicable.

The following are the management measures recommended by the Council and approved and implemented here for 2016 and, as specified, for 2017.

Section 1. Commercial Management Measures for 2016 Ocean Salmon Fisheries

Parts A, B, and C of this section contain restrictions that must be followed for lawful participation in the fishery. Part A identifies each fishing area and provides the geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions, and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Cape Falcon

May 1–3, May 6–31, June 3–5, June 10–16, and June 24–30 or 14,000 Chinook, no more than 4,600 of which may be caught in the area between the U.S./Canada border and the Queets River and no more than 4,600 of which may be caught in the area between Leadbetter Pt. and Cape Falcon (C.8). May 1 through May 3 with a landing and possession limit of 40 Chinook per vessel for the open period. Then May 6 through May 31, five days per week, Friday through Tuesday with a landing and possession limit of 40 Chinook per vessel per open period. Then June 3–5, June 10–16, and June 24–30, with a landing and possession limit of 40 Chinook per vessel per open period (C.1, C.6). All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B). Vessels in possession of salmon north of the Queets River may not cross the Queets River line without first notifying Washington Department of Fish and Wildlife (WDFW) at 360–249–1215 with area fished, total Chinook and halibut catch aboard, and destination. Vessels in possession of salmon south of the Queets River may not cross the Queets River line without first notifying WDFW at 360–249–1215 with area fished, total Chinook and halibut catch aboard, and destination. When it is projected that approximately 75 percent of the overall Chinook guideline has been landed, or approximately 75 percent of the Chinook subarea guideline has been landed in the area between the U.S./Canada border and the Queets River, or approximately 75 percent of the Chinook subarea guideline has been landed in the area between Leadbetter Point and Cape Falcon, inseason action will be considered to ensure the guideline is not exceeded. See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). Cape Flattery, Mandatory Yelloweye Rockfish Conservation Area (YRCA), and Columbia Control Zones closed (C.5). Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Under state law, vessels must report their catch on a state fish receiving ticket. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and

deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify Oregon Department of Fish and Wildlife (ODFW) within one hour of delivery or prior to transport away from the port of landing by either calling 541–867–0300 ext. 271 or sending notification via email to *nfalcon.trollreport@state.or.us.* Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

July 8–14, July 22–28, August 1–7, and August 15–23 or 21,000 Chinook, no more than 8,300 of which may be caught in the area between the U.S./Canada border and the Queets River (C.8). Landing and possession limit of 50 Chinook per vessel per open period (C.1). Vessels in possession of salmon north of the Queets River may not cross the Queets River line (see Section 5. Geographical Landmarks) without first notifying WDFW at 360–249–1215 with area fished, total Chinook and halibut catch aboard, and destination. Vessels in possession of salmon south of the Queets River may not cross the Queets River line (see Section 5. Geographical Landmarks) without first notifying WDFW at 360–249–1215 with area fished, total Chinook and halibut catch aboard, and destination. When it is projected that approximately 75 percent of the overall Chinook guideline has been landed, or approximately 75 percent of the Chinook subarea guideline has been landed in the area between the U.S./Canada border to the Queets River, inseason action will be considered to ensure the guideline is not exceeded. All salmon except coho; no chum retention north of Cape Alava, Washington in August and September (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). Mandatory Yelloweye Rockfish Conservation Area, Cape Flattery and Columbia Control Zones, and beginning August 8, Grays Harbor Control Zone closed (C.5, C.6). Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Under state law, vessels must report their catch on a state fish receiving ticket. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to transport away from the port of landing by either calling 541–867–0300 ext. 271 or sending notification via email to *nfalcon.trollreport@state.or.us.* Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

South of Cape Falcon, OR

—Cape Falcon to Humbug Mountain

April 8–30;
May 1–31;
June 5–10, 15–30;
July 8–31;
August 8–12, 18–24;
September 1–7, 15–30;
October 1–31 (C.9.a).

Seven days per week. All salmon except coho (C.4, C.6, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). All vessels fishing in the area must land their fish in the State of Oregon. See gear restrictions and definitions (C.2, C.3) and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay. Beginning September 1, no more than 40 Chinook per vessel per landing week (Thursday through Wednesday). Beginning October 1, open shoreward of the 40 fathom regulatory line (C.5.f).

In 2017, the season will open March 15 for all salmon except coho. Chinook minimum size limit of 28 inches total length. Gear restrictions same as in 2016. This opening could be modified following Council review at its March 2017 meeting.

—Humbug Mountain to Oregon/California Border (Oregon Klamath Management Zone (KMZ))

April 8–30;
May 1–31;
June 5–10 and 15–30 or a 720 Chinook quota;
July 8 through the earlier of July 31 or a 200 Chinook quota (C.9.a).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). Prior to June 1, all fish caught in this area must be landed and delivered in the state of Oregon. See compliance requirements (C.1, C.6) and gear restrictions and definitions (C.2, C.3).

June 5 through July 31 single daily landing and possession limit of 15 Chinook per vessel per day (C.8.f). Any remaining portion of the June Chinook quota may be transferred inseason on an impact neutral basis to the July quota period (C.8.b). All vessels fishing in this area must land and deliver all fish within this area or Port Orford within 24 hours of any closure of this fishery, and prior to fishing outside of this area (C.6). State regulations require fishers landing from any quota managed season in this area to notify ODFW within one hour of delivery or prior to transporting their catch to other locations by calling 541–867–0300 ext. 252 or sending notification via email to *KMZOR.trollreport@state.or.us,* notification shall include vessel name and number, number of salmon by species, location of delivery, and estimated time of delivery.

In 2017, the season will open March 15 for all salmon except coho, with a 28 inch Chinook minimum size limit. This opening could be modified following Council review at its March 2017 meeting.

—Oregon/California Border to Humboldt South Jetty (California KMZ)

September 9 through the earlier of September 27 or a 1,000 Chinook quota (C.9.b).

Five days per week, Friday through Tuesday. All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). Landing and possession limit of 20 Chinook per vessel per day (C.8.f). All fish caught in this area must be landed within the area and within 24 hours of any closure of the fishery and prior to fishing outside the area (C.10). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed (C.5.e). See California State regulations for additional closures adjacent to the Smith and Klamath Rivers. When the fishery is closed between the Oregon/California border and Humbug Mountain and open to the south, vessels with fish on board caught in the open

area off California may seek temporary mooring in Brookings, Oregon, prior to landing in California only if such vessels first notify the Chetco River Coast Guard Station via VHF channel 22A between the hours of 0500 and 2200 and provide the vessel name, number of fish on board, and estimated time of arrival (C.6).

—Humboldt South Jetty to Horse Mt.

Closed.

—Horse Mt. to Point Arena (Fort Bragg)

June 13–30;
August 3–27;
September 1–30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length (B, C.1). All fish must be landed in California. All salmon caught in California prior to September 1 must be landed and offloaded no later than 11:59 p.m., August 30 (C.6). When the California KMZ fishery is open, all fish caught in the area must be landed south of Horse Mountain (C.6). During September, all fish must be landed north of Point Arena (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

In 2017, the season will open April 16–30 for all salmon except coho, with a 27-inch Chinook minimum size limit and the same gear restrictions as in 2016. All fish caught in the area must be landed in the area. This opening could be modified following Council review at its March 2017 meeting.

—Point Arena to Pigeon Point (San Francisco)

May 6–31;
June 13–30;
August 3–28;
September 1–30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length prior to September 1, 26 inches thereafter (B, C.1). All fish must be landed in California. All salmon caught in California prior to September 1 must be landed and offloaded no later than 11:59 p.m., August 30 (C.6). During September, all fish must be landed south of Point Arena (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

—Point Reyes to Point San Pedro (Fall Area Target Zone)

October 3–7 and 10–14.

Five days per week, Monday through Friday. All salmon except coho (C.4, C.7). Chinook minimum size limit of 26 inches total length (B, C.1). All fish caught in this area must be landed between Point Arena and Pigeon Point (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

—Pigeon Point to Point Sur (Monterey North)

May 1–31;
June 1–30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length (B, C.1). All fish must be landed in California. All salmon caught in California prior to September 1 must be landed and offloaded no later than 11:59 p.m., August 30 (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

—Point Sur to U.S./Mexico Border (Monterey South)

May 1–31;
June 1–30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length (B, C.1). All fish must be landed in California. All salmon caught in California prior to September 1 must be landed and offloaded no later than 11:59 p.m., August 30 (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

California State regulations require all salmon be made available to a CDFW representative for sampling immediately at port of landing. Any person in possession of a salmon with a missing adipose fin, upon request by an authorized agent or employee of the CDFW, shall immediately relinquish the head of the salmon to the state (California Fish and Game Code § 8226).

B. Minimum Size (Inches) (See C.1)

Area (when open)	Chinook		Coho		Pink
	Total length	Head-off	Total length	Head-off	
North of Cape Falcon, OR	28.0	21.5			None.
Cape Falcon to OR/CA border	28.0	21.5			None.
OR/CA border to Humboldt South Jetty	28.0	21.5			None.
Horse Mountain to Point Arena	27.0	20.5			None.
Point Arena to Pigeon Point:					
Prior to September 1	27.0	20.5			None.
After September 1	26.0	19.5			None.
Pigeon Point to U.S./Mexico Border	27.0	20.5			None.

Metric equivalents: 28.0 in = 71.1 cm, 27.0 in = 68.6 cm, 26.0 in = 66.0 cm, 21.5 in = 54.6 cm, 20.5 in = 52.1 cm, 19.5 in = 49.5 cm, 16.0 in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size or Other Special Restrictions

All salmon on board a vessel must meet the minimum size, landing/possession limit, or other special requirements for the area being fished and the area in which they are landed if the area is open or has been closed less than 48 hours for that species of salmon. Salmon may be landed in an area that has been closed for a species of salmon more than 48 hours only if they meet the minimum size, landing/possession limit, or other special requirements for the area in which they were caught. Salmon may not be filleted prior to landing.

Any person who is required to report a salmon landing by applicable state law must include on the state landing receipt for that landing both the number and weight of salmon landed by species. States may require fish landing/receiving tickets be kept on board the vessel for 90 days or more after landing to account for all previous salmon landings.

C.2. Gear Restrictions

a. Salmon may be taken only by hook and line using single point, single shank, barbless hooks.

b. Cape Falcon, Oregon, to the Oregon/California border: No more than 4 spreads are allowed per line.

c. Oregon/California border to U.S./Mexico border: No more than 6 lines are allowed per vessel, and barbless circle hooks are required when fishing with bait by any means other than trolling.

C.3. Gear Definitions

Trolling defined: Fishing from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

Troll fishing gear defined: One or more lines that drag hooks behind a moving fishing vessel. In that portion of the fishery management area off Oregon and Washington, the line or lines must be affixed to the vessel and must not be intentionally disengaged from the vessel at any time during the fishing operation.

Spread defined: A single leader connected to an individual lure and/or bait.

Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Vessel Operation in Closed Areas With Salmon on Board

a. Except as provided under C.4.b below, it is unlawful for a vessel to have troll or recreational gear in the water while in any area closed to fishing for a certain species of salmon, while possessing that species of salmon; however, fishing for species other than salmon is not prohibited if the area is open for such species, and no salmon are in possession.

b. When Genetic Stock Identification (GSI) samples will be collected in an area closed to commercial salmon fishing, the scientific research permit holder shall notify NOAA Office of Law Enforcement, USCG, CDFW, WDFW, and Oregon State Police at least 24 hours prior to sampling and provide the following information: The vessel name, date, location and time collection activities will be done. Any vessel collecting GSI samples in a closed area shall not possess any salmon other than those from which GSI samples are being collected. Salmon caught for collection of GSI samples must be immediately released in good condition after collection of samples.

C.5. Control Zone Definitions

a. *Cape Flattery Control Zone*—The area from Cape Flattery (48°23′00″ N. lat.) to the northern boundary of the U.S. EEZ; and the area from Cape Flattery south to Cape Alava (48°10′00″ N. lat.) and east of 125°05′00″ W. long.

b. *Mandatory Yelloweye Rockfish Conservation Area*—The area in Washington Marine Catch Area 3 from 48°00.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°16.50′ W. long. to 48°00.00′ N. lat.; 125°16.50′ W. long. and connecting back to 48°00.00′ N. lat.; 125°14.00′ W. long.

c. *Grays Harbor Control Zone*—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124°07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46°55′36″ N. lat., 124°10′51″ W. long.).

d. *Columbia Control Zone*—An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.), and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

e. *Klamath Control Zone*—The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately 6 nautical miles north of the Klamath River mouth); on the west by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and on the south by 41°26′48″ N. lat. (approximately 6 nautical miles south of the Klamath River mouth).

f. Waypoints for the 40 fathom regulatory line from Cape Falcon to Humbug Mountain (50 CFR 660.71(k)).

(12) 45°46.00′ N. lat., 124°04.49′ W. long.;
(13) 45°44.34′ N. lat., 124°05.09′ W. long.;
(14) 45°40.64′ N. lat., 124°04.90′ W. long.;
(15) 45°33.00′ N. lat., 124°04.46′ W. long.;
(16) 45°32.27′ N. lat., 124°04.74′ W. long.;
(17) 45°29.26′ N. lat., 124°04.22′ W. long.;
(18) 45°20.25′ N. lat., 124°04.67′ W. long.;
(19) 45°19.99′ N. lat., 124°04.62′ W. long.;
(20) 45°17.50′ N. lat., 124°04.91′ W. long.;
(21) 45°11.29′ N. lat., 124°05.20′ W. long.;
(22) 45°05.80′ N. lat., 124°05.40′ W. long.;
(23) 45°05.08′ N. lat., 124°05.93′ W. long.;
(24) 45°03.83′ N. lat., 124°06.47′ W. long.;
(25) 45°01.70′ N. lat., 124°06.53′ W. long.;
(26) 44°58.75′ N. lat., 124°07.14′ W. long.;
(27) 44°51.28′ N. lat., 124°10.21′ W. long.;
(28) 44°49.49′ N. lat., 124°10.90′ W. long.;
(29) 44°44.96′ N. lat., 124°14.39′ W. long.;
(30) 44°43.44′ N. lat., 124°14.78′ W. long.;
(31) 44°42.26′ N. lat., 124°13.81′ W. long.;
(32) 44°41.68′ N. lat., 124°15.38′ W. long.;
(33) 44°34.87′ N. lat., 124°15.80′ W. long.;
(34) 44°33.74′ N. lat., 124°14.44′ W. long.;
(35) 44°27.66′ N. lat., 124°16.99′ W. long.;
(36) 44°19.13′ N. lat., 124°19.22′ W. long.;
(37) 44°15.35′ N. lat., 124°17.38′ W. long.;
(38) 44°14.38′ N. lat., 124°17.78′ W. long.;
(39) 44°12.80′ N. lat., 124°17.18′ W. long.;
(40) 44°09.23′ N. lat., 124°15.96′ W. long.;
(41) 44°08.38′ N. lat., 124°16.79′ W. long.;
(42) 44°08.30′ N. lat., 124°16.75′ W. long.;
(43) 44°01.18′ N. lat., 124°15.42′ W. long.;
(44) 43°51.61′ N. lat., 124°14.68′ W. long.;
(45) 43°42.66′ N. lat., 124°15.46′ W. long.;
(46) 43°40.49′ N. lat., 124°15.74′ W. long.;
(47) 43°38.77′ N. lat., 124°15.64′ W. long.;
(48) 43°34.52′ N. lat., 124°16.73′ W. long.;
(49) 43°28.82′ N. lat., 124°19.52′ W. long.;
(50) 43°23.91′ N. lat., 124°24.28′ W. long.;
(51) 43°20.83′ N. lat., 124°26.63′ W. long.;
(52) 43°17.96′ N. lat., 124°28.81′ W. long.;
(53) 43°16.75′ N. lat., 124°28.42′ W. long.;
(54) 43°13.97′ N. lat., 124°31.99′ W. long.;
(55) 43°13.72′ N. lat., 124°33.25′ W. long.;
(56) 43°12.26′ N. lat., 124°34.16′ W. long.;
(57) 43°10.96′ N. lat., 124°32.33′ W. long.;

(58) 43°05.65′ N. lat., 124°31.52′ W. long.;
(59) 42°59.66′ N. lat., 124°32.58′ W. long.;
(60) 42°54.97′ N. lat., 124°36.99′ W. long.;
(61) 42°53.81′ N. lat., 124°38.57′ W. long.;
(62) 42°50.00′ N. lat., 124°39.68′ W. long.;
(63) 42°49.13′ N. lat., 124°39.70′ W. long.;
(64) 42°46.47′ N. lat., 124°38.89′ W. long.;
(65) 42°45.74′ N. lat., 124°38.86′ W. long.;
(66) 42°44.79′ N. lat., 124°37.96′ W. long.;
(67) 42°45.01′ N. lat., 124°36.39′ W. long.;
(68) 42°44.14′ N. lat., 124°35.17′ W. long.;
(69) 42°42.14′ N. lat., 124°32.82′ W. long.;
(70) 42°40.50′ N. lat., 124°31.98′ W. long.;

C.6. Notification When Unsafe Conditions Prevent Compliance With Regulations

If prevented by unsafe weather conditions or mechanical problems from meeting special management area landing restrictions, vessels must notify the U.S. Coast Guard and receive acknowledgment of such notification prior to leaving the area. This notification shall include the name of the vessel, port where delivery will be made, approximate amount of salmon (by species) on board, the estimated time of arrival, and the specific reason the vessel is not able to meet special management area landing restrictions.

In addition to contacting the U.S. Coast Guard, vessels fishing south of the Oregon/California border must notify CDFW within one hour of leaving the management area by calling 800–889–8346 and providing the same information as reported to the U.S. Coast Guard. All salmon must be offloaded within 24 hours of reaching port.

C.7. Incidental Halibut Harvest

During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license by the International Pacific Halibut Commission may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. When halibut are caught and landed incidental to commercial salmon fishing by an IPHC license holder, any person who is required to report the salmon landing by applicable state law must include on the state landing receipt for that landing both the number of halibut landed, and the total dressed, head-on weight of halibut landed, in pounds, as well as the number and species of salmon landed.

License applications for incidental harvest must be obtained from the IPHC (phone: 206–634–1838). Applicants must apply prior to mid-March 2017 for 2017 permits (exact date to be set by the IPHC in early 2017). Incidental harvest is authorized only during April, May, and June of the 2016 troll seasons and after June 30 in 2016 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825 or 206–526–6667). WDFW, ODFW, and CDFW will monitor landings. If the landings are projected to exceed the IPHC's 34,123 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

May 1, 2016, through December 31, 2016, and April 1–30, 2017, license holders may land or possess no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 20 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on). IPHC license holders must comply with all applicable IPHC regulations.

Incidental Pacific halibut catch regulations in the commercial salmon troll fishery adopted for 2016, prior to any 2016 inseason action, will be in effect when incidental Pacific halibut retention opens on April 1, 2017 unless otherwise modified by inseason action at the March 2017 Council meeting.

a. ''C-shaped'' yelloweye rockfish conservation area is an area to be voluntarily avoided for salmon trolling. NMFS and the Council request salmon trollers voluntarily avoid this area in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (Washington marine area 3), with the following coordinates in the order listed:

48°18′ N. lat.; 125°18′ W. long.;
48°18′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 125°18′ W. long.;
and connecting back to 48°18′ N. lat.;
125°18′ W. long.

C.8. Inseason Management

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Chinook remaining from the May through June non-Indian commercial troll harvest guideline north of Cape Falcon may be transferred to the July through September harvest guideline if the transfer would not result in exceeding preseason impact expectations on any stocks.

b. Chinook remaining from the June non-Indian commercial troll quotas in the Oregon KMZ may be transferred to the Chinook quota for the July open period if the transfer would not result in exceeding preseason impact expectations on any stocks.

c. NMFS may transfer fish between the recreational and commercial fisheries north of Cape Falcon if there is agreement among the areas' representatives on the Salmon Advisory Subpanel (SAS), and if the transfer would not result in exceeding preseason impact expectations on any stocks.

d. At the March 2017 meeting, the Council will consider inseason recommendations for special regulations for any experimental fisheries (proposals must meet Council protocol and be received in November 2016).

e. If retention of unmarked coho is permitted by inseason action, the allowable coho quota will be adjusted to ensure preseason projected impacts on all stocks is not exceeded.

f. Landing limits may be modified inseason to sustain season length and keep harvest within overall quotas.

C.9. State Waters Fisheries

Consistent with Council management objectives:

a. The State of Oregon may establish additional late-season fisheries in state waters.

b. The State of California may establish limited fisheries in selected state waters. Check state regulations for details.

C.10. For the purposes of California Fish and Game Code, Section 8232.5, the definition of the Klamath Management Zone (KMZ) for the ocean salmon season shall be that area from Humbug Mountain, Oregon, to Horse Mountain, California.

Section 2. Recreational Management Measures for 2016 Ocean Salmon Fisheries

Parts A, B, and C of this section contain restrictions that must be

followed for lawful participation in the fishery. Part A identifies each fishing area and provides the geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Cape Alava (Neah Bay Subarea)

July 1 through earlier of August 21 or a subarea guideline of 6,200 Chinook (C.6).

Seven days per week. All salmon except coho; no chum beginning August 1; two fish per day (C.1). Beginning August 1, Chinook non-retention east of the Bonilla-Tatoosh line (C.4.a) during Council managed ocean fishery. Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Cape Alava to Queets River (La Push Subarea)

July 1 through earlier of August 21 or a subarea guideline of 2,000 Chinook (C.6).

Seven days per week. All salmon except coho; two fish per day. Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Queets River to Leadbetter Point (Westport Subarea)

July 1 through earlier of August 21 or a subarea guideline of 16,600 Chinook (C.6).

Seven days per week. All salmon except coho; one fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Grays Harbor Control Zone closed beginning August 8 (C.4.b). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Leadbetter Point to Cape Falcon (Columbia River Subarea)

July 1 through earlier of August 31 or 18,900 marked coho subarea quota with a subarea guideline of 10,200 Chinook (C.6).

Seven days per week. All salmon; two fish per day, no more than one of which can be a Chinook (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Columbia Control Zone closed (C.4.c). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

South of Cape Falcon, OR

—Cape Falcon to Humbug Mt.

March 15 through October 31 (C.6), except as provided below during the all-salmon mark-selective and September non-mark-selective coho fisheries.

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

• Non-mark-selective coho fishery: September 3 through the earlier of September 30 or a landed catch of 7,500 coho (C.5).

Seven days per week. All salmon, two fish per day (C.1). See minimum size limits (B) and gear restrictions and definitions (C.2, C.3).

The all salmon except coho season reopens the earlier of October 1 or attainment of the coho quota (C.5).

In 2017, the season between Cape Falcon and Humbug Mountain will open March 15 for all salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2016 (C.2, C.3).

Fishing in the Stonewall Bank yelloweye rockfish conservation area restricted to trolling only on days the all depth recreational halibut fishery is open (call the halibut fishing hotline 1–800–662–9825 for specific dates) (C.3.b, C.4.d).

—Cape Falcon to Oregon/California Border

All-salmon mark-selective coho fishery: June 25 through the earlier of August 7 or a landed catch of 26,000 marked coho (C.5).

Seven days per week. All salmon, two fish per day. All retained coho must be marked with a healed adipose fin clip (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

The all salmon except coho season reopens the earlier of August 8 or attainment of the coho quota.

Fishing in the Stonewall Bank Yelloweye Rockfish Conservation Area restricted to trolling only on days the all depth recreational halibut fishery is open (call the halibut fishing hotline 1–800–662–9825 for specific dates) (C.3.b, C.4.d).

—Humbug Mt. to Oregon/California Border (Oregon KMZ)

May 28 through August 7 and September 3 through September 5; except as provided above during the all-salmon mark-selective coho fishery (C.6).

Seven days per week. All salmon except coho, except as noted above in the all-salmon mark-selective coho fishery; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

—Oregon/California Border to Horse Mountain (California KMZ)

May 16 through May 31, June 16 through June 30, July 16 through August 16, and September 1 through September 5 (C.6).

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed in August (C.4.e). See California State regulations for additional closures adjacent to the Smith, Eel, and Klamath Rivers.

—Horse Mountain to Point Arena (Fort Bragg)

April 2 through November 13 (C.6).

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3).

In 2017, season opens April 1 for all salmon except coho; two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B); and the same gear restrictions as in 2016 (C.2, C.3).

—Point Arena to Pigeon Point (San Francisco)

April 2 through October 31 (C.6).

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length through April 30, 20 inches thereafter (B). See gear restrictions and definitions (C.2, C.3).

In 2017, season opens April 1 for all salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2016 (C.2, C.3).

—Pigeon Point to Point Sur (Monterey North)

April 2 through July 15 (C.6).

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

In 2017, season opens April 1 for all salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2016 (C.2, C.3).

—Point Sur to U.S./Mexico Border (Monterey South)

April 2 through May 31 (C.6).

Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

In 2017, season opens April 1 for all salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2016 (C.2, C.3).

California State regulations require all salmon be made available to a CDFW representative for sampling immediately at port of landing. Any person in possession of a salmon with a missing adipose fin, upon request by an authorized agent or employee of the CDFW, shall immediately relinquish the head of the salmon to the state (California Code of Regulations Title 14 Section 1.73).

B. Minimum Size (Total Length in Inches) (See C.1)

Area (when open)	Chinook	Coho	Pink
North of Cape Falcon	24.0	16.0	None.
Cape Falcon to Humbug Mountain	24.0	16.0	None.
Humbug Mt. to OR/CA border	24.0	16.0	None.
OR/CA border to Horse Mountain	20.0	.....	20.0.
Horse Mountain to Point Arena	20.0	.....	20.0.
Point Arena to Pigeon Point			
Through April 30	24.0	.....	24.0.
After April 30	20.0	.....	20.0.
Pigeon Point to U.S./Mexico border	24.0	.....	24.0.

Metric equivalents: 24.0 in = 61.0 cm, 20.0 in = 50.8 cm, and 16.0 in = 40.6 cm.

C. Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size and Other Special Restrictions

All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught. Salmon may not be filleted prior to landing.

Ocean Boat Limits: Off the coast of Washington, Oregon, and California, each fisher aboard a vessel may continue to use angling gear until the combined daily limits of Chinook and coho salmon for all licensed and juvenile anglers aboard have been attained (additional state restrictions may apply).

C.2. Gear Restrictions

Salmon may be taken only by hook and line using barbless hooks. All persons fishing for salmon, and all persons fishing from a boat with salmon on board, must meet the gear restrictions listed below for specific areas or seasons.

a. U.S./Canada border to Point Conception, California: No more than one rod may be used per angler; and no more than two single point, single shank barbless hooks are required for all fishing gear. [Note: ODFW regulations in the state-water fishery off Tillamook Bay may allow the use of barbed hooks to be consistent with inside regulations.]

b. Horse Mountain, California, to Point Conception, California: Single point, single shank, barbless circle hooks (see gear definitions below) are required when fishing with bait by any means other than trolling, and no more than two such hooks shall be used. When angling with two hooks, the distance between the hooks must not exceed five inches when measured from the top of the eye of the top hook to the inner base of the curve of the lower hook, and both hooks must be permanently tied in place (hard tied). Circle hooks are not required when artificial lures are used without bait.

C.3. Gear Definitions

a. Recreational fishing gear defined: Off Oregon and Washington, angling tackle consists of a single line that must be attached to a rod and reel held by hand or closely attended; the rod and reel must be held by hand while playing a hooked fish. No person may use more than one rod and line while fishing off Oregon or Washington. Off California, the line must be attached to a rod and reel held by hand or closely attended; weights directly attached to a line may not exceed four pounds (1.8 kg). While fishing off California north of Point Conception, no person fishing for salmon, and no person fishing from a boat with salmon on board, may use more than one rod and line. Fishing includes any activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.

b. Trolling defined: Angling from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

c. Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Control Zone Definitions

a. The Bonilla-Tatoosh Line: A line running from the western end of Cape Flattery to Tatoosh Island Lighthouse (48°23′30″ N. lat., 124°44′12″ W. long.) to the buoy adjacent to Duntze Rock (48°24′37″ N. lat., 124°44′37″ W. long.), then in a straight line to Bonilla Point (48°35′39″ N. lat., 124°42′58″ W. long.) on Vancouver Island, British Columbia.

b. Grays Harbor Control Zone—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124° 07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46°55′36″ N. lat., 124°10′51″ W. long.).

c. Columbia Control Zone: An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09′ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a

line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long. and then along the north jetty to the point of intersection with the Buoy #10 line; and on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Stonewall Bank Yelloweye Rockfish Conservation Area: The area defined by the following coordinates in the order listed:

44°37.46′ N. lat.; 124°24.92′ W. long.

44°37.46′ N. lat.; 124°23.63′ W. long.

44°28.71′ N. lat.; 124°21.80′ W. long.

44°28.71′ N. lat.; 124°24.10′ W. long.

44°31.42′ N. lat.; 124°25.47′ W. long.

and connecting back to 44°37.46′ N. lat.; 124°24.92′ W. long.

e. Klamath Control Zone: The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately 6 nautical miles north of the Klamath River mouth); on the west by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and, on the south by 41°26′48″ N. lat. (approximately 6 nautical miles south of the Klamath River mouth).

C.5. Inseason Management

Regulatory modifications may become necessary inseason to meet preseason management objectives such as quotas, harvest guidelines, and season duration. In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Actions could include modifications to bag limits, or days open to fishing, and extensions or reductions in areas open to fishing.

b. Coho may be transferred inseason among recreational subareas north of Cape Falcon to help meet the recreational season duration objectives (for each subarea) after conferring with representatives of the affected ports and the Council's SAS recreational representatives north of Cape Falcon, and if the transfer would not result in exceeding preseason impact expectations on any stocks.

c. Chinook and coho may be transferred between the recreational and commercial fisheries north of Cape Falcon if there is agreement among the representatives of the SAS, and if the transfer would not result in exceeding preseason impact expectations on any stocks.

d. Fishery managers may consider inseason action modifying regulations restricting retention of unmarked coho. To remain consistent with preseason expectations, any inseason action shall consider, if significant, the difference between observed and preseason forecasted mark rates. Such a consideration may also include a change in bag limit of two salmon, no more than one of which may be a coho.

C.6. Additional Seasons in State Territorial Waters

Consistent with Council management objectives, the States of Washington, Oregon, and California may establish limited seasons in state waters. Check state regulations for details.

Section 3. Treaty Indian Management Measures for 2016 Ocean Salmon Fisheries

Parts A, B, and C of this section contain requirements that must be followed for lawful participation in the fishery.

A. Season Descriptions

May 1 through the earlier of June 30 or 20,000 Chinook quota.

All salmon except coho. If the Chinook quota is exceeded, the excess will be deducted from the later all-salmon season (C.5). See size limit (B) and other restrictions (C).

July 1 through the earlier of August 31, or 20,000 preseason Chinook quota (C.5). All salmon except coho. See size limit (B) and other restrictions (C).

B. Minimum Size (Inches)

Area (when open)	Chinook		Coho		Pink
	Total	Head-off	Total	Head-off	
North of Cape Falcon	24.0	18.0	.....	.....	None.

Metric equivalents: 24.0 in = 61.0 cm, 18.0 in = 45.7 cm.

C. Requirements, Restrictions, and Exceptions

C.1. Tribe and Area Boundaries

All boundaries may be changed to include such other areas as may hereafter be authorized by a Federal court for that tribe's treaty fishery.

S'KLALLAM—Washington State Statistical Area 4B (All).

MAKAH—Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.

QUILEUTE—That portion of the FMA between 48°10′00″ N. lat. (Cape Alava.) and 47°3′70″ N. lat. (Queets River) and east of 125°44′00″ W. long.

HOH—That portion of the FMA between 47°54′18″ N. lat. (Quillayute River) and 47°21′00″ N. lat. (Quinault River) and east of 125°44′00″ W. long.

QUINAULT—That portion of the FMA between 47°40′06″ N. lat. (Destruction Island) and 46°53′18″ N. lat. (Point Chehalis) and east of 125°08′30″ W. long.

C.2. Gear Restrictions

a. Single point, single shank, barbless hooks are required in all fisheries.

b. No more than eight fixed lines per boat.

c. No more than four hand held lines per person in the Makah area fishery (Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.).

C.3. Quotas

a. The quotas include troll catches by the S'Klallam and Makah tribes in Washington State Statistical Area 4B from May 1 through August 31.

b. The Quileute Tribe will continue a ceremonial and subsistence fishery during the time frame of October 1 through October 15 in the same manner as in 2004–2015. Fish taken during this fishery are to be counted against treaty troll quotas established for the 2016 season (estimated harvest during the October ceremonial and subsistence fishery: 20 Chinook; 0 coho).

C.4. Area Closures

a. The area within a six nautical mile radius of the mouths of the Queets River (47°31′42″ N. lat.) and the Hoh River (47°45′12″ N. lat.) will be closed to commercial fishing.

b. A closure within two nautical miles of the mouth of the Quinault River (47°21′00″ N. lat.) may be enacted by the Quinault Nation and/or the State of Washington and will not adversely

affect the Secretary of Commerce's management regime.

C.5. Inseason Management

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Chinook remaining from the May through June treaty—Indian ocean troll harvest guideline north of Cape Falcon may be transferred to the July through August harvest guideline on a fishery impact equivalent basis.

Section 4. Halibut Retention

Under the authority of the Northern Pacific Halibut Act, NMFS promulgated regulations governing the Pacific halibut fishery, which appear at 50 CFR part 300, subpart E. On April 1, 2016, NMFS published a final rule (81 FR 18789) to implement the IPHC's recommendations, to announce fishery regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries, some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast, and approval of and implementation of the Area 2A Pacific halibut Catch Sharing Plan and the Area 2A management measures for 2016. The regulations and management measures provide that vessels participating in the salmon troll fishery in Area 2A (all waters off the States of Washington, Oregon, and California), which have obtained the appropriate IPHC license, may retain halibut caught incidentally during authorized periods in conformance with provisions published with the annual salmon management measures. A salmon troller may participate in the halibut incidental catch fishery during the salmon troll season or in the directed commercial fishery targeting halibut, but not both.

The following measures have been approved by the IPHC, and implemented by NMFS. During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on.

License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (IPHC) (phone: 206–634–1838). Applicants must apply prior to mid-March 2017 for 2017 permits (exact date to be set by the IPHC in early 2017). Incidental harvest is authorized only during April, May, and June of the 2016 troll seasons and after June 30 in 2016 if quota remains and if announced on the NMFS hotline (phone: 1–800–662–9825 or 206–526–6667). WDFW, ODFW, and CDFW will monitor landings. If the landings are projected to exceed the 34,123 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

May 1, 2016, through December 31, 2016, and April 1–30, 2017, license holders may land or possess no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 20 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on). IPHC license holders must comply with all applicable IPHC regulations.

Incidental Pacific halibut catch regulations in the commercial salmon troll fishery adopted for 2016, prior to any 2016 inseason action, will be in effect when incidental Pacific halibut retention opens on April 1, 2017, unless otherwise modified by inseason action at the March 2017 Council meeting.

NMFS and the Council request that salmon trollers voluntarily avoid a ''C-shaped'' YRCA (also known as the Salmon Troll YRCA) in order to protect yelloweye rockfish. Coordinates for the Salmon Troll YRCA are defined at 50 CFR 660.70(a) in the North Coast subarea (Washington marine area 3). See Section 1.C.7. in this document for the coordinates.

Section 5. Geographical Landmarks

Wherever the words ''nautical miles off shore'' are used in this document, the distance is measured from the baseline from which the territorial sea is measured.

Geographical landmarks referenced in this document are at the following locations:

Cape Flattery, WA	48°23′00″ N. lat.
Cape Alava, WA	48°10′00″ N. lat.
Queets River, WA	47°31′42″ N. lat.
Leadbetter Point, WA	46°38′10″ N. lat.
Cape Falcon, OR	45°46′00″ N. lat.
Florence South Jetty, OR	44°00′54″ N. lat.
Humbug Mountain, OR	42°40′30″ N. lat.
Oregon-California border	42°00′00″ N. lat.
Humboldt South Jetty, CA	40°45′53″ N. lat.
Horse Mountain, CA	40°05′00″ N. lat.
Point Arena, CA	38°57′30″ N. lat.
Point Reyes, CA	37°59′44″ N. lat.
Point San Pedro, CA	37°35′40″ N. lat.
Pigeon Point, CA	37°11′00″ N. lat.
Point Sur, CA	36°18′00″ N. lat.
Point Conception, CA	34°27′00″ N. lat.

Section 6. Inseason Notice Procedures

Notice of inseason management actions will be provided by a telephone hotline administered by the West Coast Region, NMFS, 1–800–662–9825 or 206–526–6667, and by USCG Notice to Mariners broadcasts. These broadcasts are announced on Channel 16 VHF–FM and 2182 KHz at frequent intervals. The announcements designate the channel or frequency over which the Notice to Mariners will be immediately broadcast. Inseason actions will also be published in the **Federal Register** as soon as practicable. Since provisions of these management measures may be altered by inseason actions, fishermen should monitor either the telephone hotline or Coast Guard broadcasts for current information for the area in which they are fishing.

Classification

This final rule is necessary for conservation and management of Pacific coast salmon stocks and is consistent with the Magnuson-Stevens Act and other applicable law. These regulations are being promulgated under the authority of 16 U.S.C. 1855(d) and 16 U.S.C. 773(c).

This final rule is not significant under Executive Order 12866.

The Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet

annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from previous years' observed spawning escapement, vary substantially from year to year, and are not available until January or February because spawning escapement continues through the fall.

The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a two-month period culminating with the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval, and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the two-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days would require that fishing regulations for May and June be set in the previous year, without the benefit of information regarding current stock status. For the 2016 fishing regulations, the current stock status was not available to the Council until February. Because a substantial amount of fishing occurs during May and June, managing the fishery with measures developed using the prior year's data could have significant adverse effects on the managed stocks, including ESA-listed stocks. Although salmon fisheries that open prior to May are managed under the prior year's measures, as modified by the Council at its March meeting, relatively little harvest occurs during that period (*e.g.,* on average, less than 5 percent of commercial and recreational harvest occurred prior to May 1 during the years 2001 through 2015). Allowing the much more substantial harvest levels normally associated with the May and June salmon seasons to be promulgated under the prior year's regulations would impair NMFS' ability to protect weak and ESA-listed salmon stocks, and to provide harvest opportunity where appropriate. The choice of May 1 as the beginning of the regulatory season balances the need to gather and analyze the data needed to meet the management objectives of the Salmon FMP and the need to manage the fishery using the best available scientific information.

If these measures are not in place on May 1, salmon fisheries will not open as scheduled. This would result in lost fishing opportunity, negative economic impacts, and confusion for the public as the state fisheries adopt concurrent regulations that conform to the Federal management measures.

Overall, the annual population dynamics of the various salmon stocks require managers to adjust the season structure of the West Coast salmon fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action.

In addition, public comment is received and considered by the Council and NMFS throughout the process of developing these management measures. As described above, the Council takes comment at its March and April meetings, and hears summaries of comments received at public meetings held between the March and April meetings in each of the coastal states. NMFS also invited comments in a notice published prior to the March Council meeting, and considered comments received by the Council through its representative on the Council. Thus, these measures were developed with significant public input.

Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable and contrary to the public interest to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B).

The Assistant Administrator for Fisheries also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures are not finalized until mid-April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. Delaying the effectiveness of these measures by 30 days could compromise the ability of some stocks to attain their conservation objectives, preclude harvest opportunity, and negatively impact anticipated international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action and the requirements of the Magnuson-Stevens Act.

To enhance the fishing industry's notification of these new measures, and to minimize the burden on the regulated community required to comply with the new regulations, NMFS is announcing the new measures over the telephone hotline used for inseason management actions and is posting the regulations on its West Coast Region Web site (*http://www.westcoast.fisheries.noaa.gov*). NMFS is also advising the states of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and Federal fisheries through their own public notification systems.

Because prior notice and an opportunity for public comment are not required to be provided for these portions of this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are not applicable. Accordingly, no Regulatory Flexibility Analysis is required for this portion of the rule and none has been prepared.

This action contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by the Office of Management and Budget (OMB) under control number 0648–0433. The public reporting burden for providing notifications if landing area restrictions cannot be met is estimated to average 15 minutes per response. This estimate includes 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.

NMFS has current ESA biological opinions that cover fishing under these

regulations on all listed salmon species. NMFS reiterated their consultation standards for all ESA listed salmon and steelhead species in their annual Guidance letter to the Council dated March 7, 2016. Some of NMFS past biological opinions have found no jeopardy, and others have found jeopardy, but provided reasonable and prudent alternatives to avoid jeopardy. The management measures for 2016 are consistent with the biological opinions that found no jeopardy, and with the reasonable and prudent alternatives in the jeopardy biological opinions. The Council's recommended management measures therefore comply with NMFS' consultation standards and guidance for all listed salmon species which may be affected by Council fisheries. In some cases, the recommended measures are more restrictive than NMFS' ESA requirements.

In 2009, NMFS consulted on the effects of fishing under the Salmon FMP on the endangered Southern Resident Killer Whale Distinct Population Segment (SRKW) and concluded the salmon fisheries were not likely to jeopardize SRKW. The 2016 salmon management measures are consistent with the terms of that biological opinion.

This final rule was developed after meaningful and collaboration with the affected tribes. The tribal representative on the Council made the motion for the regulations that apply to the tribal fisheries.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 27, 2016.

Samuel D. Rauch III,

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

[FR Doc. 2016–10250 Filed 4–28–16; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 84
Monday, May 2, 2016

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 330 and 731

RIN 3206–AN25

Recruitment, Selection, and Placement (General) and Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is proposing to revise its regulations pertaining to when, during the hiring process (unless an exception is granted), a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. OPM is proposing this change to promote compliance with Merit System Principles as well as the goal of the Federal Interagency Reentry Council and the President's Memorandum of January 31, 2014, ''Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own.'' The intended effect of this proposal is to better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal employment.

DATES: Comments must be received on or before July 1, 2016.

ADDRESSES: You may submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this proposed rulemaking. You may also send, deliver, or fax comments to Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management, Room 6351D, 1900 E Street NW., Washington, DC 20415–9700; email at *employ@opm.gov;* or fax at (202) 606–4430.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Gilmore by telephone on (202) 606–2429, by fax at (202) 606–4430, by TTY at (202) 418–3134, or by email at *Michael.Gilmore@opm.gov.*

SUPPLEMENTARY INFORMATION: Current regulations at 5 CFR part 731.103(d) allow agencies to begin to determine an applicant's suitability at any time during the hiring process. Agencies use a variety of methods to determine an applicant's suitability for Federal employment. Criminal conduct is one of several criteria agencies consider in the course of making suitability determinations. Many agencies administer the Optional Form (OF) 306, ''Declaration for Federal Employment,'' to applicants in order to collect information about an applicant's history, as an advance screening process prior to the suitability investigation that is required for appointment in a covered position. The OF–306 contains a variety of questions about background information. Among these are several questions about an applicant's criminal history, including past convictions or current arrests that were not yet the subject of a final disposition.

Currently, there is nothing in OPM's regulations to prevent hiring agencies from requiring an applicant to complete and submit the OF–306 or equivalent information collection as part of the job-seeker's initial application package. The better practice, and one that many agencies already employ, is to wait until the later stages of the hiring process to collect this kind of information.

Early inquiries into an applicant's background, including his or her criminal or credit history (such as at the point at which an applicant submits his or her application materials) could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job. In particular, collecting such information from those who have a criminal record, but who have served their time and been rehabilitated, might discourage them from applying for a Federal job and limit their opportunities to obtain the means to secure stable housing, provide support for their families, and contribute to their communities. Early inquiries could also result in the disqualification of an otherwise eligible and qualified applicant solely on the basis of his or her criminal history—regardless of whether an arrest has actually resulted in charges or a conviction, and regardless of whether consideration of the applicant's criminal history is justified by business necessity, *i.e.,* in the suitability context, whether the suitability action will protect the integrity or promote the efficiency of the service. Therefore, OPM is proposing to amend parts 330 and 731 of its regulations to prevent agencies, unless an exception is granted from OPM, from administering the OF–306 to applicants, or otherwise making inquiries into an applicant's background of the sort asked on the OF–306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment, unless the hiring agency has made a conditional offer of employment to the applicant. Though agencies generally defer collecting this information until the end of the process, it is a good practice to take steps to affirmatively prevent misuse of such information earlier in the process—either inadvertent or intentional.

Under the proposed rule, agencies will not be permitted to make specific inquiries concerning an applicant's background of the sort asked on the OF–306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to an applicant. This will preclude agencies, in most cases, from making a referral or initial selection decision on the basis of adverse criminal or credit history or other factors normally developed through the OF–306. The proposed rule will permit the agency to make an objection, pass-over request, or suitability determination on the basis of criminal history record information or other information normally collected on the OF–306 only after the applicant's qualifications for the position being filled have been fairly assessed and the hiring agency has made a conditional offer of employment to the applicant. The proposed rule provides a mechanism for agencies to request exceptions from this prohibition where there are legitimate, specifically job-related reasons why agencies might wish to disqualify candidates based on their criminal history. Nothing in this

proposed rule affects the timing of pre-employment medical examinations or inquiries as required by section 501 of the Rehabilitation Act.

OPM is proposing this change to continue to encourage applicants from all segments of society to seek Federal employment, and to ensure that for most Federal jobs, individuals with prior criminal or other adverse history are given the opportunity to demonstrate their knowledge, skills, and ability in a fair and open competition. The proposed rule will strengthen the enforceability of OPM's regulations while preserving necessary processes that ensure the efficiency, integrity and safety of the service.

The Merit System Principles provide that ''Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.'' 5 U.S.C. 2301(b)(1). The Director of OPM is charged with ''executing, administering, and enforcing'' the Civil Service laws, including the Merit System Principles, and ''securing . . . justice in the functions of the Office.'' 5 U.S.C. 1103(a)(1), (a)(5).

In addition, the Director of OPM is a member of the Federal Interagency Reentry Council chaired by the Attorney General. OPM is committed to the Council's stated goal of ''remov[ing] Federal barriers to successful reentry, so that motivated individuals—who have served their time and paid their debts—are able to compete for a job, attain stable housing, support their children and their families, and contribute to their communities . . . to not only reduce recidivism and high correctional costs, but also to improve public health, child welfare, employment, education, housing and other key reintegration outcomes.'' *See* Federal Interagency Reentry Council, *https://csgjusticecenter.org/nrrc/projects/firc/* (last visited March 15, 2016).

Finally, prompted, in part, by the recent Presidential Memorandum, ''Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own,'' 79 FR 7045 (Feb. 5, 2014), OPM has determined that it would be good policy to require agencies to defer the collection of the types of background information collected on the OF–306 until the hiring agency has made a conditional offer of employment to an applicant, with appropriate exceptions, so that there is less opportunity for this information to be misused at the preliminary screening stage. Below is an explanation of the proposed rule:

Specifically, OPM is proposing to amend 5 CFR parts 330 and 731 to require that, unless an exception has been requested by the hiring agency and granted by OPM, agencies cannot begin collecting background information unless the hiring agency has made a conditional offer of employment to an applicant. This change would limit the flexibility currently granted to agencies to administer the OF–306, and any other form of inquiry into an applicant's background, at any time during the hiring process.

The proposed language, in new subpart M of 5 CFR part 330 and 731.103(d), will require agencies to defer the collection of background information required by the OF–306 until the hiring agency has made a conditional offer of employment to an applicant. This change in requirements will further the objective that most applicants would have the opportunity to apply and be fully considered and evaluated before any action can be taken by the hiring official in reliance on that information. This will preclude agencies, in most cases, from making referral or initial selection decisions on the basis of criminal history or other information normally collected on the OF–306's background information section, and will permit the agency to make an objection, pursue a pass-over of, or make a suitability-based decision on a candidate on the basis of such information only after the applicant's qualifications have been fairly assessed and the applicant has received a conditional job offer.

The proposed rule allows agencies to request from OPM an exception to collect background information earlier in the hiring process. OPM recognizes there are legitimate, job/position-related reasons why a hiring agency may have a need to disqualify candidates with significant issues, including, *e.g.,* criminal history, from particular types of positions they are seeking to fill. These exceptions could include, for example, certain law enforcement or public trust positions where the ability to testify as a witness is an aspect of the work, and thus a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively. In these cases, the agency will need to demonstrate the validity of its conclusion that the presence of certain background information should be disqualifying.

It could also include positions where the expense of completing the examination makes it appropriate to adjudicate suitability at the outset of the process (*e.g.,* a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before he or she may be selected).

In any event, the applicant would have notice of the process, an opportunity to rebut any issue(s) that arose, and the ability to appeal any adverse suitability action to the Merit Systems Protection Board.

OPM is proposing to consider requests for exceptions on a case-by-case basis (rather than prescribe specific criteria for an exception) in order to provide maximum flexibility to hiring agencies and account for the many unique circumstances that agencies face. In determining whether an exception is justified, OPM will consider, among other things: The occupation, and grade level(s) of the position(s) being filled; the basis for any conclusion that certain information is appropriately considered to be disqualifying; for requests based upon expense, at what point in the hiring process the agency has been conducting suitability screening for the position(s) for which an exception is being sought; and the specific need for the exception. OPM is prepared to consult with agencies and to receive requests for exceptions prior to the effective date of the final rule. In appropriate cases, OPM will be prepared to grant exceptions immediately upon effect of the final rule.

OPM is proposing the new subpart M to part 330 in order to impact all forms of placement in the Competitive service (*e.g.,* hiring under the competitive examining process, reinstatement of a former Federal employee, or the transfer of a current employee from one agency to another). Many agencies administer the OF–306, ''Declaration for Federal Employment,'' to applicants in order to collect information about an applicant's history, as an advance screening process prior to the suitability investigation that is required for appointment in a covered position. The OF–306 contains a variety of questions about background information. Among these are several questions about an applicant's criminal history, including past convictions or current arrests that were not yet the subject of a final disposition. OPM is proposing to limit the discretion agencies have in collecting this information from Federal job applicants, whether through the OF–306 or through other similar inquiries or investigative inquiries, such as fingerprint records

checks, before the hiring agency makes a conditional offer of employment to an applicant.

Executive Order 13563 and Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed this rulemaking in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal agencies and employees.

E.O. 13132, Federalism

This proposed regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This proposed regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in Title 5 CFR Parts 330 and 731

5 CFR Part 330

Armed forces reserves, District of Columbia, Government employees.

5 CFR Part 731

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is proposing to revise 5 CFR parts 330 and 731 as follows:

PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

■ 1. The authority citation for part 330 continues to read as follows:

Authority: 5 U.S.C. 1104, 1302, 3301, 3302, 3304, and 3330; E.O. 10577, 3 CFR, 1954–58 Comp., p. 218; Section 330.103 also issued under 5 U.S.C. 3327; Subpart B also issued under 5 U.S.C. 3315 and 8151; Section 330.401 also issued under 5 U.S.C. 3310; Subparts F and G also issued under Presidential Memorandum on Career Transition Assistance for Federal Employees, September 12, 1995; Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b).

■ 2. Add subpart M, consisting of § 330.1300 to read as follows:

Subpart M—Timing of Background Investigations

§ 330.1300 Timing of suitability inquiries in competitive hiring.

A hiring agency may not make specific inquiries concerning an applicant's background of the sort asked on the OF–306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. However, in certain situations, agencies may have a business need to obtain information about the background of applicants earlier in the hiring process to determine if they meet the qualifications requirements or are suitable for the position being filled. If so, agencies must request an exception from the Office of Personnel Management in order to determine an applicant's ability to meet qualifications or suitability for Federal employment prior to making a conditional offer of employment to the applicant(s). OPM will grant exceptions only when the agency demonstrates specific job-related reasons the agency wishes to evaluate suitability earlier in the process or consider the disqualification of candidates with criminal backgrounds or other conduct issues from particular types of positions. OPM will consider such factors as, but not limited to, the nature of the position being filled (*e.g.,* a law enforcement position) and whether a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively. OPM may also consider positions for which the expense of completing the examination makes it appropriate to adjudicate suitability at the outset of the process (*e.g.,* a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before he or she may be selected).

PART 731—SUITABILITY

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

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR 2009 Comp., p. 198; E.O. 13488, 3 CFR 2010 Comp., p. 189; 5 CFR parts 1, 2 and 5.

■ 4. Revise § 731.103(d) to read as follows:

§ 731.103 Delegation to agencies.

* * * * *

(d)(1) A hiring agency may not make specific inquiries concerning an applicant's background of the sort asked on the OF–306's 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. However, in certain situations, agencies may have a business need to obtain information about the suitability or background of applicants earlier in the process. If so, agencies must request an exception from the Office of Personnel Management, in accordance with the provisions of 5 CFR part 330 subpart M.

(2) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

* * * * *

[FR Doc. 2016–10063 Filed 4–29–16; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6148; Directorate Identifier 2015–NM–154–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–400 series airplanes. This proposed AD was prompted by a malfunctioning No. 2 engine intake heater with corrosion on the thermostats and the fuselage skin where the thermostats made contact with the aircraft fuselage skin. This proposed AD would require a general visual inspection for corrosion of the thermostats' mounting surfaces and fuselage skin surface, corrective actions if necessary, and relocating the existing thermostats. We are proposing this AD to prevent corrosion within the thermostats that may cause the switch mechanism to seize in the open position and prevent the activation of the associated engine air intake heater. An inactive engine air intake heater could lead to an engine failure.

DATES: We must receive comments on this proposed AD by June 16, 2016.

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 *http://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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone: 416–375–4000; fax: 416–375–4539; email: *thd.qseries@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6148; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received and other information. The street address for the Docket Operations office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Services Branch, ANE 172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7301; fax: 516–794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–6148; Directorate Identifier 2015–NM–154–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2015–24, dated August 24, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model DHC–8–400 series airplanes. The MCAI states:

> A malfunctioning Engine Air Intake Heater has been discovered with corrosion on the thermostats and the aeroplane skin where the thermostats are installed. The two thermostats are installed directly under the flight compartment floor along the aeroplane centre line where moisture accumulation and/or migration may occur, which can cause corrosion of the thermostats. Corrosion within the thermostats may seize the switch mechanism open, preventing the activation of the associated Engine Air Intake Heater. Failure of the Engine Air Intake Heater to activate may pose a safety risk to the aeroplane in icing conditions.
>
> Bombardier has issued Service Bulletin (SB) 84–30–10 to inspect, replace if required and relocate the thermostat assembly to rectify this problem. [An inactive engine air intake heater could lead to an engine failure.]

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6148.

Related Service Information Under 1 CFR Part 51

Bombardier, Inc. has issued Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014. The service information describes procedures for a general visual inspection for corrosion of the thermostats' mounting surfaces and fuselage skin surface, corrective actions if necessary, and relocating the existing thermostats from a lower position on the aircraft skin at X–54.00 between stringers 31P and 32P (next to the centerline) to a higher position at X–54.00 between stringers 26P and 27P. 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.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 76 airplanes of U.S. registry.

We also estimate that it would take about 12 work-hours per product to comply with the basic requirements of

this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $77,520, or $1,020 per product.

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.

We are 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

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

4. 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 Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2016–6148; Directorate Identifier 2015–NM–154–AD.

(a) Comments Due Date

We must receive comments by June 16, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, certificated in any category, serial numbers 4001 through 4184 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and rain protection.

(e) Reason

This AD was prompted by a malfunctioning No. 2 engine intake heater with corrosion on the thermostats and the fuselage skin where the thermostats made contact with the aircraft fuselage skin. We are issuing this AD to prevent corrosion within the thermostats that may cause the switch mechanism to seize in the open position and prevent the activation of the associated engine air intake heater. An inactive engine air intake heater could lead to an engine failure.

(f) Compliance

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

(g) Inspection of the Thermostats and Replacement

Within 2,000 flight hours or 12 months, whichever occurs first after the effective date of this AD, do a general visual inspection of the thermostats' exterior for any signs of corrosion, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014. If any thermostat is corroded, replace the thermostat before further flight in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014.

(h) Inspection of the Fuselage Skin Surface and Corrective Action

Within 2,000 flight hours or 12 months, whichever occurs first after the effective date of this AD, do a general visual inspection of the fuselage skin surface for skin corrosion, and modify the engine air intake heater thermostat installation, in accordance with Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014.

(1) If the skin corrosion is 0.001 inch deep or less, before further flight remove the corrosion and treat bare metal in accordance with Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014.

(2) If the skin corrosion is greater than 0.001 inch deep, before further flight, repair using a method approved by the Manager, New York Aircraft Certification Office (ACO), ANE–170, Transport Airplane Directorate, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO).

(i) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (i)(1) through (i)(5) of this AD. This service information is not incorporated by reference in this AD.

(1) Bombardier Service Bulletin 84–30–10, dated September 07, 2007, provided that the thermostat location label is replaced in accordance with the accomplishment instruction of Bombardier Service Bulletin 84–30–10, Revision E, dated October 10, 2014, within the compliance times specified in paragraph (g) of this AD.

(2) Bombardier Service Bulletin 84–30–10, Revision A, dated April 07, 2008.

(3) Bombardier Service Bulletin 84–30–10, Revision B, dated January 20, 2010.

(4) Bombardier Service Bulletin 84–30–10, Revision C, dated July 14, 2011.

(5) Bombardier Service Bulletin 84–30–10, Revision D, dated December 20, 2011.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO, ANE–170, 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 ACO, send it to ATTN: Assata Dessaline, Aerospace Engineer, Avionics and Services Branch, ANE 172, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7301; fax: 516–794–5531. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* 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. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, Engine and Propeller Directorate, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval

Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2015–24, dated August 24, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6148.

(2) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone: 416–375–4000; fax: 416–375–4539; email: *thd.qseries@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on April 20, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–10116 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2015–1649; Airspace Docket No. 15–AGL–6]

Proposed Amendment of Class D Airspace and Revocation of Class E Airspace; Columbus, Ohio State University Airport, OH, and Amendment of Class E Airspace; Columbus, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); withdrawal.

SUMMARY: This action withdraws the NPRM published in the **Federal Register** on June 24, 2015, proposing to amend Class D and Class E airspace and remove Class E airspace in the Columbus, OH, area. The FAA has determined that withdrawal of that NPRM is warranted as a second NPRM for the same airspace action was issued in July 2015.

DATES: May 2, 2016.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION: An NPRM was published in the **Federal Register** of June 24, 2015 (80 FR 36265), to amend Title 14 Code of Federal Regulations (14 CFR) part 71, by amending Class D and Class E airspace and removing Class E airspace in the Columbus, OH area. The proposed action was due to the decommissioning of the Dan Scott non-directional beacon (NDB) and cancellation of the NDB approach at Ohio State University Airport, Columbus, OH. A second NPRM was published in the **Federal Register** of July 17, 2015 (80 FR 42434), proposing the same airspace actions and followed by a final rule published in the **Federal Register** of October 20, 2015 (80 FR 63426), acknowledging only the second NPRM. Therefore, the first NPRM issued is being withdrawn.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Withdrawal

In consideration of the foregoing, the NPRM for FR Doc. FAA–2015–1649, Airspace Docket No. 15–AGL–6, as published in the **Federal Register** of June 24, 2015 (80 FR 36265) (FR Doc. 2015–15461), is hereby withdrawn.

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

Issued in Fort Worth, TX, on April 19, 2016.

Walter Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–10011 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 382

[Docket No. DOT–OST–2015–0246]

RIN 2105–AE12

Nondiscrimination on the Basis of Disability in Air Travel: Negotiated Rulemaking Committee Membership and First Meeting

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of negotiated rulemaking (Reg-Neg) committee membership and public meeting.

SUMMARY: The Department of Transportation (''Department'' or ''DOT'') announces the appointment of members to the Advisory Committee on Accessible Air Transportation (ACCESS Advisory Committee). The ACCESS Advisory Committee was established to negotiate and develop a proposed rule concerning accommodations for air travelers with disabilities addressing inflight entertainment (IFE), accessible lavatory on new single-aisle aircraft, and service animals. Additionally, DOT announces that the first meeting of the ACCESS Advisory Committee will be held on May 17 and 18, 2016. The meeting is open to the public for its entirety.

DATES: The first meeting of the ACCESS Advisory Committee will be held on May 17 and 18, 2016, from 9:00 a.m. to 5:00 p.m., Eastern Time.

ADDRESSES: The meeting will be held at the Omni Shoreham Hotel, 2500 Calvert Street NW., Washington, DC 20001, 202–234–0700, in the Diplomat Room. Attendance is open to the public up to the room's capacity of 150 attendees. Since space is limited, any member of the general public who plans to attend this meeting must notify the registration contact identified below no later than May 10, 2016.

FOR FURTHER INFORMATION CONTACT: To register to attend the meeting, please contact Alyssa Battle (*Abattle@linkvisum.com;* 703–442–4575 extension 127) or Kyle Illgenfritz (*kilgenfritz@linkvisum.com;* 703–442–4575 extension 128). For other information, please contact Livaughn Chapman or Vinh Nguyen, Office of the Aviation Enforcement and Proceedings, U.S. Department of Transportation, by email at *livaughn.chapman@dot.gov* or *vinh.nguyen@dot.gov* or by telephone at 202–366–9342.

SUPPLEMENTARY INFORMATION:

I. Background

On December 7, 2015, the Department published a notice in the **Federal Register** announcing its intent to consider a Reg-Neg on six issues—(1) inflight entertainment accessibility; (2) supplemental medical oxygen; (3) service animals; (4) accessible lavatories on single-aisle aircraft; (5) seating accommodations; and (6) carrier reporting of disability service requests.[1] DOT also announced that we had hired a neutral convener, Professor Richard Parker, to speak with disability advocacy organizations, airlines, and others about the feasibility of conducting a Reg-Neg on these six issues. Mr. Parker conducted interviews with 46 different stakeholders representing these interests and prepared a convening report to DOT on

[1] 80 FR 75953 (Dec. 7, 2015).

the feasibility of conducting the negotiated rulemaking under consideration. The convening report is available in the rulemaking docket at DOT–OST–2015–0246.

Based on the convening report, the comments received on the December notice, and on the statutory factors in the Negotiated Rulemaking Act (5 U.S.C. 563), DOT decided that it would be in the public interest to establish a negotiated rulemaking committee with a narrower scope. On April 7, 2016, DOT announced that it would establish a Reg-Neg committee to negotiate and develop proposed amendments to the Department's disability regulation on three issues: Whether to require accessible inflight entertainment (IFE) and strengthen accessibility requirements for other in-flight communications; whether to require an accessible lavatory on new single-aisle aircraft over a certain size; and whether to amend the definition of ''service animals'' that may accompany passengers with a disability on a flight.[2]

II. Establishment of the ACCESS Advisory Committee

The ACCESS Advisory Committee is established by charter in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. Secretary of Transportation Anthony Foxx approved the ACCESS Advisory Committee charter on April 6, 2016. In accordance with section 14 of FACA, the charter provides for the ACCESS Advisory Committee to terminate when the stated objectives of the Committee have been accomplished (*i.e.,* the committee submits its recommendations to the Secretary) or upon the expiration of a period not to exceed two years, whichever happens sooner.

III. ACCESS Advisory Committee Membership

In its April 7th **Federal Register** notice, DOT announced that it was soliciting applications and nominations for membership on the ACCESS Advisory Committee. DOT stated that it would choose the Committee members based on four main criteria: (1) Representativeness (does the applicant represent a significant stakeholder group that will be substantially affected by the final rule); (2) expertise (does the applicant bring essential knowledge, expertise and/or experience regarding accessibility and the topic area(s) of interest that will enrich the discussion of the available options and their respective costs and benefits); (3) balance (does the slate of selected applicants comprise a balanced array of representative and expert stakeholders); and (4) willingness to participate fully (is the applicant able and willing to attend the listed meetings and associated working group conference calls, bring in other experts from the applicant's organization as needed and relevant, bargain in good faith, and generally contribute constructively to a rigorous policy development process).

DOT proposed for public comment the following tentative list of stakeholder categories to be members of the Committee: DOT; airlines; cross-disability advocacy groups; consumer groups; professional associations of flight attendants; advocacy groups for blind and visually impaired individuals; advocacy groups representing service animal users; advocacy groups for representing people with psychiatric disabilities; providers, manufactures, or experts of IFE products, systems, and services; advocacy groups representing deaf and hard of hearing individuals; academic or non-profit institutions having technical expertise in accessibility research and development; aircraft manufacturers; and advocacy groups representing individuals with mobility disabilities. DOT stated that Committee members will be selected to represent not only the interest of that individual's own organization but rather the collective stakeholder interests of organizations in the same stakeholder category. DOT also noted that all individuals or organizations who wished to be selected to serve on the Committee should submit an application regardless of whether their stakeholder category appeared on list.

After a careful review of all the individuals nominated to be ACCESS Advisory Committee members, the Secretary of Transportation hereby appoints the following members:

- Michelle Albert, Boeing Commercial Airplanes
- Zainab Alkebsi, National Association of the Deaf
- Mary Barnicle, United Airlines
- Kelly Buckland, National Council on Independent Living
- Curtis L. Decker, National Disability Rights Network
- Parnell Diggs, National Federation of the Blind
- Paul Doell, National Air Carrier Association
- Geoff Freed, National Center for Accessible Media at WGBH
- Brian Friedman, JetBlue Airways
- Laurie A. Gawelko, Service Dog Express, LLC
- Lise Hamlin, Hearing Loss Association of America
- Dr. Katherine Hunter-Zaworski, Oregon State University
- Candace Kolander, Association of Flight Attendants
- Doug Lavin, International Air Transport Association
- Russ Lemieux, Airline Passenger Experience Association
- Lorne Mackenzie, WestJet Airlines
- David Martin, Delta Air Lines
- Orit H. Michiel, Motion Picture Association of America
- Bradley W. Morris, Psychiatric Service Dog Partners
- Lawrence Mullins, Lufthansa Group
- Lee Page, Paralyzed Veterans of America
- Deborah Lynn Price, Frontier Airlines
- Roser Roca-Toha, Airbus
- Alicia Smith, National Alliance on Mental Illness
- Anthony Stevens, American Counsel of the Blind
- Jennifer Sunderman, Regional Airline Association
- Blane A. Workie, U.S. Department of Transportation (Designated Federal Officer)

IV. Meeting Participation

The meeting will be open to the public. Attendance will necessarily be limited by the size of the meeting room (maximum 150 attendees). Since space is limited, we ask that any member of the general public who plans to attend the first meeting notify the registration contact, contact Alyssa Battle (*Abattle@linkvisum.com;* 703–442–4575 extension 127) or Kyle Illgenfritz (*kilgenfritz@linkvisum.com;* 703–442–4575 extension 128) at Linkvisum, no later than May 10, 2016. At the discretion of the facilitator and the Committee and time permitting, members of the public are invited to contribute to the discussion and provide oral comments.

The Committee will dedicate a substantial amount of time at the first meeting to establishing the rules, procedures, and process of the Committee, such as outlining the voting rights of the Committee members and defining the meaning of ''consensus.''

V. Submitting Written Comments

Members of the public may submit written comments on the topics to be considered during the meeting by May 10, 2016, to Federal Docket Management System (FDMC), Docket Number DOT–OST–2015–0246. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. DOT recommends that you include your name and a mailing address, an email address, or a phone number in the body

[2] 81 FR 20265 (Apr. 7, 2016).

of your document so that DOT can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, DOT–OST–2015–0246, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

VI. Viewing Comments and Documents

To view comments and any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Enter the docket number, DOT–OST–2015–0246, in the keyword box, and click ''Search.'' Next, click the link to ''Open Docket Folder'' and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

VII. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

VIII. Future Committee Meetings

DOT anticipates that the ACCESS Advisory Committee will have five additional two-day meetings in Washington, DC. The meetings are tentatively scheduled for following dates: Second meeting, June 14–15; third meeting, July 11–12; fourth meeting, August 16–17; fifth meeting, September 22–23, and the sixth and final meeting, October 13–14. Notices of all future meetings will be published in the **Federal Register** at least 15 calendar days prior to each meeting.

Notice of this meeting is being provided in accordance with the Federal Advisory Committee Act and the General Services Administration regulations covering management of Federal advisory committees.

(41 CFR part 102–3.)

Issued under the authority of delegation in 49 CFR 1.27(n).

Dated: April 27, 2016.

Kristin Amerling,

Deputy General Counsel.

[FR Doc. 2016–10307 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–9X–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0861; FRL–9945–95–Region 6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the General Definitions for Texas New Source Review and the Minor NSR Qualified Facilities Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve and disapprove portions of revisions to the Texas State Implementation Plan (SIP) pertaining to the Texas New Source Review (NSR) program submitted on March 13, 1996; July 22, 1998; September 11, 2000; September 4, 2002; and October 5, 2010. Specifically, the EPA is proposing to approve the severable portions of the amendments to the General Definitions for the Texas NSR program, and the Minor NSR Qualified Facilities Program. The EPA is proposing to disapprove a severable portion of the General Definition of ''modification of existing facility'' submitted on October 5, 2010. We are taking these actions under section 110, parts C and D of the Clean Air Act (CAA).

DATES: Written comments must be received on or before June 1, 2016.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2010–0861, at *http://www.regulations.gov* or via email to *wiley.adina@epa.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact Ms. Adina Wiley, (214) 665–2115, *wiley.adina@epa.gov.* For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available at either location (*e.g.*, CBI).

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, (214) 665–2115, *wiley.adina@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at 214–665–7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

I. Background

A. The CAA and SIPs

The Act at Section 110(a)(2)(C) requires states to develop and submit to the EPA for approval into the SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment/unclassifiable and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the NSR SIP. The CAA NSR SIP program is composed of three separate programs: Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS—''attainment areas''—as well as areas where there is insufficient information to determine if the area meets the NAAQS—''unclassifiable areas.'' The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS—

''nonattainment areas.'' The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source/major modification thresholds and thus do not qualify as ''major'' and applies regardless of the designation of the area in which a source is located. Any submitted SIP revision must meet the applicable requirements for SIP elements in section 110 of the Act, and be consistent with all applicable statutory and regulatory requirements. The EPA regulations governing the criteria that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR 51.160 through 51.166. Regulations specific to Minor NSR programs are contained in 40 CFR 51.160 through 51.164. Texas submitted the revisions to the General Definitions as revisions to the Texas SIP applicable to the entirety of the Texas NSR Program. The provisions specific to the Qualified Facilities Program have been submitted for inclusion in the State's Minor NSR program.

B. Overview of the Revisions to the General Definitions for the Texas NSR Program

The General Definitions germane to the implementation of the Texas NSR Program are contained in the Texas Administrative Code (TAC) at 30 TAC Section 116.10. The October 5, 2010, submitted revisions include substantive revisions to the definition of ''Best Available Control Technology (BACT)'', substantive revisions to the definition of ''modification of existing facility'', deletion of definitions specific to the Minor NSR Qualified Facilities Program that have been moved to a new section for Qualified Facilities definitions, non-substantive edits to improve clarity throughout the definitions, and renumbering of the existing SIP-approved definitions to account for the other edits. On March 25, 2011, the TCEQ resubmitted the revisions to the General Definitions at 30 TAC Section 116.10 that were submitted on March 13, 1996; July 22, 1998; September 11, 2000; September 4, 2002. As such, the portions of these prior submittals that have not already been addressed by the EPA are before us for review.

C. Overview of the Texas Minor NSR Qualified Facilities Program

The Texas Minor NSR Qualified Facilities Program was authorized under Texas Senate Bill 1126, 74th Texas Legislature, to create a streamlined Minor NSR mechanism to authorize minor changes at existing facilities that are not subject to federal major source requirements under PSD or NNSR. The program authorizes changes at existing permitted facilities by allowing the participating facilities to trade permitted emission allowables. Changes at qualified facilities cannot result in the emission of an air contaminant not previously emitted, the construction of a new facility, a reduction in emission control efficiency, a net increase in allowable emissions, or any increases in actual emissions that exceed applicable major source thresholds.

D. Overview of the Texas Permit Renewal Requirements

Requirements for the renewal of air permits issued under 30 TAC Chapter 116 are provided under 30 TAC Chapter 116, Division D. The EPA has SIP-approved the majority of this division; the exception being the provision in 30 TAC Section 116.311 exempting changes authorized as a qualified facility from the requirement to obtain a permit renewal. The revisions remaining before us pertaining to Qualified Facilities were submitted to 30 TAC Section 116.311 on July 22, 1998 and September 4, 2002.

II. The EPA's Evaluation

A. Revisions to the General Definitions for Texas NSR

The TCEQ revised the General Definitions at 30 TAC Section 116.10 on September 5, 2010 and submitted these revisions for inclusion in the Texas NSR SIP on October 5, 2010. The TCEQ submitted a clarification letter to the EPA on March 25, 2011, that resubmitted prior rulemakings addressing the General Definitions at 30 TAC Section 116.10; specifically the rulemakings and records associated with SIP submittals dated March 13, 1996; July 22, 1998; September 11, 2000; and September 4, 2002. We note that the July 22, 1998 submittal repealed and replaced the March 13, 1996 submittal of 30 TAC Section 116.10. Therefore, the EPA has determined that the March 13, 1996 revisions to 30 TAC Section 116.10 are no longer before us for review. We are only addressing the pieces of the General Definition submittals that have yet to be finally acted upon by the EPA.

The EPA has taken several actions over the years to approve and disapprove specific components of the General Definitions into the Texas SIP. Our actions are dated August 28, 2007 (72 FR 49198); April 14, 2010 (75 FR 19468); and November 17, 2011 (76 FR 71260). The Technical Support Document (TSD) accompanying this proposal provides a detailed history of our past actions.

Today's proposal addresses the remaining submitted revisions to the General Definitions from July 22, 1998 through the current version of the General Definitions submitted on October 5, 2010. The following is a summary of the EPA's evaluation of the submitted revisions to the General Definitions.

- On October 5, 2010, the TCEQ submitted a substantive revision to the definition of ''best available control technology (BACT)'' at 30 TAC Section 116.10(1). The definition initially submitted on July 22, 1998 at 30 TAC Section 116.10(3) was disapproved by the EPA on September 15, 2010. *See* 75 FR 56424. On September 15, 2010, the TCEQ substantively revised the definition of ''BACT'' and submitted this revised definition for SIP approval on October 5, 2010 at 30 TAC Section 116.10(1). The revised definition of BACT at 30 TAC Section 116.10(1) clarifies how the TCEQ defines BACT for NSR permitting. The Texas SIP at 30 TAC Section 116.111(a)(2)(C) requires that BACT must be evaluated and applied to all facilities subject to the Texas Clean Air Act. Section 116.111(a)(2)(C) further clarifies that applications subject to PSD requirements under Title I Part C of the CAA must comply with the provisions of BACT as defined in the Texas SIP at 30 TAC Section 116.160(c)(1)(A). Thus, the Texas SIP has two definitions for BACT—the definition at 30 TAC Section 116.10(1) creates what is generally referred to as ''Texas BACT'' and will be applied to all Texas NSR permitting actions, major and minor. The ''federal BACT'' requirements are applied to PSD permits in accordance with the Texas PSD SIP. The EPA finds that the revisions to the definition of ''BACT'' at 30 TAC Section 116.10(1) are approvable.
- On October 5, 2010, the TCEQ submitted substantive revisions to the NSR definition of ''modification of existing facility'' at 30 TAC Section 116.10(9). The EPA has approved portions of this definition into the Texas SIP, but we are proposing to act on the remaining components of this definition as initially adopted on June 17, 1998 and submitted July 22, 1998; as further revised through submittals dated September 11, 2000; September 4, 2002; and October 5, 2010. The EPA proposes to approve the outstanding provisions in the definition of ''modification of existing facility'' at 30 TAC Section 116.10(9) as submitted on October 5, 2010, as a portion of the Texas NSR program, with the exception of the

severable subparagraph (F) as discussed below. Each subparagraph provides a Minor NSR mechanism by which a facility can be changed without a case-by case Minor NSR permit amendment:

○ 30 TAC Section 116.10(9)(A) provides for the use of permits by rule (PBRs) to be used for the insignificant increases of already authorized air contaminants. The EPA has SIP-approved the Texas PBR program under 30 TAC Chapter 106 as a component of the Texas Minor NSR program. As such, we find that use of a PBR for insignificant increases for an already authorized air contaminant should not be considered as part of the modification of an existing facility. We are proposing approval of this provision as initially adopted on June 17, 1998 and submitted on July 22, 1998; and further revised on September 15, 2010 and submitted on October 5, 2010.

○ The current Texas SIP includes the definition of ''modification of existing facilities'' at 30 TAC Section 116.10(11)(C) and (D). On October 5, 2010, the TCEQ submitted non-substantive renumbering of these provisions to new 30 TAC Section 116.10(9)(B) and (C) as adopted on September 15, 2010. This non-substantive renumbering is approvable.

○ 30 TAC Section 116.10(9)(D) establishes the criteria for a facility to become ''qualified.'' This definition is necessary for the implementation of the Texas Minor NSR Qualified Facilities Program and is therefore approvable under 40 CFR 51.160 as defining the scope of the Minor NSR program;

○ 30 TAC Section 116.10(9)(E) is already SIP-approved with respect to flexible permits. *See* 79 FR 40666, July 14, 2014.

○ 30 TAC Section 116.10(9)(F) provides for modifications to be made at natural gas processing facilities without a case-by case permit.[1] On November 17, 2011, the EPA disapproved the subparagraph (G) portion of the ''modification of existing facility'' definition at 30 TAC Section 116.10(11) as submitted on July 22, 1998 and further revised on September 4, 2002. We previously disapproved subparagraph (G) because it was not clearly limited to Minor NSR and we could not demonstrate whether this exemption met the anti-backsliding requirements of CAA 110(l). *See* 76 FR 71260. The TCEQ resubmitted this identical provision in the October 5, 2010 submittal, renumbered to be 30 TAC Section 116.10(9)(F), and we are reviewing the resubmitted subparagraph (F) as a new revision to the Texas SIP. The exemption provides that changes at certain natural gas processing, treating, or compression facilities are not modifications if the change does not result in an annual emissions rate of any air contaminant in excess of the volume for grandfathered facilities. The ''annual emissions rate'' is the same as the ''volume emitted at maximum design capacity;'' therefore, this would provide an exemption for those sources from permit review for any emission increases at these facilities. The requirements of 40 CFR 51.160(e) allow a state to identify facilities that will be subject to review under its Minor NSR program and require its Minor NSR SIP to discuss the basis for determining which facilities will be subject to review. The submitted definition at 30 TAC Section 116.10(9)(F), however, does not contain an applicability statement or regulatory provision limiting this type of change to Minor NSR. The TCEQ has not submitted any additional evidence to substantiate that this provision is only applicable to the Texas Minor NSR program. Further, the submittal does not include any explanation of the basis for exempting this type of change from the permitting SIP requirements. Without an analysis describing how this exemption does not negate the Major NSR SIP requirements and meets the Minor NSR SIP requirements in 40 CFR 51.160 and the CAA's anti-backsliding requirements in section 110(l), EPA has no basis to approve this exemption. As such, we propose to disapprove subparagraph (F) consistent with our prior final action.

• On October 5, 2010, the TCEQ submitted a new definition of ''qualified facility'' at 30 TAC Section 116.10(14); this definition is necessary for the implementation of the Texas Minor NSR Qualified Facilities Program and is therefore approvable under 40 CFR 51.160 as defining the scope of the Minor NSR program.

• On October 5, 2010, the TCEQ also submitted non-substantive edits to the opening paragraph of the General Definitions to clarify an acronym and renumbering throughout the section of the existing SIP-approved definitions: ''dockside vessel,'' ''dockside vessel emissions,'' ''facility,'' ''federally enforceable,'' ''grandfathered facility,'' ''lead smelting plant,'' ''maximum allowable emissions rate table (MAERT),'' ''new facility,'' ''new source,'' ''nonattainment area,'' ''public notice,'' and ''source''. These non-substantive edits are approvable.

B. The Texas Minor NSR Qualified Facilities Program

On April 14, 2010, the EPA disapproved the Texas Qualified Facilities Program as submitted by the TCEQ on March 13, 1996; repealed and re-adopted on June 17, 1998, submitted on July 22, 1998; and revised on September 11, 2000 and September 4, 2002. *See* 75 FR 19468. In the final disapproval the EPA found that the Qualified Facilities Program was not approvable as a Minor NSR program and was not approvable as a substitute Major NSR program.

On October 5, 2010, the TCEQ submitted a revised Qualified Facilities Program to address the April 14, 2010, identified deficiencies. Our evaluation demonstrates that the TCEQ has appropriately limited the Qualified Facilities Program to Minor NSR by requiring that each proposed change conduct a separate applicability determination under PSD and NNSR to ensure no federal major source permitting requirements are circumvented. The Texas Qualified Facilities Program enables an existing permitted facility to increase allowable emissions, provided that another permitted facility has a corresponding decrease in permit allowable emissions; resulting in no net increase in permitted emission allowables.[2] Each of the facilities in the qualified transaction will have an existing permit authorized under the Texas NSR SIP at 30 TAC Chapter 106 (Permits by Rule (PBR)) or Chapter 116 (PSD, NNSR, Minor NSR, or standard permit). To ensure the changes in emission allowables will be enforceable, the Texas Qualified Facilities Program requires sources to document the transaction through the submittal of a P1–E form and to revise the underlying existing permits under the requirements of 30 TAC Section 116.111 or through a revision to the existing PBR registration at 30 TAC

[1] Specifically, it exempts ''a change in the method of operation of a natural gas processing, treating, or compression facility connected to or part of a natural gas gathering or transmission pipeline which does not result in an annual emission rate of any air contaminant in excess of the volume emitted at the maximum designed capacity, provided that the facility is one for which: (i) Construction or operation started on or before September 1, 1971, and at which either no modification has occurred after September 1, 1971, or at which modifications have occurred only under Chapter 106 of this title; or (ii) construction started after September 1, 1971, and before March 1, 1972, and which registered in accordance with TCAA, § 382.060, as that section existed prior to September 1, 1991.'' 30 TAC section 116.10(9)(F).

[2] Relying on permitted allowable emissions is appropriate for a Minor NSR permit program. The EPA has approved the Texas Minor NSR program as consistent with the federal requirements; therefore, the Texas Minor NSR program establishes allowable permit limits that are protective of the NAAQS and increment consistent with 40 CFR 51.160–51.164. The trading of these permitted allowables will not result in a net increase in permitted allowables.

Section 106.6.[3] The netting of emission allowables will not result in interference with attainment and maintenance of the NAAQS, reasonable further progress, increment or any other requirement of the CAA because each of the underlying permits, or PBR, was issued as protective of air quality. A qualified facility change may result in an increase in actual emissions, but this increase is already authorized under the existing permitted allowables. A qualified facility cannot be used to authorize the emission of a new air contaminant or the construction of a new source. Further, a qualified facility cannot be used to lessen the already required level of control technology in the existing permits or reduce the permitted monitoring and recordkeeping requirements. Because the Texas Qualified Facilities Program will not reduce existing permit requirements nor result in a net increase in allowable emissions from the existing permitted facilities, the EPA proposes to find that the program is approvable as a component of the Texas Minor NSR program for authorizing changes at existing facilities without a specific permit modification. We are also proposing to find that the Qualified Facilities Program is an enforceable component of the Texas Minor NSR program because it requires that the existing NSR authorizations for the participating facilities are revised to document the changes in permitted allowable emission rates and sources are required to maintain documentation quantifying the increases and decreases in actual emissions associated with the change and all information necessary to demonstrate no adverse air quality impact.

C. The Texas Permit Renewal Requirements

The EPA is also reviewing revisions to the Permit Renewal Application procedures at 30 TAC Section 116.311. The TCEQ initially submitted a revision on July 22, 1998, at 30 TAC Section 116.311(a)(1) to specify that changes authorized under a qualified facility are not subject to the permit renewal requirements under 30 TAC Chapter 116. This provision was renumbered in the September 4, 2002 submittal to 30 TAC Section 116.311(a)(2). Changes authorized under the Qualified Facilities Program are made enforceable by revisions to the underlying Chapter 116 permits or Chapter 106 PBR registration. Because there is not a specific permit issued for a Qualified Facility transaction, there is no ''Qualified Facility permit'' subject to permit renewal requirements. Rather, the underlying permits under Chapter 116 remain subject to the permit renewal requirements. Note that the permit renewal requirements at 30 TAC Section 116.311 do not apply to PBRs authorized under 30 TAC Chapter 106 or any portion of the Qualified Facility transaction authorized under 30 TAC Chapter 106. However, the federal regulations under the CAA do not require a permit renewal process for an approved NSR program. *See* 40 CFR 51.160–51.166.

Because a change authorized under the Qualified Facilities Program does not result in a specific permit modification, such a change is not subject to the permit renewal requirements because there is not a permit action to renew. However, the underlying permit terms remain subject to the applicable permit renewal requirements.

D. Evaluation Under Section 110(l) of the CAA

Under Section 110(l), the EPA cannot propose to approve a SIP revision that has not been developed with reasonable notice and public hearing. Nor can we propose to approve a revision that will worsen air quality. The October 5, 2010, submitted revisions to the Texas SIP were developed using the Texas SIP-approved process with adequate notice and comment procedures. Our analysis also indicates that the General Definitions, with the exception of the portion of ''modification of existing facilities'' pertaining to natural gas processing facilities, are necessary to implement the CAA required title I permitting programs in Texas. As such, these General Definitions will support the state's air quality programs and will not interfere with attainment, reasonable further progress or any other applicable requirements of the CAA. Additionally, the Minor NSR Qualified Facilities Program establishes a mechanism to allow modifications at existing, permitted facilities to occur without a permit revision by requiring an increase in permitted emission allowables to be offset by a corresponding decrease in permitted emission allowables at the same facility. Because the facilities participating in the Qualified Facilities Program have been previously authorized under SIP-approved permitted mechanisms, the permitted emission allowables have been developed such that there is no interference with attainment, reasonable further progress or any other applicable requirement of this chapter. Therefore, the EPA proposes to find that approval and implementation of the Qualified Facilities Program will not result in degradation of air quality.

III. Proposed Action

Section 110(k)(3) of the Act states that the EPA may partially approve and partially disapprove a SIP submittal if we find that only a portion of the submittal meets the requirements of the Act. We are proposing to determine that the majority of the October 5, 2010 revision to the Texas SIP is approvable because the submitted rules are adopted and submitted in accordance with the CAA and are consistent with the EPA's regulations regarding NSR and Minor NSR. Therefore, the EPA proposes to approve the following as a revision to the Texas SIP under section 110 and parts C and D of the CAA:

- Substantive and non-substantive revisions to the General Definitions at 30 TAC Section 116.10, as initially adopted on June 17, 1998 and submitted on July 22, 1998 and revised through the October 5, 2010 submittal, with the exception of 30 TAC Section 116.10(9)(F). Note that 30 TAC Section 116.10(5)(F) has not been submitted or proposed for inclusion in the Texas SIP.
- New section 30 TAC Section 116.17 establishing the definitions for the Minor NSR Qualified Facilities Program as adopted by the State on September 15, 2010 and submitted on October 5, 2010.
- Substantive revisions to 30 TAC Section 116.116(e)(1)–(e)(11) creating the Texas Minor NSR Qualified Facilities Program as adopted by the State on September 15, 2010 and submitted on October 5, 2010.
- New section 30 TAC Section 116.117 establishing the documentation and notification requirements for the Minor NSR Qualified Facilities Program as adopted by the State on September 15, 2010 and submitted on October 5, 2010. Note that 30 TAC Section 116.117(a)(4)(B) has not been submitted or proposed for inclusion in the Texas SIP.
- The SIP narrative titled ''Revisions to the State Implementation Plan (SIP) Concerning the Qualified Facility Program as Authorized by Senate Bill 1126'' as submitted on October 5, 2010.
- Revisions to 30 TAC Section 116.311(a)(2) as adopted by the State on June 17, 1998 and submitted on July 22,

[3] We note that all of the requirements of 30 TAC Chapter 106, Subchapter A (which includes 30 TAC Section 106.6) and any preconstruction requirements under 30 TAC Chapter 116 are applicable requirements under the Texas title V program at 30 TAC Chapter 122. The EPA is not making a change to the approval status of the part 70 program in Texas; rather we are noting that any permit revisions associated with a Qualified Facility transaction would also be part of the permit record for the source's title V permit.

1998; and further revised by the adoption of August 21, 2002 and the submitted on September 4, 2002.

The EPA's approval, if finalized, would not make federally enforceable any Qualified Facility actions that were authorized by the State before the EPA's final approval of the Qualified Facilities Program is effective. The EPA is also proposing, that upon the final approval of today's action, we will amend 40 CFR 52.2273(b) to reflect that the Texas Minor NSR Qualified Facilities Program is an approved component of the Texas SIP. We also are proposing to delete 40 CFR 52.2273(d)(1) because the EPA is now proposing approval of the general definition of BACT.

We are also proposing to disapprove the severable portion of the definition of ''modification of existing facility'' at 30 TAC Section 116.10(9)(F) pertaining to natural gas processing facilities as submitted on October 5, 2010. The EPA previously disapproved this provision on November 17, 2011. The state resubmitted the provision on October 5, 2010, unchanged with the exception of numbering and provided no additional evidence to substantiate inclusion in the Texas Minor NSR program or to address the anti-backsliding requirements under CAA section 110(l). As such, we continue to believe that this provision is not clearly limited to Minor NSR and should be disapproved as inconsistent with the requirements of section 110 of the Act and the EPA's regulations under 40 CFR 51.160 through 51.164 regarding Minor NSR. The provision in subparagraph (F) in the definition of ''modification of existing facility'' that we are proposing to disapprove was not submitted to meet a mandatory requirement of the CAA. Therefore, if the EPA takes final action to disapprove subparagraph (F), no sanctions or Federal Implementation Plan clocks will be triggered. *See* CAA section 179(a).

At this time the EPA is also proposing several unrelated corrections to the Texas SIP to accurately reflect recent federal final actions.

- We are proposing to correct 40 CFR 52.2270(c) to include 30 TAC Section 116.112 as part of the Texas SIP. On December 7, 2005, the EPA approved 30 TAC Section 116.112—Distance Limitations as adopted by the TCEQ on January 14, 2004. *See* 70 FR 72720. As a result of this final approval, we included this provision in the table of EPA-Approved Regulations in the Texas SIP at 40 CFR 52.2270(c). 30 TAC Section 116.112 was inadvertently removed from 40 CFR 52.2270(c) due to a typographical error in later final rulemaking. We have taken no action to remove the Distance Limitation provisions at 30 TAC Section 116.112 from the Texas SIP; therefore, we are merely correcting a clerical error.
- The EPA is also proposing to correct 40 CFR 52.2270(c) to include the date and **Federal Register** citation for the EPA's final approval of 30 TAC Section 116.760 into the Texas SIP. This section was included in our final approval of the Texas Flexible Permits Program on July 14, 2014; however, the table in 40 CFR 52.2270(c) does not include the date or citation of EPA's approval. We are proposing to correct this inadvertent omission.
- Additionally, the EPA is proposing to delete 40 CFR 52.2273(d)(4)(viii) because of our March 30, 2015 final approval. *See* 80 FR 16573. We are also proposing to delete 40 CFR 52.2273(d)(5)(i) because of our February 14, 2014 final approval and 40 CFR 52.2273(d)(5)(ii) because of our April 1, 2014 final approval. *See* 79 FR 08861 and 79 FR 18183, respectively. As a result of the proposed deletions to 40 CFR 52.2273 described here, we will also consider renumbering this section to improve readability.
- Finally, we are proposing to clarify the SIP status of 30 TAC Section 116.110(c). This section was returned to the TCEQ on June 29, 2011, as it was inappropriately submitted for inclusion in the Texas SIP. As such, we propose to revise 40 CFR 52.2270(c) to specify that 30 TAC Section 116.110(c) is not in the SIP.

IV. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Texas regulations as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the EPA Region 6 office.

V. Statutory and Executive Order Reviews

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

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

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action merely proposes to approve state permitting provisions that are consistent with the CAA and disapprove state permitting provisions that are inconsistent with the CAA.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely proposes to approve state permitting provisions that are consistent with the CAA and disapprove state permitting provisions that are inconsistent with the CAA; therefore this action will not impose any requirements on small entities.

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. This action merely proposes to approve state permitting provisions that are consistent with the CAA and disapprove state permitting provisions that are inconsistent with the CAA; and therefore will have no impact on small governments.

E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may

disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely proposes to approve state permitting provisions that are consistent with the CAA and disapprove state permitting provisions that are inconsistent with the CAA.

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action merely proposes to approve state permitting provisions that are consistent with the CAA and disapprove state permitting provisions that are inconsistent with the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: April 22, 2016.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2016–10225 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2015–0187; FRL–9945–96–Region 9]

Limited Disapproval of Air Plan Revisions; Arizona; New Source Review; $PM_{2.5}$

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing a limited disapproval of a revision to the Arizona Department of Environmental Quality (ADEQ) portion of the Arizona State Implementation Plan (SIP) under the Clean Air Act (CAA or Act). This ADEQ-submitted SIP revision primarily was intended to serve as a replacement of ADEQ's SIP-approved rules for the issuance of New Source Review (NSR) permits for stationary sources, including but not limited to the rules governing the review and permitting of major sources and major modifications under the Act. This action concerns only the major nonattainment NSR provisions in ADEQ's submittal as they pertain to the Nogales and West Central Pinal nonattainment areas for particulate matter with a diameter of 2.5 micrometers or less ($PM_{2.5}$). The EPA previously finalized a limited approval for these $PM_{2.5}$ nonattainment areas related to certain major nonattainment NSR permitting requirements for $PM_{2.5}$ under the CAA, and is now also proposing a limited disapproval to set the stage for remedying certain deficiencies related to these requirements.

DATES: Comments must arrive by June 1, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2015–0187 at *http://www.regulations.gov,* or via email to *R9AirPermits@epa.gov.* For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Lisa Beckham, EPA Region IX, (415) 972–3811, *beckham.lisa@epa.gov.*

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

Table of Contents

I. The State's Submittal

A. What did the State submit?

On July 28, 2011 and October 29, 2012, ADEQ submitted revisions to the ADEQ portion of the Arizona SIP for EPA approval under the CAA. On May 16, 2014, ADEQ supplemented the July 28, 2011 submittal. On September 6, 2013, July 2, 2014, and February 16, 2015, ADEQ supplemented the October 29, 2012 submittal. Collectively, these submittals generally comprise ADEQ's current program for preconstruction review and permitting of new or modified stationary sources under ADEQ's jurisdiction in Arizona. On November 2, 2015, the EPA finalized a limited approval and limited disapproval, and other actions, for these submittals. See our final rule at 80 FR 67319 (Nov. 2, 2015) and proposed rule at 80 FR 14044 (Mar. 18, 2015). The EPA is now taking further action related to these submittals. The specific rules that were reviewed as part of these submittals and our previous action, and which are the subject of this action, can be found in Table 1 of the preamble to our November 2, 2015 final rule (80 FR 67320).

The SIP submittals that are the subject of this action and our 2015 proposed and final rules, referred to herein as the

''NSR SIP submittal,'' represent a comprehensive revision to ADEQ's preconstruction review and permitting program and were intended to satisfy the requirements under both part C (prevention of significant deterioration) (PSD) and part D (nonattainment new source review) of title I of the Act for major sources as well as the general preconstruction review requirements under section 110(a)(2)(C) of the Act. The Act's preconstruction review and permitting programs are often collectively referred to as ''New Source Review''.

Please see our previous proposed and final actions for the NSR SIP submittal—Revisions to Air Plan; Arizona; Stationary Sources; New Source Review—for a detailed description of the actions taken to date related to these submittals, including the docket for these actions (Docket ID No. EPA–R09–OAR–2015–0187 at *www.regulations.gov*) where other supplementary materials are available.

On December 28, 2012, April 29, 2013, and December 2, 2014, ADEQ's July 28, 2011, October 29, 2012, and July 2, 2014 submittals, respectively, were deemed complete by operation of law to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review. Each of these submittals includes evidence of public notice and adoption of the relevant ADEQ regulations.

B. What is the purpose of this proposed rule?

The purpose of this EPA rulemaking is solicit comment on whether the major nonattainment NSR portion of ADEQ's NSR SIP submittal fully meets the permitting requirements for $PM_{2.5}$ precursors under section 189(e) of the CAA. In the EPA's March 2015 proposed action on ADEQ's NSR SIP Submittal, we explained that we were not evaluating at that time whether the NSR SIP submittal would require additional revisions related to $PM_{2.5}$ to satisfy CAA section 189(e) requirements, and we finalized our action accordingly in November 2015. We are now proposing a limited disapproval of the major nonattainment NSR portion of ADEQ's NSR SIP submittal for $PM_{2.5}$ as it pertains to the statutory requirements of section 189(e).

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the submittal?

At this time the EPA is evaluating whether ADEQ's NSR SIP submittal meets certain permitting requirements for $PM_{2.5}$ nonattainment areas under title I, part D, subpart 4 of the CAA (subpart 4). At the time of our 2015 action, we did not determine that the submittal fully addressed section 189(e) in subpart 4, related to NSR permitting requirements for $PM_{2.5}$ for major stationary sources in $PM_{2.5}$ nonattainment areas, and instead finalized a limited approval related to subpart 4 based on this issue. For $PM_{2.5}$ nonattainment areas, section 189(e) requires that the control requirements applicable under plans in effect under part D of the CAA for major stationary sources of $PM_{2.5}$ also apply to major stationary sources of $PM_{2.5}$ precursors, except where the Administrator determines that such sources do not contribute significantly to $PM_{2.5}$ levels which exceed the standards in the area.

B. Does the submittal meet the evaluation criteria?

As explained further below, in order to meet the evaluation criteria in CAA section 189(e) for $PM_{2.5}$ as discussed above, ADEQ's NSR SIP submittal would need to (1) require major stationary sources of $PM_{2.5}$ precursors (nitrogen oxides (NO_X), sulfur dioxide (SO_2), volatile organic compounds (VOC), and ammonia) in areas designated nonattainment for the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS) to meet the same control requirements as those applicable to major stationary sources of $PM_{2.5}$, or (2) if not including such requirements for any of these precursors, provide a demonstration that the particular precursor does not contribute significantly to $PM_{2.5}$ levels that exceed the standard in the relevant $PM_{2.5}$ nonattainment area. As explained in our March 2015 proposed action on the ADEQ NSR SIP submittal, the rules in that submittal regulate NO_X and SO_2 as $PM_{2.5}$ precursors (see 80 FR 14057). As a result, the only remaining element for evaluation is whether the submittal appropriately addresses VOC and ammonia as $PM_{2.5}$ precursors.

1. Background

On January 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit, in *Natural Resources Defense Council (NRDC)* v. *EPA,* issued a decision that remanded the EPA's 2007 and 2008 rules implementing the 1997 $PM_{2.5}$ NAAQS. See 706 F.3d 428 (D.C. Cir. 2013). The 2008 EPA implementation rule addressed by the court decision, ''Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)'' (the 2008 NSR $PM_{2.5}$ Rule),[1] promulgated NSR requirements for implementation of $PM_{2.5}$ in both nonattainment areas (under the nonattainment NSR program) and attainment/unclassifiable areas (under the PSD program). The Court of Appeals found that the EPA had erred in implementing the $PM_{2.5}$ NAAQS in these rules for nonattainment areas solely pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than pursuant to the additional implementation provisions specific to particulate matter nonattainment areas in subpart 4 of part D of title I. The Court of Appeals ordered the EPA to ''repromulgate these rules pursuant to Subpart 4 consistent with this opinion.'' 706 F.3d at 437. The EPA issued a proposed rule to promulgate new generally applicable implementation regulations for the $PM_{2.5}$ NAAQS in accordance with the requirements of subpart 4 and the Court's remand decision, see 80 FR 15340 (March 23, 2015), but the EPA has not yet issued the final implementation rule. In the interim, however, states and the EPA still need to proceed with implementation of the $PM_{2.5}$ NAAQS in a timely and effective fashion in order to meet statutory obligations under the CAA and to assure the protection of public health intended by those NAAQS.

2. ADEQ's NSR SIP Submittal for $PM_{2.5}$ Nonattainment Areas

ADEQ's NSR SIP submittal generally includes requirements for the $PM_{2.5}$ nonattainment NSR program for major sources consistent with the provisions promulgated in the EPA's 2008 NSR $PM_{2.5}$ Rule. Specifically, ADEQ's NSR SIP submittal includes the $PM_{2.5}$ significant emission rates at R18–2–101(130), regulation of certain $PM_{2.5}$ precursors (SO_2 and NO_X) at R18–2–101(130), the regulation of PM_{10} and $PM_{2.5}$ condensable emissions at R18–2–101(122)(f), and the emissions offset requirements at R18–2–403(A)(3). The EPA approved these provisions into ADEQ's SIP as part of a limited approval and limited disapproval, and other actions, on November 2, 2015 (80 FR 67319).

Although ADEQ's NSR SIP submittal does include regulation of major sources of SO_2 and NO_X as $PM_{2.5}$ precursors under the major source nonattainment NSR program, it does not include rules regulating VOCs or ammonia in this manner. Nor does the NSR SIP submittal include a demonstration showing that

[1] 73 FR 28321 (May 16, 2008).

the regulation of VOCs and ammonia is not necessary under section 189(e).

The evaluation of which precursors need to be controlled to achieve a NAAQS in a particular nonattainment area is typically conducted in the context of the state's preparing and the EPA's reviewing an area's attainment plan SIP. In this case, there are two designated $PM_{2.5}$ nonattainment areas in Arizona, the Nogales (portion of Santa Cruz County, AZ) and West Central Pinal (portion of Pinal County, AZ) areas. Both are designated nonattainment for the 2006 annual $PM_{2.5}$ NAAQS. However, on January 7, 2013 and September 4, 2013, the EPA finalized determinations of attainment for these areas, respectively (78 FR 887 and 78 FR 54394), which suspended the requirement for the state to submit, among other things, an attainment plan SIP for the areas.[2] Accordingly, $PM_{2.5}$ attainment plans for SIP approval are not before EPA Region 9 for these areas, nor were they at the time of the EPA's proposed or final 2015 actions on the NSR SIP submittal. In 2015, as the EPA did not have before it the state's analysis as to which precursors needed to be controlled in these areas pursuant to section 189(e) of the Act, we determined that we could not fully approve as complying with the Act a nonattainment NSR SIP that addressed only a subset of the scientific $PM_{2.5}$ precursors recognized by the EPA. We determined that while ADEQ's NSR SIP submittal may not contain all of the elements necessary to satisfy the CAA requirements when evaluated under subpart 4, the major source nonattainment NSR portion of the submittal represented a considerable strengthening of the previously approved Arizona SIP, which did not previously address NSR permitting for $PM_{2.5}$ at all. Therefore, in our 2015 action, the EPA granted limited approval to the $PM_{2.5}$ major nonattainment NSR provisions in ADEQ's NSR SIP submittal for the Nogales and West Central Pinal $PM_{2.5}$ nonattainment areas based on the subpart 4 requirements, and indicated that we would consider whether a limited disapproval was appropriate pertaining to these requirements when the EPA re-promulgated its $PM_{2.5}$ regulations with respect to major nonattainment NSR permitting in response to the Court of Appeals' remand decision in the *NRDC* case.

Although the EPA has not yet re-promulgated these $PM_{2.5}$ regulations in response to the remand decision, the EPA is now proposing to determine that ADEQ's NSR SIP submittal does not fully satisfy the major nonattainment NSR requirements for $PM_{2.5}$ under section 189(e) of the Act for the Nogales and West Central Pinal $PM_{2.5}$ nonattainment areas, based on our finding that the submittal does not include rules regulating VOCs or ammonia as $PM_{2.5}$ precursors under the major source nonattainment NSR program, nor does it include a demonstration showing that the regulation of VOCs and ammonia is not necessary under section 189(e). We find it is appropriate to take action now in order to proceed with implementation of the major source nonattainment NSR program for the $PM_{2.5}$ NAAQS in a timely and effective fashion to address statutory obligations under the CAA and to assure the protection of public health as intended by the Act based on those NAAQS. Therefore, we are proposing a limited disapproval of the major source nonattainment NSR provisions in ADEQ's NSR SIP submittal for the Nogales and West Central Pinal $PM_{2.5}$ nonattainment areas based on our finding that the submittal does not fully satisfy section 189(e) of the Act as it relates to $PM_{2.5}$ precursors. To address this limited disapproval, ADEQ must revise its major source nonattainment NSR permitting program to include VOC and ammonia as $PM_{2.5}$ precursors, or provide a demonstration satisfying the requirement in section 189(e) that a particular precursor does not contribute significantly to $PM_{2.5}$ levels that exceed the standard in the Nogales and/or West Central Pinal $PM_{2.5}$ nonattainment areas.

C. Proposed Action and Public Comment

Pursuant to Section 110(k) of the Act, and for the reasons provided above, we are proposing a limited disapproval of the major source nonattainment NSR provisions of ADEQ's NSR SIP submittal for the Nogales and West Central Pinal $PM_{2.5}$ nonattainment areas under section 189(e) of the Act related to $PM_{2.5}$ precursors. The EPA is proposing this action because, although we found that the NSR SIP submittal met most of the applicable NSR permitting requirements for $PM_{2.5}$ nonattainment areas, we have found certain deficiencies that prevent full approval. The intended effect of our limited disapproval action is to set the stage for remedying deficiencies in these regulations in a timely fashion.

If finalized as proposed, our limited disapproval action will trigger an obligation on the EPA to promulgate a Federal Implementation Plan unless Arizona corrects the deficiencies that are the bases for this limited disapproval, and the EPA approves the related plan revisions, within two years of the final action. Additionally, the offset sanction in CAA section 179(b)(2) would apply in the nonattainment areas at issue 18 months after the effective date of a final limited disapproval, and the highway funding sanctions in CAA section 179(b)(1) would apply in these areas six months after the offset sanction is imposed. However, neither sanction will be imposed under the CAA if Arizona submits, and we approve, prior to the implementation of the sanctions, SIP revisions that correct the deficiencies that we identify in a final action. The EPA is working with ADEQ to correct the deficiencies identified in this action in a timely manner.

We will accept comments from the public on the proposed disapproval for the next 30 days.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.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 not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

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. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

[2] Prior to the *NRDC* Court's decision, the EPA would not have reviewed $PM_{2.5}$ attainment plan submittals for compliance with Section 189.

E. Executive Order 13132: Federalism

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

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 21, 2016.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2016–10219 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2015–0788; FRL–9945–80–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Reasonable Further Progress Plan, Contingency Measures, Motor Vehicle Emissions Budgets for the Baltimore 1997 8-Hour Ozone Serious Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the serious nonattainment area reasonable further progress (RFP) plan for the Baltimore serious nonattainment area for the 1997 8-hour ozone national ambient air quality standard (NAAQS). The SIP revision includes 2011 and 2012 RFP milestones, contingency measures for failure to meet RFP, and updates to the 2002 base year inventory and the 2008 reasonable RFP plan previously approved by EPA. EPA is also proposing to approve the transportation conformity motor vehicle emissions budgets (MVEBs) associated with this revision. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before June 1, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2015–0788 at *http://www.regulations.gov,* or via email to *fernandez.cristina@epa.gov.* For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Maria A. Pino, (215) 814–2181, or by email at *pino.maria@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. The Baltimore Area

In 1997, EPA revised the health-based NAAQS for ozone, setting it at 0.08 parts per million (ppm) averaged over an 8-hour time frame.[1] EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.

On April 30, 2004, EPA finalized its attainment/nonattainment designations for areas across the country with respect to the 1997 8-hour ozone standard. 69 FR 23858. These actions became effective on June 15, 2004. Among those

[1] EPA revoked the 1997 8-hour ozone NAAQS, effective April 6, 2015. *See* 80 FR 12264 (March 06, 2015). EPA revised the ozone NAAQS in both 2008 and 2015. EPA lowered the level of the 8-hour NAAQS to 0.075 ppm and then 0.070 ppm. *See* 73 FR 16483 (March 27, 2008) and 80 FR 65291 (October 26, 2015). This SIP revision does not address the 2008 and 2015 ozone NAAQS.

nonattainment areas was the Baltimore, Maryland moderate nonattainment area (the Baltimore Area). The Baltimore Area includes Baltimore City and Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties, which are all in Maryland.

Pursuant to Phase 1 of the 8-hour ozone implementation rule for the 1997 8-hour ozone NAAQS, an area was classified under Subpart 2 of the CAA based on its 8-hour design value if that area had a 1-hour design value at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of Subpart 2). *See* 69 FR 23951 (April 30, 2004). Based on this criterion, the Baltimore Area was classified under Subpart 2 as a moderate nonattainment area. Moderate areas were required to attain the 1997 8-hour ozone NAAQS within 6 years of designation, or by June 15, 2010.

The Baltimore Area did not attain the 1997 8-hour ozone NAAQS by June 2010. However, the area was eligible for a one-year extension of its attainment date, from June 15, 2010 to June 15, 2011. EPA granted that attainment date extension on March 11, 2011. 76 FR 13289. The extension was based on the air quality data for the 4th highest daily 8-hour monitored value during the 2009 ozone season.

The Baltimore Area also did not attain the 1997 8-hour ozone NAAQS by June 2011. The area did not qualify for a second one-year extension of its attainment date, based on air quality data monitored during the 2009 and 2010 ozone seasons. Therefore, on February 1, 2012, EPA made a determination that the Baltimore Area did not attain the 1997 8-hour ozone NAAQS by its attainment date. 77 FR 4901. As a result of this determination, the Baltimore Area was reclassified by operation of law as a serious 8-hour ozone nonattainment area for the 1997 8-hour ozone standard. *See* 40 CFR 81.321. Consequently, the State of Maryland was required to submit SIP revisions for the Baltimore Area to meet the CAA requirements for serious ozone nonattainment areas. EPA set the due date for the serious area SIP revision as no later than September 30, 2012. The serious area attainment date for the Baltimore Area was as expeditiously as practicable, but not later than June 15, 2013. MDE submitted its July 22, 2013 SIP revision request, the Baltimore 8-hour Serious Area Plan, pursuant to this requirement.

On May 26, 2015, EPA determined that the Baltimore Area attained the 1997 8-hour ozone NAAQS, based on monitored ambient air quality data for the 2012–2014 monitoring period. 80 FR 29970. Under the provisions of EPA's ozone implementation rule (40 CFR 51.918), when EPA issues a determination that an area is attaining the relevant standard, that determination suspends the area's obligations to submit an attainment demonstration, reasonably available control measures (RACM), RFP plan, contingency measures and other planning requirements under part D of title I of the CAA related to attainment of the 1997 8-hour ozone NAAQS for as long as the area continues to attain the standard.[2] Preliminary (*i.e.,* not yet quality assured or certified) monitoring data for the 2013–2015 monitoring period indicates that the Baltimore Area continues to attain the 1997 8-hour ozone NAAQS.[3] Although the requirement to submit these plan elements is suspended, EPA is not precluded from acting upon these elements at any time if a state still submits them to EPA for review and approval. Therefore, the requirement for Maryland to submit certain serious area SIP elements pursuant to sections 172 and 182 of the CAA has been suspended. However, Maryland had already submitted its July 22, 2013 serious area SIP revision, and MDE requested that EPA act on the RFP plan, RFP contingency measures, MVEBs and emission inventories contained in the SIP revision submittal. EPA is proposing to approve these elements as SIP strengthening measures pursuant to section 110 of the CAA. Considering the most recent ambient air quality monitoring data, the Baltimore Area continues to meet the 1997 8-hour ozone NAAQS.

B. Serious Area Requirements

Section 182 of the CAA and EPA's 1997 8-hour ozone regulations (40 CFR 51.910) require each moderate and above 8-hour ozone nonattainment area to submit an emissions inventory and RFP SIP revision that describes how the area will achieve actual emissions reductions of volatile organic compounds (VOC) and nitrogen oxides (NO_X) from a baseline emissions inventory. An emissions inventory is an estimation of actual emissions of air pollutants in an area. The emissions inventory for an ozone nonattainment area contains VOC and NO_X emissions, which are precursors to ozone formation. In this case, a ''baseline'' emissions inventory is required for the year 2002. *See* EPA's Phase 2 Final Rule for Implementation of the 8-hour Ozone Standard (Phase 2 Rule), 70 FR 71612, 71615 (November 29, 2005).

EPA's Phase 1 Final Rule for Implementation of the 8-hour Ozone Standard (Phase 1 Rule), published on April 30, 2004, set out criteria for classifying nonattainment areas under the 1997 8-hour ozone standard. 69 FR 23951. The Phase 1 Rule also addressed revocation of the 1-hour ozone NAAQS; how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS; attainment dates; and the timing of emissions reductions needed for attainment. On November 29, 2005, EPA published the Phase 2 Rule. 70 FR 71612. The Phase 2 Rule addressed the RFP control and planning obligations as they apply to areas designated nonattainment for the 1997 8-hour ozone NAAQS. The Phase 2 Rule was revised on June 8, 2007. 72 FR 31727. Among other things, the Phase 1 and 2 Rules outline the SIP requirements and deadlines for various requirements in areas designated as nonattainment for the 1997 8-hour ozone NAAQS. The rules set a due date of June 15, 2007 for the required base year emission inventory, RFP plan, modeling and attainment demonstration, RACM, MVEBs, and contingency measures (40 CFR 51.908(a), (c)).

C. The Moderate Area Plan

On June 4, 2007, Maryland submitted a comprehensive SIP revision request to address moderate area ozone requirements for the Baltimore Area. That 2007 ''Moderate Area Plan'' SIP revision request included the 2002 base year emissions inventory, a 2008 RFP plan, including a 2008 ozone projected emission inventory, a RACM analysis, an attainment demonstration (including modeling and weight of evidence), a 2009 attainment year inventory, contingency measures for RFP and attainment, and 2008 and 2009 MVEBs for the Baltimore Area. On June 4, 2010, EPA approved the 2002 base year inventory, RFP plan up to 2008, RFP contingency measures, RACM demonstration, and 2008 MVEBs associated with the 2007 moderate area SIP revision submittal. 75 FR 31709.

[2] Pursuant to 40 CFR 51.918, ''[u]pon a determination by EPA that an area designated nonattainment for the 8-hour ozone NAAQS has attained the standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 8-hour ozone NAAQS shall be suspended until such time as: The area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the 8-hour ozone NAAQS.''

[3] The Preliminary 2013–2015 Baltimore Monitoring Ozone Data Report can be found online at *http://www.regulations.gov,* Docket number EPA–R03–OAR–2015–0788.

D. The Serious Area Plan

On July 22, 2013, the Maryland Department of the Environment (MDE) submitted the SIP revision, ''Baltimore Serious Nonattainment Area 0.08 ppm 8-Hour Ozone State Implementation Plan Demonstrating Rate of Progress for 2008, 2011 and 2012 Revision to 2002 Base Year Emissions; and Serious Area Attainment Demonstration, SIP Number: 13–07,'' (the Serious Area Plan). That SIP revision submittal included updates to the 2002 base year emissions inventory and 2008 RFP plan that EPA previously approved into the Maryland SIP, RFP for 2011 and 2012, an attainment demonstration, including modeling and weight of evidence, RFP and attainment contingency measures, a RACM determination, and 2012 MVEBs. After EPA determined Baltimore had attained the 1997 8-hour ozone standard, Maryland, by letter dated October 20, 2015, withdrew the attainment demonstration, including modeling and weight of evidence, contingency measures for attainment, and the RACM analysis from consideration as a SIP revision. Therefore, those elements are not addressed in this rulemaking action.

II. Summary of SIP Revision and EPA Evaluation

EPA's analysis and findings are discussed in this proposed rulemaking, and a more detailed discussion is contained in the Technical Support Documents (TSD) for this proposed rulemaking action, which is available online at *http://www.regulations.gov,* Docket number EPA–R03–OAR–2015–0788.

A. Base Year Emissions Inventory

1. Requirement

An emissions inventory is a comprehensive, accurate, and current inventory of actual emissions from all sources. The emissions inventory is required by section 172(c)(3) of the CAA. For ozone nonattainment areas, the emissions inventory needs to contain VOC and NO_X emissions because these pollutants are precursors of ozone. EPA recommended 2002 as the base year emissions inventory, which is therefore the starting point for calculating RFP. Maryland submitted its 2002 base year emissions inventory for the Baltimore Area in its 2007 moderate area plan. EPA approved that inventory on June 4, 2010 (75 FR 31709).

2. State Submittal and EPA Evaluation

In its Serious Area Plan for the Baltimore area, Maryland updated the 2002 base year inventory. The update was needed to reflect the change to EPA's approved model for onroad mobile sector emissions, from the Mobile Source Emission Factor Model (MOBILE) to the Motor Vehicle Emission Simulator (MOVES) model, as well as updates to EPA's NONROAD model. The updated 2002 base year inventory is discussed in Section 3 of Maryland's Serious Area Plan.

A summary of the approved and updated Baltimore Area 2002 base year VOC and NO_X emissions inventories are included in Table 1. EPA notes that the updates to the onroad and nonroad emissions result in a lower total base year emissions inventory for VOCs, and a higher total for NO_X.

TABLE 1—COMPARISON OF SIP APPROVED VERSUS UPDATED BALTIMORE AREA 2002 BASE YEAR VOC AND NO_X EMISSIONS

[Ozone season tons per day (tpd)]

Emission source category	VOC		NO_X	
	SIP approved	Updated	SIP approved	Updated
Point	13.88	13.88	111.88	111.89
Stationary Area	116.81	116.81	8.18	8.18
Nonroad Mobile	70.22	59.61	40.96	49.18
Onroad Mobile	70.57	72.48	177.06	202.22
Total (excluding Biogenic Emissions)	271.48	*262.77	338.08	371.47
Biogenic Emissions	223.20	223.20	0	0

* **Note:** The 2002 updated data is pulled from Table 5–1 in the Serious Area Plan. With that table, MDE states, ''Small discrepancies may result due to rounding.''

EPA reviewed Maryland's updates to its 2002 base year inventory for the Baltimore Area using the appropriate EPA policy and guidance, and found MDE's procedures, methodologies, and results for the Baltimore Area 2002 base year inventory to be reasonable. A detailed evaluation of the emissions inventories contained in the Serious Area Plan is contained in a separate November 9, 2015 technical support document, entitled ''Technical Support Document (TSD) for the Baltimore Nonattainment Area 8-Hour Ozone State Implementation Plan: Demonstrating Rate of Progress for 2008, 2011, and 2012; Revision to 2002 Base Year Emissions; and Serious Area Attainment Demonstration,'' (the Baltimore Serious Area Emissions Inventory TSD), which is available online at *http://www.regulations.gov,* Docket number EPA–R03–OAR–2015–0788. EPA thus proposes to approve the revised 2002 emissions inventory.

B. Adjusted Base Year Inventory, 2008 RFP Target Levels, and Determination of 2008 RFP

1. Requirement

The Baltimore Area was originally classified as moderate for the 1997 8-hour ozone NAAQS. As such, the CAA requires a 15 percent (%) reduction in ozone precursor emissions over an initial 6-year period. In the Phase 2 Rule, EPA interpreted this requirement for areas that were also designated nonattainment and classified as moderate or higher for the 1-hour ozone standard. In the Phase 2 Rule, EPA provided that an area classified as moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15% plan for the 1-hour ozone NAAQS, is considered to have met the requirements of section 182(b)(1) of the CAA for the 8-hour NAAQS for the 15% reduction in ozone precursor emissions. In this situation, a moderate nonattainment area is subject to RFP under section 172(c)(2) of the CAA and shall submit, no later than 3 years after designation for the 8-hour NAAQS, a SIP revision that meets the requirements

of 40 CFR 51.910(b)(2) for RFP. The RFP SIP revision must provide for a 15% emission reduction (either NO_X and/or VOC) accounting for any growth that occurs during the 6-year period following the baseline emissions inventory year, that is, 2002–2008.

The Baltimore Area was classified as severe under the 1-hour ozone standard, and had the same boundary as the Baltimore Area under the 1997 8-hour ozone standard. On July 12, 1995, Maryland submitted a 15% Plan SIP revision for the Baltimore Area. On February 2, 2000, EPA approved Maryland's 15% plan for the Baltimore severe 1-hour ozone nonattainment area. 65 FR 5252. Therefore, according to the Phase 2 Rule, the RFP plan for the Baltimore Area may use either NO_X or VOC emissions reductions (or both) to achieve the 15% emission reduction requirement.

2. State Submittal and EPA Evaluation

On June 4, 2010, EPA approved Maryland's moderate area RFP that provided for a 15% emissions reduction from 2002 to 2008, contained in the Moderate Area Plan. 75 FR 31709. Maryland, however, needed to update the 2008 target levels for its Serious Area Plan because they are the basis for the new 2011 and 2012 target level calculations for RFP. In the Serious Area Plan, MDE updated its 15% RFP plan to reflect EPA's change from MOBILE to MOVES for onroad emission modeling and updates to EPA's NONROAD model.

a. Adjusted Base Year Inventory, 2008 RFP Target Levels

Maryland set out its calculations for the adjusted base year inventory and 2008 RFP target levels in Section 5 of Maryland's Serious Area Plan. EPA previously approved 2008 RFP for the Baltimore Area. *See* 75 FR 31709 (June 4, 2010). EPA required MDE to update the 2008 target levels for RFP so that they could be used to calculate the 2011 and 2012 target levels in the Serious Area Plan. In the TSD prepared for this rulemaking action, EPA reviewed the revised 2008 target levels calculations in the Serious Area Plan, summarized in Table 2, and determined that they were done correctly and are approvable.

TABLE 2—BALTIMORE AREA 2008 RFP TARGET LEVEL CALCULATIONS

[Ozone season tpd]

Description	Formula	VOC	NO_X
A. 2002 Adjusted Base Year Inventory Relative To 2008	.....	258.69	369.69
B. RFP Ratio	.....	0.0800	0.0700
C. Emissions Reductions Required Between 2002 & 2008	A * B	20.70	25.88
D. Target Level for 2008	A – C	238.00	343.81

b. Projected 2008 Inventories and Determination of RFP

Maryland describes its methods used for developing its 2008 projected VOC and NO_X inventories in Section 4 and Appendix A of the Serious Area Plan. Projected controlled 2008 emissions for the Baltimore Area are summarized in Tables 4–5 of the Serious Area Plan, and are presented in Table 3. EPA reviewed the procedures Maryland used to develop its projected inventories and found them to be reasonable. For more information on EPA's analysis in proposing to approve the projected inventories, please see the Baltimore Serious Area Emissions Inventory TSD.

TABLE 3—BALTIMORE AREA 2008 PROJECTED CONTROLLED VOC AND NO_X EMISSIONS

[Ozone season tpd]

Source category	VOC emissions	NO_X emissions
Point	15.63	122.64
Area	108.17	8.43
Non-road	44.04	42.85
Mobile	50.12	125.69
Total	217.96	299.62

To determine if 2008 RFP is met in the Baltimore Area, the total projected controlled emissions must be compared to the 2008 target levels of emissions. As shown in Table 4, the Serious Area Plan demonstrates that sufficient emission reductions occurred between 2002 and 2008 to meet the 2008 RFP target levels. Thus, EPA proposes to approve the Baltimore Area's revised 2008 RFP.

TABLE 4—COMPARISON OF THE 2008 RFP MEASURE TARGET LEVELS VERSUS PROJECTED CONTROLLED EMISSIONS IN THE BALTIMORE AREA

[Ozone season tpd]

Description	VOC emissions	NO_X emissions
A. Total 2008 Projected Controlled Emissions	217.96	299.62.
B. Target Level for 2008	238.00	343.81.
RFP is met if A < B	Yes	Yes.

C. 2011 and 2012 RFP Target Levels and Determination of RFP

1. Requirement

Serious 8-hour ozone nonattainment areas are subject to RFP requirements in section 182(c)(2)(B) of the CAA that require an average of 3% per year of VOC and/or NO_X emissions reductions for all remaining 3-year periods after the first 6-year period out to the area's attainment date (2008–2011, and 2011–2012). For a serious area, such as the Baltimore Area, with an approved 15% rate of progress (ROP) plan under the 1-hour standard, states can use reductions from VOC or NO_X or a combination of either.

2011 and 2012 target levels are calculated in the same manner as the 2008 targets, except that the baseline is the previous target level, not the 2002 base year inventory. The 2008 target levels are thus used as the basis for calculating 2011 targets. Similarly, 2011 target levels are used to calculate the 2012 targets.

2. State Submittal and EPA Evaluation

a. Adjusted Base Year Inventories, 2011 and 2012 RFP Target Levels

2011 and 2012 RFP calculations can be found in Sections 6 and 7 of the Serious Area Plan, respectively. In the TSD prepared for this rulemaking action, EPA reviewed the 2011 and 2012 target levels calculations in the Serious Area Plan, summarized in Table 5, and determined that they were done correctly and are approvable and therefore EPA proposes to approve them.

TABLE 5—BALTIMORE AREA 2011 & 2012 RFP TARGET LEVEL CALCULATIONS

[Ozone season tpd]

Description	Formula	VOC	NO_X
2011 Target			
A. 2008 Adjusted Base Year Inventory Relative To 2011	.....	237.71	343.81
B. RFP Ratio	.....	0.0600	0.0300
C. Emissions Reductions Required Between 2008 & 2011	A * B	14.28	10.31
D. Target Level for 2011	A – C	223.72	333.49
2012 Target			
A. 2011 Adjusted Base Year Inventory Relative To 2012	.....	223.73	333.32
B. RFP Ratio	.....	0.0150	0.0150
C. Emissions Reductions Required Between 2011 & 2012	A * B	3.36	5.00
D. Target Level for 2012	A – C	220.38	328.49

b. Projected 2011 and 2012 Inventories and Determination of RFP

Maryland describes its methods used for developing its 2011 and 2012 projected VOC and NO_X inventories in Section 4.0 and Appendix A of the Serious Area Plan. Projected 2011 and 2012 VOC and NO_X emissions are found in Appendix A of the Baltimore Serious Area Plan. EPA reviewed the procedures Maryland used to develop its projected inventories and found them to be reasonable. For details on EPA's analysis, see the Baltimore Serious Area Emissions Inventory TSD.

Projected controlled 2011 and 2012 emissions for the Baltimore Area are summarized in the Serious Area Plan, in Tables 4–6 and 4–7, respectively. That data is presented in Table 6.

TABLE 6—BALTIMORE AREA 2011 AND 2012 PROJECTED CONTROLLED VOC & NO_X EMISSIONS

[Ozone season tpd]

Source category	2011		2012	
	VOC emissions	NO_X emissions	VOC emission	NO_X emissions
Point	16.79	95.21	17.19	94.79
Area	106.07	8.54	106.79	8.56
Non-road	38.26	38.12	35.69	36.05
Mobile	44.54	104.62	40.23	93.47
Total	205.65	246.48	199.90	232.88

To determine if 2011 and 2012 RFP is met in the Baltimore Area, the total projected controlled emissions must be compared to the target levels calculated in the previous section of this rulemaking. As shown in Table 7, the Serious Area Plan demonstrates that sufficient emission reductions occurred between 2008 and 2011 and between 2011 and 2012 to meet the 2011 and 2012 RFP target levels. Therefore, the Serious Area Plan demonstrates 2011 and 2012 RFP in the Baltimore Area, and EPA proposes to approve the 2011 and 2012 RFP in the Serious Area Plan.

TABLE 7—COMPARISON OF THE 2011 AND 2012 RFP MEASURE TARGET LEVELS VERSUS PROJECTED CONTROLLED EMISSIONS IN THE BALTIMORE AREA

[Ozone season tpd]

Description	VOC emissions	NO_X emissions
2011 RFP		
A. Total 2011 Projected Controlled Emissions	205.65	246.48
B. Target Level for 2011	223.72	333.49
RFP is met if A < B	Yes	Yes
2012 RFP		
.		
A. Total 2012 Projected Controlled Emissions	199.90	232.88
B. Target Level for 2012	220.38	328.49
RFP is met if A < B	Yes	Yes

D. Control Measures and Emission Reductions for RFP

1. Requirement

Emission reductions to meet RFP must be from permanent and enforceable emission control measures.

2. State Submittal and EPA Evaluation

The control measures for which Maryland took credit in order to meet the RFP requirement in the Baltimore Area are described in Section 8 of the Serious Area Plan. To meet the RFP requirement for the Baltimore Area, Maryland used a combination of point, onroad mobile, nonroad mobile, and area source control measures as described in this section of this rulemaking action.

a. Onroad Mobile Measures

The onroad mobile measures Maryland used to meet RFP in the Baltimore Area include enhanced vehicle inspection and maintenance (enhanced I/M), Tier I vehicle emission standards and new federal evaporative test procedures (Tier I), reformulated gasoline, the national low emission vehicle (NLEV) program, and the federal heavy-duty diesel engine (HDDE) rule. Maryland calculated the emission reductions for 2008, 2011, and 2012 RFP using the MOVES model for these onroad mobile measures. EPA reviewed the procedures that MDE used to develop its projected inventories, including the use of the MOBILE model, and found them to be reasonable. For details on EPA's analysis, see the Baltimore Serious Area Emissions Inventory TSD.

b. Area (Nonpoint) Source Measures

The area source measures Maryland used to meet RFP in the Baltimore Area include four Ozone Transport Commission (OTC) rules, Commercial and Consumer Products (Phases 1 and 2), Architectural and Industrial Maintenance Coatings (AIM), Portable Fuel Containers (PFC) (Phases 1 and 2), and Industrial Adhesives and Sealants. In the TSD for this action, EPA evaluated each of these measures and calculated the emission reductions for each measure, and finds the emission reductions Maryland claimed for these measures to be reasonable.

c. Non-Road Measures—NONROAD Model

The non-road mobile measures Maryland used to meet RFP in the Baltimore Area include Non-Road Small Gasoline Engines, Non-Road Diesel Engines (Tier I and Tier II), Marine Engine Standards, Emissions Standards for Large Spark Ignition Engines, and Reformulated Gasoline Use in Non-Road Motor Vehicles and Equipment. Maryland used the EPA NONROAD model to calculate 2008, 2011, and 2012 RFP emission reductions for these measures. As discussed in the Baltimore Serious Area Emissions Inventory TSD, EPA reviewed the procedures that MDE used to develop its projected inventories, including the use of the NONROAD model, and found them to be reasonable.

d. Point Source Measures

Maryland took credit for one point source measure in its RFP plan, the Maryland Healthy Air Act (HAA). In the Baltimore Area, the sources covered by the HAA are Brandon Shores and H.A. Wagner in Anne Arundel County and C.P. Crane in Baltimore County. In the TSD for this action, EPA evaluated this measure and verified Maryland's calculated emission reductions from the affected sources covered by the HAA and found the emission reductions reasonable.

Table 8 summarizes the emission reductions achieved by each measure, as calculated by Maryland in the Serious Area Plan.

TABLE 8—SUMMARY OF RFP EMISSION REDUCTIONS

[tpd]

Control measure	2008		2011		2012	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
Mobile Onroad						
MOVES model	52.86	158.43	62.23	181.35	66.59	192.33
Area						
OTC–Consumer Products Phase 1	3.70	0.00	3.77	0.00	3.79	0.00
OTC–Consumer Products Phase 2	0.00	0.00	0.46	0.00	0.46	0.00

TABLE 8—SUMMARY OF RFP EMISSION REDUCTIONS—Continued

[tpd]

Control measure	2008		2011		2012	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
OTC–AIM	6.03	0.00	6.19	0.00	6.19	0.00
OTC–PFC Phase 1	6.71	0.00	8.31	0.00	8.35	0.00
OTC–PFC Phase 2	0.00	0.00	0.60	0.00	0.60	0.00
OTC–Industrial Adhesives	0.00	0.00	2.63	0.00	2.64	0.00
Total Area reductions	16.44	0.00	21.96	0.00	22.03	0.00
Nonroad						
Nonroad Model	17.85	8.12	26.33	14.55	29.83	17.30
Railroads (Tier 2)	0.00	1.18	0.00	1.58	0.00	1.67
Point						
Healthy Air Act (HAA)	0.00	0.00	0.00	31.86	0.00	37.18
Total	87.14	167.73	110.51	229.35	118.45	248.48

Projected emissions for both VOC and NO_X are well below the RFP target levels, as shown in Table 9. Therefore, EPA finds the Serious Area Plan demonstrated more than sufficient emission reductions to meet RFP for 2008, 2011, and 2012 and thus finds the RFP plan approvable.

TABLE 9—COMPARISON OF RFP TARGETS AND PROJECTED CONTROLLED EMISSIONS FOR THE BALTIMORE AREA

[tpd]

Description	2008		2011		2012	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
A. Projected Controlled Emissions	217.96	299.62	205.65	246.48	199.90	232.88.
B. Target Level	238.00	343.81	223.72	333.49	220.38	328.49.
RFP is met if A < B	Yes	Yes	Yes	Yes	Yes	Yes.

EPA notes that Maryland was not required to demonstrate 2008 RFP, because EPA previously approved 2008 RFP for the Baltimore Area. *See* 75 FR 31709 (June 4, 2010). EPA required MDE only to update the 2008 target levels, so that they could be used to calculate the 2011 and 2012 target levels in the Serious Area Plan.

E. Contingency Measures for Failure To Meet RFP

1. Requirement

Section 182(c) of the CAA requires a state with a moderate or above ozone nonattainment area to include in its SIP, among other things, sufficient additional contingency measures in its RFP plan in case the area fails to meet any applicable milestone. *See* CAA section 182(c)(9). These contingency measures must be fully adopted control measures or rules, so that upon failure to meet a RFP milestone requirement, the state must be able to implement the contingency measures without any further rulemaking activities. If triggered, these contingency measures must achieve additional emission reductions of at least 3% of the adjusted baseline emissions. For more information on contingency measures, see the General Preamble to Title I of the CAA (57 FR 13512 (April 16, 1992)) and the Phase 2 Rule. To meet the requirements for contingency measure emission reductions, EPA allows states to use NO_X emission reductions to substitute for VOC emission reductions in their contingency plans. Maryland discusses its contingency measures for failure to meet RFP in Section 12.3 of the Serious Area Plan.

EPA's May 26, 2015 determination that the Baltimore Area attained the 1997 8-hour ozone NAAQS suspends certain planning requirements, including contingency measures, for the 1997 8-hour ozone NAAQS for as long as the area continues to meet that NAAQS. 80 FR 29970. Considering the most recent ambient air quality monitoring data, the Baltimore Area continues to meet the 1997 8-hour NAAQS. Therefore, no contingency measures are required to address requirements in sections 172 or 182 of the CAA. *See* 40 CFR 51.918. However, as discussed in this section of this rulemaking action, EPA is proposing to approve the RFP contingency measures along with the serious area RFP plan in the Serious Area Plan, as SIP strengthening measures pursuant to section 110 of the CAA, as requested by MDE.

2. State Submittal and EPA Evaluation

Maryland's Serious Area Plan contains contingency measures for failure to meet the 2012 RFP milestone. The Serious Area Plan relies on the excess emission reductions from the same measures used to meet the RFP targets in order to meet the contingency measure target. This is acceptable under EPA's early implementation policy, set out in the August 13, 1993 memorandum from G.T. Helms, entitled, ''Early Implementation of Contingency Measures for Ozone and Carbon Monoxide (CO) Nonattainment Areas.'' Maryland chose to split the 3% contingency requirement equally between VOC and NO_X. For details on the contingency target level

calculations, see Tables 10 and 11, and for EPA's detailed analysis and evaluation of the 2012 RFP contingency measure requirement, see EPA's TSD supporting this rulemaking action.

TABLE 10—2012 RFP CONTINGENCY MEASURE TARGET LEVEL CALCULATIONS

Description	Formula	VOC	NO_X
A. 2011 Target Level	.....	223.73	333.49
B. FMVCP/RVP Reductions Between 2011 and 2012	.....	0.00	0.18
C. 2011 Adjusted Base Year Inventory Relative to 2012	A – B	223.73	333.32
D. RFP Ratio	.....	0.0150	0.0150
E. Emissions Reductions Required Between 2011 & 2012	C * D	3.36	5.00
F. RFP Target Level for 2012	C – E	220.38	328.49
G. Contingency, 1.5% VOC & NO_X	0.015 * C	3.36	5.00
H. 2012 Contingency Target Level	F – G	217.02	323.49

TABLE 11—COMPARISON OF THE 2012 RFP CONTINGENCY MEASURE TARGET LEVELS VERSUS PROJECTED CONTROLLED EMISSIONS

[tpd]

Description	VOC	NO_X
A. Projected Controlled Emissions	199.90	232.88.
B. Contingency Target Level	217.02	323.49.
Contingency Requirement is met if A < B	Yes	Yes.

As shown in Table 11, the Serious Area Plan achieved more than enough emission reductions to meet the contingency measure requirement for the 2012 milestone year for the Baltimore Area. Therefore, EPA proposes to approve Maryland's contingency measures from the Serious Area Plan as SIP strengthening measures.

F. Transportation Conformity Budgets

1. Requirement

Transportation conformity is required by section 176(c) of the CAA. EPA's conformity rule requires that transportation plans, programs and projects conform to state air quality implementation plans and establishes the criteria and procedure for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. *See* 69 FR 40004 (July 1, 2004).

States must establish VOC and NO_X MVEBs for each of the milestone years up to the attainment year and submit the mobile budgets to EPA for approval. Upon adequacy determination or approval by EPA, states must conduct transportation conformity analysis for their Transportation Improvement Programs (TIPs) and long range transportation plans to ensure highway vehicle emissions will not exceed relevant MVEBs. For budgets to be approvable, they must meet, at a minimum, EPA's adequacy criteria set out at 40 CFR 93.118(e)(4).

2. State Submittal and EPA's Evaluation

MDE discusses transportation conformity in Section 10 of the Baltimore Serious Area Plan. MDE, in consultation with the Baltimore Regional Transportation Board (BRTB), established MVEBs for 2012. MDE calculated the 2012 mobile emissions inventory using EPA's MOVES and the Highway Performance Monitoring System (HPMS) models. MDE describes its methods in Appendix E of the Baltimore Serious Area Plan.

The MVEBs are the amount of emissions allowed in the SIP for onroad motor vehicles; it establishes an emissions ceiling for the regional transportation network. The 2012 MVEBs for the Baltimore Area are 93.5 tpd NO_X and 40.2 tpd VOC.

On November 23, 2015, as part of the adequacy process, EPA posted the availability of the 2012 MVEBs on EPA's Web site for the purpose of soliciting public comments.[4] The comment period for the Baltimore Area's 2012 MVEBs closed on December 23, 2015, and EPA received no comments. In a February 22, 2016 **Federal Register** notice, EPA notified the public that EPA found the 2012 RFP MVEBs in the Baltimore Serious Area Plan adequate for transportation conformity purposes. 81 FR 8711.[5] As a result of EPA's finding, the State of Maryland must use the 2012 MVEBs from the Serious Area Plan for future transportation conformity determinations.

The MVEBs which EPA has determined to be adequate are identical to the projected controlled 2012 onroad mobile source emissions for the Baltimore Area in the Serious Area Plan. In addition to the budgets being adequate for transportation conformity purposes, EPA found the procedures Maryland used to develop the MVEBs to be reasonable. For more information on EPA's analysis, see EPA's TSD available in the docket for this rulemaking. Because the 2012 RFP MVEBs are adequate for transportation conformity purposes and the methods MDE used to develop them are correct, the 2012 RFP MVEBs are approvable.

III. Proposed Action

EPA has reviewed the RFP plan for the Baltimore Area, submitted in the Serious Area Plan, including updates to

[4] *See https://www3.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

[5] EPA's February 22, 2016 notification included an inadvertent error mentioning that the comment period on the Baltimore Area 2012 MVEBs closed November 23, 2015 instead of December 23, 2015. In fact, the comment period on EPA's Web site for the public to comment on the adequacy of the Baltimore Area's 2012 MVEBs was open for 30 days from November 23, 2015 through December 23, 2015, and EPA's Web site correctly includes the appropriate December 23, 2015 closing date. *See https://www3.epa.gov/otaq/stateresources/transconf/adequacy.htm*, Because the comment period was open for 30 days and because the public therefore had adequate time to comment on the 2012 MVEBs, EPA's incorrect reference in the February 22, 2016 **Federal Register** publication after the comment period closed was harmless and inadvertent error. Thus, the inadvertent error does not alter EPA's finding that the 2012 RFP MVEBs are adequate.

the 2008 RFP target levels previously SIP approved by EPA, the 2011 and 2012 RFP targets levels, control measures used to meet RFP, and contingency measures for failure to meet the 2012 RFP target, and found them to be approvable. In addition, EPA determined that MDE used acceptable techniques and methodologies to update the 2002 base year and 2008 projected inventories, and to develop the 2011 and 2012 milestone year projected inventories and found them approvable. Furthermore, EPA has found the Baltimore Area's 2012 MVEBs adequate for transportation conformity purposes and approvable. Therefore, EPA is proposing to approve the updates to the 2002 base year inventory, updates to the 2008 RFP plan and associated 2008 projected emissions inventory, the 2011 and 2012 RFP plan and associated projected emission inventories, the contingency measures for failure to meet 2012 RFP, and the 2012 MVEBs for the Baltimore Area submitted in MDE's July 22, 2013 Serious Area Plan. The other parts of the Serious Area Plan were withdrawn by Maryland. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to the Baltimore Area serious RFP plan, inventories, RFP contingency measures, and MVEBs, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Volatile organic compounds.

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

Dated: April 15, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2016–10222 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0127; FRL–9945–43–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; State Board Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the state implementation plan (SIP) revision submitted by the State of Maryland for the purpose of updating their state board requirements. The SIP revision removes the current SIP approved state board requirements and replaces them with an updated version of the requirements. The new provisions continue to address state board requirements for all the National Ambient Air Quality Standards (NAAQS). The revision is being done because the Maryland legislature revised Maryland's statutory requirements related to state boards and the state wants the most recent version in their SIP. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by June 1, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0127 at *http://www.regulations.gov,* or via email to *fernandez.cristina@epa.gov.* For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section.

For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ruth Knapp, (215) 814–2191, or by email at *knapp.ruth@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: April 8, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2016–09448 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 81, No. 84
Monday, May 2, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FV–16–0040]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget (OMB) for an extension of a currently approved information collection for the Reporting and Recordkeeping Requirements Under Regulations Under the Perishable Agricultural Commodities Act, 1930, as amended.

DATES: Comments received by July 1, 2016 will be considered.

Additional Information or Comments: You may submit written or electronic comments to: Natalie Worku, PACA Recordkeeping and Reporting Comments, AMS, Specialty Crops Program, PACA Branch, 1400 Independence Avenue SW., Room 1510–S, Stop 0242, Washington DC 20250–0242; fax: 202–690–4413; or Internet: *http://www.regulations.gov*.

SUPPLEMENTARY INFORMATION:

Title: Reporting and Recordkeeping Requirements Under Regulations (Other than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930.

OMB Number: 0581–0031.

Expiration Date of Approval: December 31, 2016.

Type of Request: Extension of a currently approved information collection.

Abstract: The PACA was enacted by Congress in 1930 to establish a code of fair trading practices covering the marketing of fresh and frozen fruits and vegetables in interstate or foreign commerce. It protects growers, shippers, and distributors dealing in those commodities by prohibiting unfair and fraudulent trade practices.

The law provides a forum for resolving contract disputes, and a mechanism for the collection of damages from anyone who fails to meet contractual obligations. In addition, the PACA provides for prompt payment to fruit and vegetable sellers and for revocation of licenses and sanctions against firms or principals found to have violated the law's standards for fair business practices. The PACA also imposes a statutory trust that attaches to perishable agricultural commodities received by regulated entities, products derived from the commodities, and any receivables or proceeds from the sale of the commodities. The trust exists for the benefit of produce suppliers, sellers, or agents that have not been paid, and continues until they have been paid in full.

The PACA is enforced through a licensing system. All commission merchants, dealers, and brokers engaged in business subject to the PACA must be licensed. Retailers and grocery wholesalers must renew their licenses every three years. All other licensees renew yearly. Those who engage in practices prohibited by the PACA may have their licenses suspended or revoked.

The information collected pursuant to OMB Number 0581–0031 is used to administer licensing provisions under the PACA, to adjudicate contract disputes, and to enforce the PACA and the regulations. The purpose of this notice is to solicit comments from the public concerning our information collection.

We estimate the paperwork and time burden of the above referenced information collection to be as follows:

Form FV–211, Application for License: average of .25 hours per application per response.

Form FV–231–1 (or 231–1A, or 231–2, or 231–2A), Application for Renewal or Reinstatement of License: Average of .05 hours per application per response.

Regulations Section 46.13—Letters to Notify USDA of Changes in Business Operations: Average of .05 hours per notice per response.

Regulations Section 46.4—Limited Liability Company Articles of Organization and Operating Agreement: Average of .083 hours with approximately 2,968 annual responses.

Regulations Section 46.18—Record of Produce Received: Average of 5 hours with approximately 6,725 recordkeepers.

Regulations Section 46.20—Records Reflecting Lot Numbers: Average of 8.25 hours with approximately 683 recordkeepers.

Regulations Section 46.46(c)(2)—Waiver of Rights to Trust Protection: Average of .25 hours per notice with approximately 100 principals.

Regulations Sections 46.2(aa)(11) and 46.46(e)(1)—Copy of Written Agreement Reflecting Times for Payment: Average of 20 hours with approximately 2,343 recordkeepers.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 hours per response annually.

Respondents: Commission merchants, dealers, and brokers engaged in the business of buying, selling, or negotiating the purchase or sale of commercial quantities of fresh and/or frozen fruits and vegetables in interstate or foreign commerce are required to be licensed under the PACA (7 U.S.C. 499(c)(a)).

Estimated Number of Respondents: 13,543.

Estimated Total Annual Responses: 28,433.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 87,406.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: April 27, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–10210 Filed 4–29–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Opportunity To Apply for Membership on the National Advisory Council on Innovation and Entrepreneurship (NACIE)

ACTION: Notice.

SUMMARY: The Department of Commerce (DOC) is currently seeking applications for membership on the National Advisory Council on Innovation and Entrepreneurship (NACIE). NACIE advises the Secretary of Commerce (the Secretary) on matters related to accelerating innovation and entrepreneurship.

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DATES: Applications must be received by the Office of Innovation and Entrepreneurship (OIE), Economic Development Administration (EDA) by 11:59 p.m. Eastern Time on June 1, 2016, to be considered for membership in the formation of this NACIE cohort. Applications received by June 1, 2016, will also be considered to fill vacancies up to one year after this NACIE cohort's formation.

ADDRESSES: Please submit applications electronically to *nacie@doc.gov* and include ''[NACIEApplication]'' (without quotation marks) in the subject line, or by post or courier to the Office of Innovation and Entrepreneurship, Attn: NACIE Membership Applications, 1401 Constitution Avenue NW., Suite 78018, Washington, DC 20230. Electronic submissions are preferred.

FOR FURTHER INFORMATION CONTACT: For further information, interested parties can contact the Office of Innovation and Entrepreneurship via post at 1401 Constitution Avenue NW., Suite 78018, Washington, DC 20230; via telephone at +1 (202) 482–8001; or via email at *nacie@doc.gov*. NACIE's establishment is authorized by Section 25(c) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3720(c)). Additional information regarding NACIE can be found at *https://www.eda.gov/oie/nacie/.*

SUPPLEMENTARY INFORMATION: The Office of Innovation and Entrepreneurship (OIE) is accepting applications for membership on the National Advisory Council on Innovation and Entrepreneurship (NACIE) for a two-year term beginning on the date of appointment. Members will be selected, in accordance with Department of Commerce (DOC) guidelines, based on their ability to advise the Secretary of Commerce (the Secretary) on matters relating to the acceleration of innovation and the support for and expansion of entrepreneurship, including but not limited to the matters set forth in 15 U.S.C. 3720(b) and

- The development of policy recommendations to support entrepreneurship and innovation across business sectors and geographies;
- insights into innovative opportunities to increase the global competitiveness of both the workforce and the economy;
- the exploration of opportunities to promote the role of employers in creating and expanding successful talent development partnerships across multiple stakeholders;
- policies that encourage the creative use of technology to facilitate employee recruitment, training, career and talent development, and business startups; and
- the identification and promotion of best practices that accelerate the commercialization of research and intellectual property.

NACIE will identify and recommend solutions to issues critical to driving the innovation economy, including enabling entrepreneurs and firms to successfully access and develop a skilled, globally competitive workforce. NACIE will also serve as a vehicle for ongoing dialogue with the innovation, entrepreneurship, and workforce development communities, including but not limited to business and trade associations. The duties of NACIE are solely advisory, and it shall report to the Secretary through the Economic Development Administration (EDA) and the Office of the Secretary.

NACIE members shall be selected in a manner that ensures that NACIE is balanced in terms of perspectives and expertise with regard to innovation, entrepreneurship, and business-driven talent development that leads to a globally competitive workforce. To that end, the Secretary seeks diversity in the size of organization represented and seeks to appoint members who represent diverse geographies and innovation and entrepreneurship experiences from industry, government, academia, nonprofits, and non-governmental organizations.

Additional factors which may be considered in the selection of NACIE members include each candidate's proven experience in the design, creation, or improvement of innovation systems; commercialization of research and development; entrepreneurship; business-driven talent development that leads to a globally competitive workforce; and the creation and growth of innovation- and entrepreneurship-focused ecosystems. Members' affiliations may include, but are not limited to, successful executive-level business leaders; entrepreneurs; innovators; investors; post-secondary education leaders; directors of workforce and training organizations; and other experts drawn from industry, government, academia, philanthropic foundations with a demonstrated track record of research or support of innovation and entrepreneurship, and non-governmental organizations. Nominees will be evaluated consistent with factors specified in this notice and their ability to carry out the goals of NACIE.

Self-nominations will be accepted.

Appointments will be made without regard to political affiliation.

Membership. Members shall serve at the discretion of the Secretary. Because members will be appointed as experts, members will be considered special government employees (SGEs). Members participating in NACIE meetings and events will be responsible for their travel, living, and other personal expenses. Meetings will be held regularly and not less than twice annually, usually in Washington, DC. Members are required to attend a majority of NACIE's meetings. The first meeting for this NACIE cohort will take place October 6–7, 2016, in Washington, DC. Members may be required to arrive one day early for onboarding and orientation activities. Attendance is mandatory.

Eligibility. Eligibility for membership is limited to U.S. citizens who are not full-time employees of the United States government or of a foreign government, are not registered with the Department of Justice under the Foreign Agents Registration Act, and are not federally-registered lobbyists.

Application Procedure. For consideration, a nominee should submit: (1) A résumé; (2) a personal statement of interest including an outline of her or his abilities to advise the Secretary on the matters described above; (3) an affirmative statement that the nominee is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended; and (4) an affirmative statement that the nominee is not a federally-registered lobbyist. It is preferred that applications be submitted electronically to *nacie@doc.gov* with a subject line that includes the text ''[NACIEApplication]'' (without quotation marks). Applications also may be sent to the Office of Innovation and Entrepreneurship, Attn: NACIE Membership Applications, 1401 Constitution Avenue NW., Suite 78018, Washington, DC 20230.

Appointments of members to NACIE will be made by the Secretary.

Dated: April 26, 2016.

Julie Lenzer,

Director, Office of Innovation and Entrepreneurship, Economic Development Administration.

[FR Doc. 2016–10196 Filed 4–29–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–24–2016]

Foreign-Trade Zone (FTZ) 22—Chicago, Illinois; Notification of Proposed Production Activity; Omron Automotive Electronics, Inc.; (Automotive Electronic Components); St. Charles, Illinois

Omron Automotive Electronics, Inc. (Omron), an operator of FTZ 22, submitted a notification of proposed production activity to the FTZ Board for its facility located in St. Charles, Illinois, within FTZ 22. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on April 14, 2016.

The Omron facility is located within Site 41 of FTZ 22. The facility is used for the production of automotive electronic components. Pursuant to 15 CFR 400.14(b), FTZ authority would be limited to the specific foreign-status components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Omron from customs duty payments on the foreign status components used in export production. On its domestic sales, Omron would be able to choose the duty rate during customs entry procedures that applies to electronic control units (body control, transmission, wiper system), controllers (fuel pump, alarm, tire pressure), electronic modules, assemblies (tire pressure monitoring, transmitters, electrical switches (accessory, power seat, power window), knobs and trim pieces, and actuators (duty rate ranges from free to 6.5%) for the foreign status components noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The materials and components sourced from abroad include: Resistors; actuators; housing subassemblies; adhesives; antennas; armatures; plastic bags; switches; bobbins; steel balls; barrels with ribs; plastic bases/trays/bags/plates/plungers/actuator posts; base covers/substrates/assemblies; bases; knobs; bezels; boxes and related spacers; buttons; brackets; buzzers; ceramic chips; capacitors; cages for batteries; cartons; cases; chipboards and pads; desiccants; clips; connectors; coils; coil leads/terminals/assemblies; contacts (rivet, terminal); core pins; covers; central processing units (CPUs); electronic control units (ECUs); elastomeric pads; plastic emblems; encoders; epoxy resins; electric filters; foam sheets/dividers/pads; foil with adhesive; followers; frets; fuses; crystal oscillators; transformers; integrated circuits; resistors; dampers; double face pads; detents; diodes; door lock packing inserts; garnishes; gimbles; rubber grommets; labels; handles; heat sinks; housing blocks/assemblies; housings; integrated circuits; light emitting diodes; immobilizers/anti-theft systems; inductors; inner cases; inserts; inverters; jewels; transmitter keypads and keyrings; logic chips; lamps; lean containers; levers; lids; light guides; linear integrated circuits; semiconductors; magnet wires and relays; multi-switch units; power supplies; printed circuit boards; padding and pads; paddles (steering wheel); plastic panels/partitions; pins (coil, connector; spring); pipe lights; packaging boxes/lids/inserts/chips/pads; printed wiring boards; resistor chips; resistor glaze metal; relays; retainers; plastic rings/screws/spacers/spools/seals/sliders/seats/clips/bezels/tape; seals (nitrile, rubber); heat shields; shrouds; shunts; silicone fluid compound; surface mount technology resistors; electrical (socket) outlets; springs; striker assemblies; subassemblies (base, case, power breaker, dome, window knob); substrates; supply bezels/brackets/clips/screws/head bolts; varistors; switch assemblies; tapes; terminal/contact assemblies; terminals; thermistors; paint thinners; thumbwheels; screws; transistors; trays; upfitter subassemblies; vacform trays; wire coils; jumper wires; wireless charging units; relay yokes; and, yokes (duty rate ranges from free to 8%).

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is June 13, 2016.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* (202) 482–1378.

Dated: April 25, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–10242 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–25–2016]

Foreign-Trade Zone (FTZ) 133—Quad-Cities, Iowa/Illinois; Notification of Proposed Production Activity, Deere & Company, Subzone 133D (Construction and Forestry Equipment), Davenport, Iowa

Deere & Company (Deere), operator of Subzone 133D, submitted a notification of proposed production activity to the FTZ Board for its facilities within Subzone 133D, located in Davenport, Iowa. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on April 15, 2016.

Deere already has authority to produce motor graders, four wheel drive loaders, log skidders and articulated dump trucks within Subzone 133D. The current request would add construction and forestry equipment and foreign-status materials/components to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-

status materials/components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Deere from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, Deere would be able to choose the duty rates during customs entry procedures that apply to: Wheeled feller bunchers; disc saw felling heads; and, cabs for knuckleboom loaders, backhoes, loaders, motor graders, feller bunchers, log skidders and articulated dump trucks (duty rates: Free or 4%) for the foreign-status materials/components noted below and in the existing scope of authority. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: Plastic ribbed conduits/labels/anti-skid pads/floor mat plugs/spacers/ashtrays/rings; nylon domed plugs; rubber hoses/elbows/belts/v-belts/tires/floor mats/O-rings/O-ring kits/PTO (power take-off) housings/gaskets/seals/seal kits/sealing trims/isolators/ring guides/air deflectors/arched covers/insulators/grommets/isolator strips/bellows/bellow boots/spacers/splash guards/step straps/stop bumpers/tray foot bumpers/vibration dampeners; cork gaskets; paper gaskets; glass rear view mirrors; steel push pull cables/wiring harness cables/link chains/alloy clevis plates/clothes hooks/screws/bolts/planetary hub studs/alloy hexagon fittings/nuts/locking collars/pins/plugs/washers/G-rings/seal retainers/washer and spacer kits/pneumatic control valves/rings/alloy disk saw drive rings/pin fasteners/retainers/retainer clips/springs/spring assemblies/spring kits/alloy raw castings/adapter fittings/air conditioning fittings/spacers/clamps/beaded special adaptors/shims/corner brackets/elbow fittings/excavator thumb kits/fittings/fitting plugs/flange fitings/fuel supply banjo fittings/hose clamps/hydraulic clamp kits/lock kits/lower carrier plates/lubrication fittings/mounting adapters/oil line tube assemblies/oil tubes/plates/plugs with O-ring fittings/power link casting assemblies/PTO flanges/pushbeam trunnions/serrated yoke flanges/skid shoes/straps/steering column sleeves/toolboxes/toolbox covers/tubes/tube fittings/clamp halves/upper carrier plates/valve section plug kits/weldment adapters; iron lock plates/mounting adapters; brass washers; copper electrical connector accessories; aluminum washers; tooth kits; tooth inserts; lock-ring tools; cutting blades; cutting edges; bucket tooth locks; bucket weldment hinges; exterior steel hinges; gas-operated cylinders; brackets; latches; engine mount supports; gear case isolators; hood catch assemblies; hood compartment studs; hood springs; interior cab handles; mounting parts; oscillation stops; rear suspension stops; rubber boom stops; sliding window catches; filler caps; diesel engines; air intakes; cylinder covers; cylinder heads; engine cooler clamps; exhaust elbows; gas outlet tubes; high pressure fuel lines; intake manifolds; oil pans; orifices; pistons; piston ring kits; rotate manifolds; seal rings; seal liner rings; short block assemblies; spacer tubes; threaded inserts; timing gear covers; lumber fork cylinders; master brake cylinders; hydraulic cylinders; thumb kit clamps; hydraulic motors; brake cylinders; dust covers; hydraulic cylinder rod guides; steering cylinder rods; cooler bypass manifolds; hydraulic manifolds; pressure manifolds; hydraulic reservoirs; pumps (fuel injection, fuel, oil, water, hydraulic, steering metering); pump repair kits; DEF (diesel exhaust fluid) lines; heat sleeves; drive shafts; hydraulic reservoirs; air conditioner compressors; HVAC (heating, venting and air conditioning) blowers; turbochargers; compressor kits; fan blades; fan drives; piston-liner kits; air conditioners (AC); HVAC equipment; vapor condensers; AC/heater evaporators; refrigerant hoses; Hayden coolers; filters (fuel, hydraulic, oil, air, reservoir breather, pneumatic exhaust, headlight venting); oil filter elements; receiver-dryers; pre-filters; air dryers; filter discs; filter elements; filter heads; oil filter covers; strainers; transmission shafts; catwalk platforms; counterweight weldments; jib booms; main booms; outrigger stabilizers; rotary manifolds for forestry equipment; bucket plates; loader buckets; loader cutting edges; grapple hooks; multi-purpose buckets; backhoe buckets; excavator buckets; skid steer buckets; dura-max cutting edges; backhoe hydraulic clamp kits; axle stop blocks; battery boxes; controller arm supports; cooler tubes; exhaust tubes; front axle limited slip differentials; fuel tank assemblies; grapple teeth; grille frames; grommet plates; heater/AC brackets; lower carrier plates; oil lines; outrigger arms; pedal and bracket assemblies; pilot arm strut supports; rear axles; scarifier booms; seat swivel assemblies; sliding frames; soft start brackets; steering columns; support plates; tie rod assemblies; tie rod ends; upper carrier plates; valve mounting plates; moldboards; air intake plates; air plenums; yoke assemblies; axle drive housings; axle oscillation supports; axles with differentials; baffle structures; baffle supports; battery service doors; boom crossmember tubes; bottom guard supports; brake pistons; brake rotors; brush guards; bucket teeth; bucket tooth adapters; bulkhead assembly plates; bumper brackets; cast mounts; cast steps; clamp rings; controller brackets; counterweights; covers; cover plate kits; cutting edges; decomposition tubes; DEF tank lid covers; differential case covers; differential housings; drive damper covers; end bits; end kits; engine mount supports; engine side shield supports; exhaust aftertreatment brackets; exhaust nozzles; exhaust support brackets; fan guards; filter supports; floor plates; fork tine assemblies; frame kits; front axles; fuel line filters; fuel tank bracket plates; fuel tank guards; generator pump drive supports; guard extensions; hand rails; heat shield mount plates; hood supports; housings with covers; hub kingpins; hydraulic reservoirs; insert support plates; isolators; lift arms; lift lug plates; main drive axles and tandem pivot; mount frames; mounting plates; multifunction cab levers; oil coolers; outlet duct plates; overlay end bits; pilot tower arms; pump spacers; pushbeam trunnions; radiators; rear axle guards; rear tube guards; ripper shanks; ripper teeth; scarifier links; scarifier retainers; side cutter plates; side shield bumpers; sidecutter shrouds; skid plates; slide weldment supports; step assemblies; rubber stop bumpers; steering stop bumpers; supports; threaded stud bumpers; transmission guard shields; transmission mounts; wear plates; rear wheel gauge frames; ripper points; safety trip standards; wheel plates; scraper arms; 180 degree tubes; adaptor plates; arm assemblies; arm kits; boom assembly adapters; disc saw felling head link assemblies; hydraulic system assembly tubes; axle guards; axles with differential; boom adapters; boom tubes; butt plates; cab guards; casting covers; charge air tubes; clean out covers; cooling return tubes; crank bars; disc saw felling head frames; engine mount supports; felling heads; filter box covers; frame guard doors; front shields for forestry equipment; fuel fill covers; fuel tanks; harvesting arm housings; hose guide plate guards; hose straps; hydraulic pump supports; hydraulic reservoirs for forestry equipment; hydraulic system tubes; hydraulic tank covers; hydraulic tubes; inner arm housings; knuckleboom lower frames; lift arm bellcranks; lift arm shims; lift links; link assemblies; log forks; main boom hydraulics tubes; main cylinder

tubes; main frames; oil lines; oil line tubes; oil tubes; painted cover plates; pilot lines tubes; power link castings; power management tubes; pressure tubes; radiator hose tubes; radio mount housings; retainer plates; saw motor adapters; saw motor tubes; sawhead cranks; shims for forestry equipment; side hoods; wear rod kits; spring guards; stabilizer feet; stick cylinder tubes; structural tubes; suction tubes; support manifold brackets; surge tank brackets; test manifolds; torque arm brackets; transmission mount brackets; valve mount brackets; wear resistant teeth; wrist bearings; wrist frames; form dies; accelerator pedals; hydraulic accumulators; compressor valve kits; valves (control, electromagnet, fuel line, hand operated, hydraulic/pilot control, manifold, radiator drain, return, spool, unloader, check, pressure relief, drain, solenoid, purge tank, park brake, exhaust); valve seal kits; valve reducer caps; quick couplers; electrohydraulic controllers; temperature switches; thermostats; electrical connector assemblies; rotary manifolds; hydraulic manifolds; articulated dump truck repair kits; return manifolds; valve section plunger kits; directional control coils; thermostat covers; ball bearings; roller bearings; tapered roller bearings; spherical roller bearings; needle bearings; cylindrical roller bearings; bearing cups; camshafts; differential shafts; pinion shafts; planetary assemblies; universal drive shafts; spherilastic bearings; air compressor bushings; cab isolators; clevis kits; connecting rod bearing kits; elastomeric bearings; engine rod bearing kits; loader boom bushings; loader mainframe bushings; main bearing kits; mirror support bushings; pin and bushing kits; pivot bushings; steel bushings; steering cylinder bushings; tapped bosses; wear rings; gear cases; planetary assemblies; half axles; transmissions; flywheels; alternator pulleys; U joint assemblies; universal joints; auxiliary drive gears; bevel gears; bevel gear drives; boom gears; fork tines; idler covers; oil circulation differential lock blocks; pinion shafts; planet pinions; planet pinion carriers; planetary assemblies; planetary gears; pump gears; ring gears; ring gears and pinions; transmission speed sensor covers; universal joint yokes; clutch plates; planet pinion carriers; planetary assemblies; cover kits; cylinder block gaskets; cylinder head gaskets; exhaust gaskets; oscillation seals; return manifolds; ring seals; turbocharger gaskets; hand tools; hydraulic tank gaskets; ring seals; seal kits; sealing rings; turbocharger gaskets; oil seals; ring seals; seal kits; electric motors; sensor resolver kits; magnetic drain plugs; engine shutdown solenoids; solenoid kits; starter motors; 12 teeth pinions; brush sets; strobe lights; travel warning alarms; wiper arms; wiper blades; radar sensors; satellite modules; GSM (global system for mobile communication)/GPS (global positioning system) antennas; iridium satellite antennas; multiband antennas; 12 volt monitors; computer monitors; dot matrix monitors; display tractor information monitors; ground speed sensors; operator display monitors; vehicle monitors; resistor networks; resistor connectors; circuit boards; change over relays; switches (rotary, push, coil spring, instrument panel, motion control); bucket control levers; multi-functional controllers; motor kits; electrical connector terminals; electrical connector assemblies; control kits; electrohydraulic controllers; electronic control units; joystick grips; monitor consoles; transmission controllers; vehicle controllers; vehicle monitors; multifunction canopy levers; 24 volt bulbs; socket outlets; control modules; speed sensors; wiring harnesses; wire cables; step assemblies; cab doors; cab door housings; cab door latch housings; cab roofs; cooler lid covers; e-module covers; engine compartment hoods; front dash panels; grilles; grille housings; grille kits; head light covers; headlight guards; hood latch rods; interior panels; hoods; mini hoods; mirror plates; mudguard extensions; oscillation frames; radio face plates; bumpers; side hood shields; sliding windows; sun visors; transmission cases; wheel curtain covers; brake caliper guards; brake disks; brake caliper pipes; brake lines; brake pads; brake piston kits; brake piston seal kits; brake seals; disk brake caliper assemblies; front brake pipes; park brake assemblies; rear brake pipes; throttle brake housings; transmissions; gear cases; axle housings; ball joint sockets; carrier ring gears; cross and bearing assemblies; differentials; output gears; planet pinion carrier assemblies; retainer plates; steel yokes; stub pivots; sun gears; universal joint crosses; axles with differential; hub housings; rear drive axles; planetary hub spindles; universal joints; bead seat bands; 5 piece wheels; rim and wheel centers; strut cylinder rods; exhaust pipes; clutch housings; PTO flanges; steering columns; steering column kits; steering column supports; steering shafts; ring gears; spline hubs; universal joints with shafts; axle guards; axle guard doors; bellow kits; belly pans; belly pan covers; belt tensioners; coolant lines; decomposition tube assemblies; fan supports; fuel lines; lever kits; lower cylinder guards; oil lines; platform supports; pressure lines; rear shields; shafts; shields; support frames; upper cylinder guards; water tank assemblies; dust cover flanges; input lids; oil tubes; universal joints; accelerator throttles; air cleaner covers; alternator supports; articulation guards; axle guards; axle guard doors; back covers; bin mounting plates; bin pivot bushings; bin pole frames; block clamps; brake adjuster kits; brake pipe guards; brake saddles; breather pipes; cab coat straps; compressor adaptors; control panels; coolant tubes; couplings; cover plates; decal panel shields; decomposition tube assemblies; drag links; eccentric shaft kits; emergency exit hammer holders; engine breather covers; exhaust shields; extension mudguards; fan shrouds; firewall plates; flex swivel adaptors; forged mount supports; front brake pipes; front chassis plates; front frame cross members; front shields; handrails; headlight covers; heat shields; in tank filter lids; indexing rings; lever kits; light cover plates; line pipes; mid-section frames; middle shields; mounting step mudguards; multifunction levers; oil cooler pipes; oil lines; oscillating joint bushings; oscillation tube bushings; pedal sleeves; perforated steps; planet carriers; plate seals; PTO housings; rear brake pipes; rear plates; rear shields; reservoirs; retainer plates; front mudguards; sealing plates; sensor plates; shields; shock absorbers; side shafts; spacer plates; steel supports; steering column covers; suction pipes; support guards; support structures; tank lid covers; timing cases; tube outlets; universal joint crosses; universal joint yokes; upper cylinder guards; valve guards; ventilated disks; walking beam mounting parts; water pump inlet pipes; water tank weldments; window plate guards; wiper housings; wire harness supports; temperature sensors; fuel senders; level sensors; oil pressure senders; engine oil dipsticks; level gauges; transmission oil dipsticks; engine oil pressure senders; pressure sensors; air intake sensors; chemical sensors; engine controllers; seat frames; seat swivels; armrests; backrest plates; seat covers; seat swivel kits; inner arm assemblies; and electrical lighters (duty rates range from free to 9%).

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is June 13, 2016.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary,

Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: April 26, 2015.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–10241 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for June 2016

The following Sunset Reviews are scheduled for initiation in June 2016 and will appear in that month's Notice of Initiation of Five-Year Sunset Review (''Sunset Review'').

	Department contact
Antidumping Duty Proceedings	
Cased Pencils from China (A–570–827) (4th Review)	Matthew Renkey (202) 482–2312.
Paper Clips from China (A–570–826) (4th Review)	David Goldberger (202) 482–4136.
Granular Polytetrafluoroethylene Resin from Italy (A–475–703) (4th Review)	David Goldberger (202) 482–4136.

Countervailing Duty Proceedings

No Sunset Review of countervailing duty orders is scheduled for initiation in June 2016.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in June 2016.

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. The Notice of Initiation of Five-Year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: April 26, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–10245 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: Effective May 2, 2016.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with March anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (''POR''), it must notify the Department within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *http://access.trade.gov* in accordance with 19 CFR 351.303.[1] Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (''the Act''). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on the Department's service list.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for

[1] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of review. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 30 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments five days after the deadline for the initial comments.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (''Q&V'') Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Status Application will be available on the Department's Web site at *http://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the

[2] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[3] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 30 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than March 31, 2017.

	Period to be reviewed
Antidumping Duty Proceedings	
Spain: Stainless Steel Bar, A–469–805	3/1/15–2/29/16
Gerdau Aceros Especiales Europa, S.L.	
Thailand: Circular Welded Carbon Steel Pipes and Tubes, A–549–502	3/1/15–2/29/16
Pacific Pipe Public Company Limited	
Saha Thai Steel Pipe (Public) Company, Ltd.	
The People's Republic of China: Glycine, A–570–836	3/1/15–2/29/16
Baoding Mantong Fine Chemistry Co., Ltd.	
Jizhou City Huayang Chemical Co., Ltd.	
Kumar Industries	
Rudraa International	
Countervailing Duty Proceedings	
Turkey: Circular Welded Carbon Steel Pipes and Tubes, C–489–502	1/1/15–12/31/15
Borusan Birlesik Boru Fabrikalari San ve Tic.	
Borusan Gemlik Boru Tesisleri A.S.	
Borusan Ihicat ve Dagitim A.S.	
Borusan Ihracat Ithalat ve Dagitim A.S.	
Borusan Istikbal Ticaret T.A.S.	
Borusan Mannesnamm Boru Sanayi ve Ticaret A.S.	
Cayirova Boru Sanayi ve Ticaret A.S.	
Erbosan Erciyas Boru Sanayi ve Ticaret A.S.	
Guven Steel Pipe (also known as Guven Celik Born San. Ve Tic. Ltd.)	
Toscelik Metal Ticaret A.S.	
Toscelik Profil ve Sac Endustrisi A.S.	
Tosyali Dis Ticaret A.S.	
Tubeco Pipe and Steel Corporation	
Umran Celik Born Sanayii A.S. (also known as Umran Steel Pipe Inc.)	
Yucel Boru ve Profil Endustrisi A.S.	
Yucelboru Ihracat Ithalat ve Pazarlama A.S.	

Suspension Agreements

None.

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Revised Factual Information Requirements

On April 10, 2013, the Department published *Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013), which modified two regulations related to antidumping and countervailing duty proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301). The final

rule identifies five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). The final rule requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The final rule also modified 19 CFR 351.301 so that, rather than providing general time limits, there are specific time limits based on the type of factual information being submitted. These modifications are effective for all segments initiated on or after May 10, 2013. Please review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in this segment.

Any party submitting factual information in an antidumping duty or countervailing duty proceeding must certify to the accuracy and completeness of that information.[4] Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives. All segments of any antidumping duty or countervailing duty proceedings initiated on or after August 16, 2013, should use the formats for the revised certifications provided at the end of the *Final Rule*.[5] The Department intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable revised certification requirements.

Revised Extension of Time Limits Regulation

On September 20, 2013, the Department modified its regulation concerning the extension of time limits for submissions in antidumping and countervailing duty proceedings: *Final Rule,* 78 FR 57790 (September 20, 2013). The modification clarifies that parties may request an extension of time limits before a time limit established under part 351 expires, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the time limit established under part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) Case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning U.S. Customs and Border Protection data; and (5) quantity and value questionnaires. Under certain circumstances, the Department may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, the Department will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This modification also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which the Department will grant untimely-filed requests for the extension of time limits. These modifications are effective for all segments initiated on or after October 21, 2013. Please review the final rule, available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: April 26, 2016.

Christian Marsh,

Deputy Assistant Secretary, for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–10244 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

[4] *See* section 782(b) of the Act.

[5] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*''); *see also* the frequently asked questions regarding the *Final Rule,* available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (''the Act''), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (''the Department'') conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP

data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after May 2016, the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

The Department is providing this notice on its Web site, as well as in its ''Opportunity to Request Administrative Review'' notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

Opportunity to Request a Review: Not later than the last day of May 2016,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in May for the following periods:

	Period of review
Antidumping Duty Proceedings	
Belgium: Stainless Steel Plate in Coils, A–423–808	5/1/15–4/30/16
Brazil: Iron Construction Castings, A–351–503	5/1/15–4/30/16
Canada: Citric Acid and Citrate Salt, A–122–853	5/1/15–4/30/16
India:	
Certain Welded Carbon Steel Standard Pipes and Tubes, A–533–502	5/1/15–4/30/16
Silicomanganese, A–533–823	5/1/15–4/30/16
Indonesia: Polyethylene Retail Carrier Bags, A–560–822	5/1/15–4/30/16
Japan:	
Diffusion-Annealed Nickel-Plated Flat-Rolled Steel Products, A–588–869	5/1/15–4/30/16
Gray Portland Cement and Cement Clinker, A–588–815.	
Kazakhstan: Silicomanganese, A–834–807	5/1/15–4/30/16
Republic of Korea: Polyester Staple Fiber, A–580–839	5/1/15–4/30/16
Socialist Republic of Vietnam: Polyethylene Retail Carrier Bags, A–552–806	5/1/15–4/30/16
South Africa: Stainless Steel Plate in Coils, A–791–805	5/1/15–4/30/16
Taiwan:	
Certain Circular Welded Carbon Steel Pipes and Tubes, A–583–008	5/1/15–4/30/16
Polyester Staple Fiber, A–583–833	5/1/15–4/30/16
Polyethylene Retail Carrier Bags, A–583–843	5/1/15–4/30/16
Stainless Steel Plate in Coils, A–583–830	5/1/15–4/30/16
Stilbenic Optical Brightening Agents, A–583–848	5/1/15–4/30/16
The People's Republic of China:	
Aluminum Extrusions, A–570–967	5/1/15–4/30/16
Circular Welded Carbon Quality Steel Line Pipe, A–570–935	5/1/15–4/30/16
Citric Acid and Citrate Salt, A–570–937	5/1/15–4/30/16
Iron Construction Castings, A–570–502	5/1/15–4/30/16
Oil Country Tubular Goods, A–570–943	5/1/15–4/30/16
Pure Magnesium, A–570–832	5/1/15–4/30/16
Stilbenic Optical Brightening Agents, A–570–972	5/1/15–4/30/16
Turkey:	
Circular Welded Carbon Steel Pipes and Tubes, A–489–501	5/1/15–4/30/16
Light-Walled Rectangular Pipe and Tube, A–489–815	5/1/15–4/30/16

[1] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when the Department is closed.

	Period of review
United Arab Emirates: Steel Nails, A–520–804	5/1/15–4/30/16
Venezuela: Silicomanganese, A–307–820	5/1/15–4/30/16
Countervailing Duty Proceedings	
Brazil: Iron Construction Castings, C–351–504	1/1/15—12/31/15
Socialist Republic of Vietnam: Polyethylene Retail Carrier Bags, C–552–805	1/1/15—12/31/15
South Africa: Stainless Steel Plate in Coils, C–791–806	1/1/15—12/31/15
The People's Republic of China:	
Aluminum Extrusions, C–570–968	1/1/15—12/31/15
Citric Acid and Citrate Salt, C–570–938	1/1/15—12/31/15

Suspension Agreements

None.

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) the Department clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[2]

Further, as explained in *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013), the Department clarified its practice with regard to the conditional review of the non-market economy (NME) entity in administrative reviews of antidumping duty orders. The Department will no longer consider the NME entity as an exporter conditionally subject to administrative reviews. Accordingly, the NME entity will not be under review unless the Department specifically receives a request for, or self-initiates, a review of the NME entity.[3] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, the Department will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity).

Following initiation of an antidumping administrative review when there is no review requested of the NME entity, the Department will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS'') on Enforcement and Compliance's ACCESS Web site at *http://access.trade.gov.*[4] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of May 2016. If the Department does not receive, by the last day of May 2016, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period of

[2] *See also* the Enforcement and Compliance Web site at *http://trade.gov/enforcement/.*

[3] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

[4] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: April 26, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–10243 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating the five-year review (''Sunset Review'') of the antidumping and countervailing duty (''AD/CVD'') order(s) listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same order(s).

DATES: Effective (May 1, 2016).

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating Sunset Reviews of the following antidumping and countervailing duty order(s):

DOC case No.	ITC case No.	Country	Product	Department contact
A–821–809	731–TA–808	Russia	Certain Hot-Rolled Carbon Steel Flat Products (3rd Review).	Jacqueline Arrowsmith (202) 482–5255.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Web site at the following address: ''*http://enforcement.trade.gov/sunset/.*'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS''), can be found at 19 CFR 351.303.[1]

This notice serves as a reminder that any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information.[2] Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in these segments.[3] The formats for the revised certifications are provided at the end of the *Final Rule.* The Department intends to reject factual submissions if the submitting party does not comply with the revised certification requirements.

On April 10, 2013, the Department modified two regulations related to AD/CVD proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301).[4] Parties are advised to review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in these segments. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied. Parties are also advised to review the final rule concerning the extension of time limits for submissions in AD/CVD proceedings, available at *http://enforcement.trade.gov/frn/2013/1309frn/2013-22853.txt,* prior to submitting factual information in these segments.[5]

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d)). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (''APO'') to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

[1] *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[2] *See* section 782(b) of the Act.

[3] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*'') (amending 19 CFR 351.303(g)).

[4] *See Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013).

[5] *See Extension of Time Limits,* 78 FR 57790 (September 20, 2013).

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review.[6]

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews. Consult the Department's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: April 26, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–10236 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–DS–P

[6] *See* 19 CFR 351.218(d)(1)(iii).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE602

Mid-Atlantic Fishery Management Council (MAFMC); Public Hearings

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

ACTION: Notice; public hearings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) will hold seven public hearings in May and June 2016 to solicit public input on the Unmanaged Forage Omnibus Amendment. The Council is also soliciting written comments on the amendment through 11:59 p.m. on Friday, June 17, 2016. The goal of this amendment is to prohibit the development of new and expansion of existing directed commercial fisheries on unmanaged forage species in Mid-Atlantic Federal waters until the Council has had an adequate opportunity to both assess the scientific information relating to any new or expanded directed fisheries and consider potential impacts to existing fisheries, fishing communities, and the marine ecosystem.

DATES: The public hearings will be held between May 17, 2016 and June 8, 2016. The dates and times of each hearing are listed in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: *Addresses for written comments:* Written comments may be sent through mail, email, or fax through 11:59 p.m. on Friday, June 17, 2016. Comments may be mailed to: Dr. Chris Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901. Comments may be faxed to: Dr. Chris Moore, Executive Director, Mid-Atlantic Fishery Management Council at fax number (302) 674–5399. Comments may be emailed to Julia Beaty, Fishery Management Specialist, at *jbeaty@mafmc.org.* If sending comments through the mail, please write ''unmanaged forage public hearing comments'' on the outside of the envelope. If sending comments through email or fax, please write ''unmanaged forage public hearing comments'' in the subject line.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: 302–674–2331; Web site: *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: 302–526–5255. More information, including background materials, will be posted at *www.mafmc.org/actions/unmanaged-forage.*

SUPPLEMENTARY INFORMATION: The Council will hold seven public hearings. The dates, times, and locations are listed below:

1. Tuesday, May 17, 2016, 6 p.m.–7:30 p.m., North Carolina Department of Marine Fisheries Washington Regional Office Hearing Room, 943 Washington Street, Washington, NC 27889; telephone: (252) 946–6481.

2. Wednesday, May 18, 2016, 6:30–8 p.m., Hilton Virginia Beach Oceanfront, 3001 Atlantic Avenue, Virginia Beach, VA 23451; telephone: (757) 213–3000.

3. Thursday, May 19, 2016, 6:30–8 p.m., Stockton Seaview Hotel and Golf Club, 401 South New York Road, Galloway, NJ 08205; telephone: (855) 894–8698.

4. Monday, May 23, 2016, 6 p.m.–7:30 p.m., University of Rhode Island Bay Campus Corless Auditorium, 215 South Ferry Road, Narragansett, RI 02882; telephone: (401) 874–6222.

5. Tuesday, May 24, 2016, 6:30 p.m.–8 p.m., New York Department of Environmental Conservation Bureau of Marine Resources Hearing Room, 205 North Bell Mead Road, Suite 1, East Setauket, NY 11733; telephone: (631) 444–0430.

6. Monday, June 6, 2016, 6:30–8 p.m., Hilton Suites Oceanfront, 3200 North Baltimore Avenue, Ocean City, Maryland 21842; telephone: (410) 289–6444.

7. Wednesday, June 8, 2016, 6:30 p.m.–8 p.m., Webinar. Information on how to connect to the webinar will be available on the events page of the Council Web site: *www.mafmc.org/council-events/.*

The goal of the Unmanaged Forage Omnibus Amendment is to prohibit the development of new and expansion of existing directed commercial fisheries on unmanaged forage species in Mid-Atlantic Federal waters until the Council has had an adequate opportunity to both assess the scientific information relating to any new or expanded directed fisheries and consider potential impacts to existing fisheries, fishing communities, and the marine ecosystem. This action is needed to protect the structure and function of marine ecosystems in the Mid-Atlantic and to advance an ecosystem approach to fisheries management in the Mid-Atlantic. In this context, ''unmanaged''

refers to species not currently managed by the Mid-Atlantic, New England, or South Atlantic Fishery Management Councils, or the Atlantic States Marine Fisheries Commission. The Council has proposed a range of management alternatives to meet the goal of the amendment. The Council is seeking public comment on these alternatives. More information on the amendment and the management alternatives can be found in the Public Hearing Document, which will be posted to: *http://www.mafmc.org/actions/unmanaged-forage.*

Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the hearing date.

Dated: April 27, 2016.

Jeffrey N. Lonergan,

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

[FR Doc. 2016–10237 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE596

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Ecosystem Workgroup (EWG) will hold a webinar, which is open to the public, to discuss and draft comments on the NOAA Fisheries Climate Science Strategy (NCSS) Western Regional Action Plan (WRAP).

DATES: The webinar will be held from 1:30 to 4:30 p.m., or when business for the day is completed, on May 19, 2016.

ADDRESSES: To join the webinar visit this link: *http://www.gotomeeting.com/online/webinar/join-webinar*. Enter the Webinar ID: 140–237–731. Enter your name and email address (required). Once you have joined the webinar, choose either your computer's audio or select ''Use Telephone.'' If you do not select ''Use Telephone'' you will be connected to audio using your computer's microphone and speakers (VolP). To use your telephone for the audio portion of the meeting dial this TOLL number +1 (631) 992–3221 (not a toll-free number); then enter the Attendee phone audio access code 621–588–987, then enter your audio phone pin (shown after joining the webinar). Participants are encouraged to use their telephone, as this is the best practice to avoid technical issues and excessive feedback. You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2280, extension 425 for technical assistance. A public listening station will also be provided at the Pacific Council office.

Council address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council Staff Officer, phone: (503) 820–2422, email: *kit.dahl@noaa.gov*.

SUPPLEMENTARY INFORMATION: The purpose of the webinar is for the EWG to discuss and draft comments on the NCSS WRAP. A March 22, 2016 draft of the WRAP may be downloaded at *http://www.st.nmfs.noaa.gov/ecosystems/climate/rap/western-regional-action-plan*. The WRAP is being developed to increase the production, delivery, and use of climate-related information and will identify priority needs and specific actions to implement the NOAA Fisheries Climate Science Strategy in the region over the next five years. Based on the webinar discussion, the EWG may submit a written report with its comments for the Pacific Council's June 23–28, 2016 meeting in Tacoma, WA. The EWG will also discuss progress on completing the Coordinated Ecosystem Indicator Review Initiative and plan future activities. This initiative is an opportunity for the larger Pacific Council family to discuss the Annual State of the California Current Ecosystem Report's indicator categories, what indicators should be part of the annual report, and how they interface with Council-managed fisheries to better support the Council's ecosystem-based management policies.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document 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 intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2425 at least 5 days prior to the meeting date.

Dated: April 27, 2016.

Jeffrey N. Lonergan,

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

[FR Doc. 2016–10240 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for National Marine Sanctuary Advisory Councils

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: ONMS is seeking applications for vacant seats for six of its 13 national marine sanctuary advisory councils and Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council (advisory councils). Vacant seats, including positions (*i.e.,* primary member and alternate), for each of the advisory councils are listed in this notice under **SUPPLEMENTARY INFORMATION**. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; views regarding the protection and management of marine or Great Lake resources; and possibly the length of residence in the area affected by the sanctuary. Applicants chosen as members or alternates should expect to serve two or three year terms, pursuant to the charter of the specific national marine sanctuary advisory council or Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council.

DATES: Applications are due before or by Tuesday, May 31, 2016.

ADDRESSES: Application kits are specific to each advisory council. As such, application kits must be obtained from and returned to the council-specific addresses noted below.

• Channel Islands National Marine Sanctuary Advisory Council: Jessica Morten, Channel Islands National Marine Sanctuary, 113 Harbor Way, Suite 150, Santa Barbara, CA 93109; 805–893–6433; email *Jessica.Morten@noaa.gov;* or download application from *http://channelislands.noaa.gov/sac/council_news.html.*

• Greater Farallones National Marine Sanctuary Advisory Council: Carolyn Gibson, Greater Farallones National Marine Sanctuary, 991 Marine Drive, The Presidio, San Francisco, CA 94129; 415–970–5252; email *Carolyn.Gibson@noaa.gov;* or download application from *http://farallones.noaa.gov/manage/sac.html.*

• Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council: Shannon Ruseborn, NOAA Inouye Regional Center, NOS/HIHWNMS/Shannon Ruseborn, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 808–725–5905; email *Shannon.Ruseborn@noaa.gov;* or download application from *http://hawaiihumpbackwhale.noaa.gov/council/council_app_accepting.html.*

• *Monitor* National Marine Sanctuary Advisory Council: William Sassorossi, *Monitor* National Marine Sanctuary, 100 Museum Drive, Newport News, VA 23606; 757–591–7329; email *William.Sassorossi@noaa.gov;* or download application from *http://monitor.noaa.gov/advisory/news.html.*

• National Marine Sanctuary of American Samoa Advisory Council: Joseph Paulin, National Marine Sanctuary of American Samoa, Tauese P.F. Sunia Ocean Center, Utulei, American Samoa; 684–633–6500 extension 226; email *Joseph.Paulin@noaa.gov;* or download application from *http://americansamoa.noaa.gov/.*

• Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council: Allison Ikeda, NOAA Inouye Regional Center, NOS/ONMS/PMNM, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 808–725–5818; email *Allison.Ikeda@noaa.gov;* or download application from *www.papahanaumokuakea.gov/council.*

• Stellwagen Bank National Marine Sanctuary Advisory Council: Elizabeth Stokes, Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate, MA 02066; 781–545–8026 extension 201; email *Elizabeth.Stokes@noaa.gov;* or download application from *http://stellwagen.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: For further information on a particular national marine sanctuary advisory council, please contact the individual identified in the Addresses section of this notice.

SUPPLEMENTARY INFORMATION: ONMS serves as the trustee for a network of underwater parks encompassing more than 170,000 square miles of marine and Great Lakes waters from Washington state to the Florida Keys, and from Lake Huron to American Samoa. The network includes a system of 13 national marine sanctuaries and Papahānaumokuākea and Rose Atoll marine national monuments. National marine sanctuaries protect our nation's most vital coastal and marine natural and cultural resources, and through active research, management, and public engagement, sustain healthy environments that are the foundation for thriving communities and stable economies. One of the many ways ONMS ensures public participation in the designation and management of national marine sanctuaries is through the formation of advisory councils. National marine sanctuary advisory councils are community-based advisory groups established to provide advice and recommendations to the superintendents of the national marine sanctuaries and Papahānaumokuākea Marine National Monument on issues including management, science, service, and stewardship; and to serve as liaisons between their constituents in the community and the sanctuary. Additional information on ONMS and its advisory councils can be found at *http://sanctuaries.noaa.gov.* Materials related to the purpose, policies, and operational requirements for advisory councils can be found in the charter for a particular advisory council (*http://sanctuaries.noaa.gov/management/ac/council_charters.html*) and the *National Marine Sanctuary Advisory Council Implementation Handbook* (*http://sanctuaries.noaa.gov/management/ac/acref.html*).

The following is a list of the vacant seats, including positions (*i.e.,* primary member or alternate), for each of the advisory councils currently seeking applications for primary members and alternates:

Channel Islands National Marine Sanctuary Advisory Council: Chumash Community (Primary); Chumash Community (Alternate); Conservation (Primary); Education (Primary); Education (Alternate); Public-at-Large (Primary); Public-at-Large (Alternate); Recreational Fishing (Primary); Recreational Fishing (Alternate); Tourism (Primary); Tourism (Alternate).

Greater Farallones National Marine Sanctuary Advisory Council: Mendocino/Sonoma County Community-at-Large (Primary); Mendocino/Sonoma County Community-at-Large (Alternate); Youth (Primary).

Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council: Citizen-at-Large (Alternate); Hawa'i County (Primary); Hawa'i County (Alternate); Maui County (Alternate); Moloka' Island (Alternate); Research (Alternate); Tourism (Alternate); Youth (Alternate).

Monitor *National Marine Sanctuary Advisory Council: Citizen-at-Large (Primary); Conservation (Primary); Heritage Tourism (Primary); Maritime Archaeological Research (Primary); Ocean Sports (Primary); Recreational/Commercial Fishing (Primary); Recreational Diving (Primary); Recreational Diving (Primary).*

National Marine Sanctuary of American Samoa Advisory Council: Community-at-Large (West Tutuila) (Primary); Tourism (Primary).

Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council: Commercial Fishing (Primary); Commercial Fishing (Alternate); Native Hawaiian (Alternate); Native Hawaiian Elder (Primary); Native Hawaiian Elder (Alternate).

Stellwagen Bank National Marine Sanctuary Advisory Council: Business/Industry (Alternate); Mobile Gear Commercial Fishing (Alternate); Recreational Fishing (Alternate); Research (Alternate); Whale Watch (Alternate); Youth (Alternate).

Authority: 16 U.S.C. 1431 *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: April 5, 2016.

John Armor,

Acting Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2016–10197 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–NK–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete services from the Procurement List that were previously provided by nonprofit agencies employing persons

who are blind or have other severe disabilities.

DATES: *Effective Date:* May 29, 2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 3/25/2016 (81 FR 16145–16146), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to provide services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services deleted from the Procurement List.

End of Certification

Accordingly, the following services are deleted from the Procurement List:

Services

Service(s) Type: Switchboard Service, Library Service
Mandatory for: Minot Air Force Base, Minot AFB, ND
Mandatory Source(s) of Supply: MVW Services, Inc., Minot, ND
Contracting Activities: Dept of the Air Force, FA4528 5 CONS LGCP, Minot AFB, ND, Dept of the Air Force, FA7014 AFDW PK, Andrews AFB, MD
Service Type: Mess Attendant Service
Mandatory for: 192d FW VA Air National Guard Sandston, VA
Mandatory Source(s) of Supply: Richmond Area Association for Retarded Citizens, Richmond, VA
Contracting Activity: Dept of the Air Force, FA7014 AFDW PK, Andrews AFB, MD
Service Type: Switchboard Operation Service
Mandatory for: Ellsworth Air Force Base, Ellsworth AFB, SD
Mandatory Source(s) of Supply: BH Services, Inc., Ellsworth AFB, SD
Contracting Activity: Dept of the Air Force, FA4690 28 CONS LGC, Ellsworth AFB, SD

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–10181 Filed 4–29–16; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2009–0044]

Agency Information Collection Activities; Submission for OMB Review; Comment Request—Safety Standard for Cigarette Lighters

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (''PRA'') of 1995 (44 U.S.C. chapter 35), the Consumer Product Safety Commission (''Commission'' or ''CPSC'') announces that the Commission has submitted to the Office of Management and Budget (''OMB'') a request for extension of approval of a collection of information from manufacturers and importers of disposable and novelty cigarette lighters under the CPSC's regulations implementing the Safety Standard for Cigarette Lighters (16 CFR part 1210). In the **Federal Register** of February 22, 2016 (81 FR 8696), the CPSC published a notice to announce the agency's intention to seek extension of approval of the collection of information. The Commission received no comments. Therefore, by publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by June 1, 2016.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503. In addition, written comments that are sent to OMB also should be submitted electronically at *http://www.regulations.gov,* under Docket No. CPSC–2009–0044.

FOR FURTHER INFORMATION CONTACT: For further information contact: Robert H. Squibb, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7815, or by email to: *rsquibb@cpsc.gov.*

SUPPLEMENTARY INFORMATION: CPSC has submitted the following currently approved collection of information to OMB for extension:

Title: Safety Standard for Cigarette Lighters.

OMB Number: 3041–0116.

Type of Review: Renewal of collection.

Frequency of Response: On occasion.

Affected Public: Manufacturers and importers of cigarette lighters.

Estimated Number of Respondents: In 2015, 42 firms submitted information to the CPSC on 307 lighter models. There were 4 new models and 303 lighters that were comparable to previously tested models (''comparison lighters'').

Estimated Time per Response: Recordkeeping is composed of two separate components: Recordkeeping for new models and recordkeeping for comparison lighters. The time burden for recordkeeping for new models is estimated at 20 hours per model. The total time for recordkeeping of new models is estimated to be 80 hours (20 hours × 4 models). For each new model, product testing for each firm would take approximately 90 hours per model, for a total of 360 hours (90 hours × 4 models).

Firms may also submit comparison lighters to demonstrate compliance with the standard. In 2015, 303 comparison lighters were reported to the CPSC. While firms bear no testing costs for comparison lighters, the burden hours for recordkeeping has been estimated at 3 hours per model. Thus, an estimated 909 hours (303 models × 3 hours) is estimated for recordkeeping for comparison lighters.

Reporting requirements for submitting forms to CPSC are estimated at one hour per model, for a total annual reporting burden on 307 hours (307 models × 1 hour).

Total Estimated Annual Burden: The total number of responses is approximately 307 per year (4 new models + 303 comparison lighters). The number of hours estimated for testing and recordkeeping is 1,349 hours per year, including new-product tests (360 hours if done in house), new product recordkeeping (4 new models × 20 hours = 80 hours), and recordkeeping for comparison lighters (303 comparison

lighters × 3 hours = 909 hours). In addition, the CPSC estimates that approximately one hour per product will be required for manufacturers to submit forms to CPSC, or 307 total hours for reporting. Accordingly the total burden hours for recordkeeping and reporting are approximately 1656 hours (1349 + 307).

General Description of Collection: In 1993, the Commission issued the Safety Standard for Cigarette Lighters (16 CFR part 1210) under the Consumer Product Safety Act (''CPSA'') (15 U.S.C. 2051 *et seq.*) to eliminate or reduce risks of death and burn injury from fires accidentally started by children playing with cigarette lighters. The standard requires certain test protocols, as well as recordkeeping and reporting requirements. 16 CFR part 1210, subpart B. In addition, section 14(a) of the CPSA (15 U.S.C. 2063(a)) requires manufacturers, importers, and private labelers of a consumer product subject to a consumer product safety standard to issue a certificate stating that the product complies with all applicable consumer product safety standards. Section 14(a) of the CPSA also requires that the certificate of compliance must be based on a test of each product or upon a reasonable testing program.

Dated: April 27, 2016.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2016–10212 Filed 4–29–16; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2012–0019]

Agency Information Collection Activities; Submission for OMB Review; Comment Request—Standards for Full-Size Baby Cribs and Non-Full Size Baby Cribs; Compliance Form

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (''PRA'') of 1995 (44 U.S.C. chapter 35), the Consumer Product Safety Commission (''Commission'' or ''CPSC'') announces that the Commission has submitted to the Office of Management and Budget (''OMB'') a request for extension of approval of a collection of information regarding a form that will be used to measure child care centers' compliance with the CPSC safety standards for full-size and non-full-size cribs (16 CFR parts 1219 and 1220). In the **Federal Register** of February 16, 2016 (81 FR 7766), the CPSC published a notice to announce the agency's intention to seek extension of approval of the collection of information. The Commission received no comments. Therefore, by publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by June 1, 2016.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503. In addition, written comments that are sent to OMB also should be submitted electronically at *http://www.regulations.gov,* under Docket No. CPSC–2012–0019.

FOR FURTHER INFORMATION CONTACT: For further information contact: Robert H. Squibb, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7815, or by email to: *rsquibb@cpsc.gov.*

SUPPLEMENTARY INFORMATION: CPSC has submitted the following currently approved collection of information to OMB for extension:

Title: Safety Standards for Full-Size Baby Cribs and Non-Full Size Baby Cribs-Verification of Compliance Form.

OMB Number: 3041–0161.

Type of Review: Renewal of collection.

Frequency of Response: On occasion.

Affected Public: Child care centers.

Estimated Number of Respondents: 74 child care centers.

Estimated Time per Response: .25 hour for each child care center to provide the information on the form.

Total Estimated Annual Burden: 18.5 hours (.25 hour × 74 child care centers).

General Description of Collection: CPSC staff intends to visit child care centers to measure compliance with the crib safety standards. Information from those visits would be recorded on a ''Verification of Compliance Form.'' CPSC investigators or designated state or local officials will use the form, which will be filled out entirely at the site during the normal course of the visit. The Commission will use the information to measure compliance with the crib safety standards and to develop an enforcement strategy. A pilot program was conducted in 2012, which included visits to approximately 50 child care centers in six states. Results of the pilot program were used to expand the program in 2013, to seven states and 112 inspections. CPSC conducted the program in 2015, in three states, which included 47 inspections. CPSC projects that four states will participate in the program in 2016 and approximately 74 inspections will be conducted.

Dated: April 27, 2016.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2016–10213 Filed 4–29–16; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of partially-closed meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for a partially-closed meeting of the President's Council of Advisors on Science and Technology (PCAST), and describes the functions of the Council. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: May 20, 2016, 9:00 a.m. to 12:00 p.m.

ADDRESSES: The meeting will be held at the National Academy of Sciences, 2101 Constitution Avenue NW., Washington, DC in the Lecture Room.

FOR FURTHER INFORMATION CONTACT: Information regarding the meeting agenda, time, location, and how to register for the meeting is available on the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.* A live video webcast and an archive of the webcast after the event are expected to be available at *http://whitehouse.gov/ostp/pcast.* The archived video will be available within one week of the meeting. Questions about the meeting should be directed to Ms. Jennifer Michael at *jmichael@ostp.eop.gov,* (202) 395–2121. Please note that public seating for this meeting is limited and is available on a first-come, first-served basis.

SUPPLEMENTARY INFORMATION: The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House, cabinet departments, and other Federal agencies. See the Executive Order at *http://www.whitehouse.gov/ostp/pcast.* PCAST is consulted about and provides analyses and recommendations concerning a wide range of issues where understandings from the domains of science, technology, and innovation may bear on the policy choices before the President. PCAST is co-chaired by Dr. John P. Holdren, Assistant to the President for Science and Technology, and Director, Office of Science and Technology Policy, Executive Office of the President, The White House; and Dr. Eric S. Lander, President, Broad Institute of the Massachusetts Institute of Technology and Harvard.

Type of Meeting: Open and Closed.

Proposed Schedule and Agenda: The President's Council of Advisors on Science and Technology (PCAST) is scheduled to meet in open session on May 20, 2016 from 9:00 a.m. to 12:00 p.m.

Open Portion of Meeting: During this open meeting, PCAST is scheduled to discuss its current study on forensics. They will also hear from speakers who will remark on near earth objects and who will talk about cryptocurrencies. They will announce their new study on science and technology for drinking-water safety. Additional information and the agenda, including any changes that arise, will be posted at the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.*

Closed Portion of the Meeting: PCAST may hold a closed meeting of approximately one hour with the President on May 20, 2016, which must take place in the White House for the President's scheduling convenience and to maintain Secret Service protection. Both meetings will be closed to the public because such portion of the meeting is likely to disclose matters that are to be kept secret in the interest of national defense or foreign policy under 5 U.S.C. 552b(c)(1).

Public Comments: It is the policy of the PCAST to accept written public comments of any length, and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on May 20, 2016 at a time specified in the meeting agenda posted on the PCAST Web site at *http://whitehouse.gov/ostp/pcast.* This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *http://whitehouse.gov/ostp/pcast,* no later than 12:00 p.m. Eastern Time on May 18, 2016. Phone or email reservations will not be accepted. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 15 minutes. If more speakers register than there is space available on the agenda, PCAST will randomly select speakers from among those who applied. Those not selected to present oral comments may always file written comments with the committee. Speakers are requested to bring at least 25 copies of their oral comments for distribution to the PCAST members.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to PCAST no later than 12:00 p.m. Eastern Time on May 18, 2016 so that the comments may be made available to the PCAST members prior to this meeting for their consideration. Information regarding how to submit comments and documents to PCAST is available at *http://whitehouse.gov/ostp/pcast* in the section entitled ''Connect with PCAST.''

Please note that because PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST Web site.

Meeting Accommodations: Individuals requiring special accommodation to access this public meeting should contact Ms. Jennifer Michael at least ten business days prior to the meeting so that appropriate arrangements can be made.

Issued in Washington, DC, on April 26, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–10208 Filed 4–29–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CW–026]

Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Whirlpool From the Department of Energy Residential Clothes Washer Test Procedure

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

ACTION: Decision and order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of a decision and order (Case No. CW–026) that grants to Whirlpool Corporation (Whirlpool) a waiver from the DOE clothes washer test procedure for determining the energy consumption of clothes washers. Under this decision and order, Whirlpool is required to test and rate its clothes washers with clothes containers greater than 6.0 cubic feet using an alternate test procedure that takes this larger capacity into account when measuring energy consumption.

DATES: This Decision and Order is effective May 2, 2016.

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–5B, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–33, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(f)(2)), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants Whirlpool a waiver from the applicable clothes washer test procedure in 10 CFR part 430, subpart B, appendix J2 for certain basic models of clothes washers with capacities greater than 6.0 cubic feet, provided that Whirlpool tests and rates such products using the alternate test procedure described in this notice. Whirlpool's representations concerning the energy efficiency of these products must be based on testing consistent with the provisions and restrictions in the

alternate test procedure set forth in the decision and order below, and the representations must fairly disclose the test results. Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

Not later than July 1, 2016, any manufacturer currently distributing in commerce in the United States a residential clothes washer with a capacity larger than 6.0 cubic feet must submit a petition for waiver pursuant to the requirements of this section. Manufacturers not currently distributing such products in commerce in the United States must petition for and be granted a waiver prior to distribution in commerce in the United States. Manufacturers may also submit a request for interim waiver pursuant to the requirements of 10 CFR 430.27.

Issued in Washington, DC, on April 26, 2016.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: Whirlpool Corporation (Case No. CW–026)

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA) (42 U.S.C. 6291–6309) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, including the residential clothes washers.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results measuring energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential clothes washers is contained in 10 CFR part 430, subpart B, appendix J2.

The regulations set forth in 10 CFR 430.27 enable a person to seek a waiver from the test procedure requirements for covered products. DOE will grant a waiver if DOE determines that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(f)(2). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2).

II. Whirlpool's Petition for Waiver: Assertions and Determinations

On November 9, 2015, Whirlpool submitted a petition for waiver from the DOE test procedure applicable to automatic and semi-automatic clothes washers as set forth in 10 CFR part 430, subpart B, appendix J2. Whirlpool requested the waiver because the mass of the test load used in the procedure, which is based on the basket volume of the test unit, is currently not defined for basket sizes greater than 6.0 cubic feet. In its petition, Whirlpool sought a waiver for the specified basic models, which have capacities greater than 6.0 cubic feet, as the current DOE test procedure specifies test load sizes only for machines with capacities up to 6.0 cubic feet. (*See* 77 FR 13888, Mar. 7, 2012; the ''March 2012 Final Rule'')

Table 5.1 of Appendix J2 defines the test load sizes used in the test procedure as linear functions of the basket volume. Whirlpool requested that DOE grant a waiver for testing and rating based on a revised Table 5.1. Whirlpool also requested an interim waiver from the existing DOE test procedure, which DOE granted. See 80 FR at 78208. After reviewing the alternate procedure suggested by Whirlpool, DOE granted the interim waiver because DOE concluded that it would allow for the accurate measurement of the energy use of these products, while alleviating the testing problems associated with testing clothes washers with capacities greater than 6.0 cubic feet.

Whirlpool's petition was published in the **Federal Register** on December 16, 2015. 80 FR 78208. DOE received one comment on the Whirlpool petition filed jointly by the Appliance Standards Awareness Project (ASAP), Alliance to Save Energy (ASE), American Council for an Energy-Efficient Economy (ACEEE), Natural Resources Defense Council (NRDC), and Northwest Energy Efficiency Alliance (NEEA) (hereinafter the ''Joint Commenters''). The Joint Commenters did not object to manufacturers being able to test and certify clothes washers with capacities greater than 6.0 cu. ft. They reiterated concerns raised in the rulemaking that culminated in the March 2012 Final Rule, however, regarding a potential bias in the test procedure towards large capacity washers, and asserted that these concerns would be exacerbated with a further extension of Table 5.1 of appendix J2 up to 8.0 cu. ft. (Joint Commenters, No. 2 at p. 1) [2]

DOE granted a waiver to Whirlpool for a similar request under Decision and Order (75 FR 69653, Nov. 15, 2010) to allow for the testing of clothes washers with container volumes between 3.8 cubic feet and 6.0 cubic feet. In addition to the previous waiver granted to Whirlpool, DOE granted waivers to LG (CW–016 (76 FR 11233, Mar. 1, 2011), CW–018 (76 FR 21879, Apr. 19, 2011), and CW–021 (76 FR 64330, Oct. 18, 2011); General Electric (75 FR 76968, Dec. 10, 2010), Samsung (76 FR 13169, Mar. 10, 2011); 76 FR 50207, Aug. 12, 2011), and Electrolux (76 FR 11440, Mar. 2, 2011) to allow for the testing of clothes washers with container volumes between 3.8 cubic feet and 6.0 cubic feet.

For the reasons set forth in DOE's March 2012 Final Rule, DOE concludes that extending the linear relationship between test load size and container capacity to larger capacities represents the best possible approach for determining load size for large capacity washers. DOE will continue to evaluate the possibility of a bias in the test procedure with respect to large capacity washers in the next revision to the DOE test procedure in appendix J2. In addition, DOE determines that testing a basic model with a capacity larger than 6.0 cubic feet using the current procedure at Appendix J2 could evaluate the basic models in a manner so unrepresentative of their true energy consumption as to provide materially inaccurate comparative data.

III. Consultations With Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Whirlpool petition for waiver. The FTC staff did not have any objections to granting a waiver to Whirlpool.

IV. Order

After careful consideration of all the material that was submitted by Whirlpool and the Joint Commenters, the testing and analysis conducted for the March 2012 Final Rule, and

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

[2] A notation in the form ''Joint Commenters, No. 2 at p. 1'' identifies a written comment: (1) Made by the ASAP, ASE, ACEEE, NRDC, and NEEA (hereinafter the ''Joint Commenters''); (2) recorded in document number 2 that is filed in the docket of this waiver (Docket No. EERE–2015– BT–WAV–0020) and available for review at *www.regulations.gov;* and (3) which appears on page 1 of document number 2.

consultation with the FTC staff, in accordance with 10 CFR 430.27, it is ORDERED that:

(1) The petition for waiver submitted by the Whirlpool Corporation (Case No. CW–026) is hereby granted as set forth in the paragraphs below.

(2) Whirlpool must test and rate the Whirlpool basic models specified in paragraph (3) on the basis of the current test procedure contained in 10 CFR part 430, subpart B, appendix J2, except that Table 5.1 of appendix J2 is supplemented by the following additional rows:

TABLE 5.1—TEST LOAD SIZES—SUPPLEMENT

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	Kg
6.00–6.10	169.9–172.7	3.00	1.36	24.80	11.25	13.90	6.30
6.10–6.20	172.7–175.6	3.00	1.36	25.20	11.43	14.10	6.40
6.20–6.30	175.6–178.4	3.00	1.36	25.60	11.61	14.30	6.49
6.30–6.40	178.4–181.2	3.00	1.36	26.00	11.79	14.50	6.58
6.40–6.50	181.2–184.1	3.00	1.36	26.40	11.97	14.70	6.67
6.50–6.60	184.1–186.9	3.00	1.36	26.90	12.20	14.95	6.78
6.60–6.70	186.9–189.7	3.00	1.36	27.30	12.38	15.15	6.87
6.70–6.80	189.7–192.6	3.00	1.36	27.70	12.56	15.35	6.96
6.80–6.90	192.6–195.4	3.00	1.36	28.10	12.75	15.55	7.05
6.90–7.00	195.4–198.2	3.00	1.36	28.50	12.93	15.75	7.14
7.00–7.10	198.2–201.0	3.00	1.36	28.90	13.11	15.95	7.23
7.10–7.20	201.0–203.9	3.00	1.36	29.30	13.29	16.15	7.33
7.20–7.30	203.9–206.7	3.00	1.36	29.70	13.47	16.35	7.42
7.30–7.40	206.7–209.5	3.00	1.36	30.10	13.65	16.55	7.51
7.40–7.50	209.5–212.4	3.00	1.36	30.60	13.88	16.80	7.62
7.50–7.60	212.4–215.2	3.00	1.36	31.00	14.06	17.00	7.71
7.60–7.70	215.2–218.0	3.00	1.36	31.40	14.24	17.20	7.80
7.70–7.80	218.0–220.9	3.00	1.36	31.80	14.42	17.40	7.89
7.80–7.90	220.9–223.7	3.00	1.36	32.20	14.61	17.60	7.98
7.90–8.00	223.7–226.5	3.00	1.36	32.60	14.79	17.80	8.07

(3) This order applies only to the following three basic models: V15EAg50(3B); V15EBg50(3B); and V15ECg50(3B).

(5) This waiver shall remain in effect consistent with the provisions of 10 CFR 430.27.

Issued in Washington, DC, on April 26, 2016.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2016–10209 Filed 4–29–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Attendance at PJM Interconnection, L.L.C. Meetings

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission and Commission staff may attend upcoming PJM Interconnection, L.L.C. (PJM) Members Committee and Markets and Reliability Committee meetings, as well as other PJM committee, subcommittee or task force meetings.[1] The Commission and Commission staff may attend the following meetings:

PJM Members Committee

- April 28, 2016—(Wilmington, DE)
- May 17–19, 2016—(Cambridge, MD)
- June 30, 2016—(Wilmington, DE)
- July 28, 2016—(TBD)
- September 29, 2016—(TBD)
- October 27, 2016—(TBD)
- November 17, 2016—(TBD)

PJM Markets and Reliability Committee

- April 28, 2016—(Wilmington, DE)
- May 26, 2016—(Wilmington, DE)
- June 30, 2016—(Wilmington, DE)
- July 28, 2016—(TBD)
- August 25, 2016—(TBD)
- September 29, 2016—(TBD)
- October 27, 2016—(TBD)
- November 17, 2016—(TBD)
- December 22, 2016—(TBD)

PJM Market Implementation Committee

- May 11, 2016—(Audubon, PA)
- June 8, 2016—(Audubon, PA)
- July 13, 2016—(Audubon, PA)
- August 10, 2016—(Audubon, PA)
- September 14, 2016—(Audubon, PA)
- October 5, 2016—(Audubon, PA)
- November 2, 2016—(Audubon, PA)
- December 14, 2016—(Audubon, PA)

The discussions at each of the meetings described above may address matters at issue in pending proceedings before the Commission, including the following currently pending proceedings:

Docket No. EL05–121, *PJM Interconnection, L.L.C.*
Docket No. EL08–14, *Black Oak Energy LLC, et al.,* v. *FERC*
Docket No. ER11–1844, *Midwest Independent Transmission System Operator, Inc.*
Docket Nos. AD12–1 and ER11–4081, *Midwest Independent Transmission System Operator, Inc.*
Docket No. EL12–54, *Viridity Energy, Inc.* v. *PJM Interconnection, L.L.C.*
Docket No. EL13–88, *Northern Indiana Public Service Company* v. *Midcontinent Independent System Operator, Inc. and PJM Interconnection, L.L.C.*
Docket No. ER13–90, *Public Service Electric and Gas Company and PJM Interconnection, L.L.C.*
Docket No. ER13–195, *Indicated PJM Transmission Owners*
Docket No. ER13–349, *PJM Interconnection, L.L.C.*
Docket No. ER13–535, *PJM Interconnection, L.L.C.*
Docket No. ER13–1654, *PJM Interconnection, L.L.C.*

[1] For example, PJM subcommittees and task forces of the standing committees (Operating, Planning and Market Implementation) and senior standing committees (Members and Markets and Reliability) meet on a variety of different topics; they convene and dissolve on an as-needed basis. Therefore, the Commission and Commission staff may monitor the various meetings posted on the PJM Web site.

Docket No. ER13–1924, *PJM Interconnection, L.L.C. and Duquesne Light Company*
Docket No. ER13–1926, *PJM Interconnection, L.L.C.*
Docket No. ER13–1942, *New York Independent System Operator, Inc.*
Docket No. ER13–1943, *Midcontinent Independent System Operator, Inc.*
Docket No. ER13–1944, *PJM Interconnection, L.L.C.*
Docket No. ER13–1945, *Midcontinent Independent System Operator, Inc.*
Docket No. ER13–1955, *Entergy Services, Inc.*
Docket No. ER13–1956, *Cleco Power LLC*
Docket No. ER13–2108, *PJM Interconnection, L.L.C.*
Docket No. EL14–20, *Independent Market Monitor* v. *PJM Interconnection, L.L.C.*
Docket No. EL14–37, *PJM Interconnection, L.L.C.*
Docket Nos. EL14–94, EL14–36, *FirstEnergy Solutions Corporation and PJM Interconnection, L.L.C.*
Docket No. ER14–504, *PJM Interconnection, L.L.C.*
Docket No. ER14–822, *PJM Interconnection, L.L.C.*
Docket No. ER14–972, *PJM Interconnection, L.L.C.*
Docket No. ER14–1144, *PJM Interconnection, L.L.C.*
Docket No. ER14–1145, *PJM Interconnection, L.L.C.*
Docket Nos. ER14–1461, EL14–48, *PJM Interconnection, L.L.C.*
Docket No. ER14–1485, *PJM Interconnection, L.L.C.*
Docket No. ER14–2242, *Old Dominion Electric Cooperative*
Docket No. ER14–2940, *PJM Interconnection, L.L.C.*
Docket Nos. EL15–15, ER15–696, *PJM Interconnection, L.L.C.*
Docket No. EL15–18, *Consolidated Edison Company of New York, Inc.* v. *PJM Interconnection, L.L.C.*
Docket No. EL15–38, *RTO Energy Trading, LLC*
Docket No. EL15–41, *Essential Power Rock Springs, LLC, et al.,* v. *PJM Interconnection, L.L.C.*
Docket No. EL15–67, *Linden VFT, LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL15–79, *TranSource, LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL15–80, *Advanced Energy Management Alliance Coalition* v. *PJM Interconnection, L.L.C.*
Docket No. EL15–95, *Maryland and Delaware State Commissions* v. *PJM Interconnection, L.L.C.*
Docket No. ER15–532, *PJM Interconnection, L.L.C.*
Docket Nos. ER15–623, EL15–29, *PJM Interconnection, L.L.C.*
Docket No. ER15–746, *RC Cape May Holdings, LLC*
Docket No. ER15–834, *Illinois Municipal Electric Agency*
Docket No. ER15–952, *New Jersey Energy Associates, A Limited Partnership*
Docket No. ER15–994, *PJM Interconnection, L.L.C.*
Docket Nos. ER15–1344, ER15–1387, *PJM Interconnection, L.L.C.*
Docket Nos. ER15–2562, ER15–2563, *PJM Interconnection, L.L.C.*
Docket No. ER15–2613, *PJM Interconnection, L.L.C., and Midcontinent Independent System Operator, Inc.*
Docket Nos. EL16–6, ER16–121, *PJM Interconnection, L.L.C.*
Docket No. EL16–9, *Big Sandy Peaker Plant, LLC et al.* v. *PJM Interconnection, L.L.C.*
Docket Nos. EL15–73, ER16–372, *PJM Interconnection, L.L.C.*
Docket No. ER16–453, *PJM Interconnection, L.L.C., and Northeast Transmission Development, LLC*
Docket Nos. ER16–535, ER16–536, *PJM Interconnection, L.L.C. and Midcontinent Independent System Operator, Inc.*
Docket No. ER16–736, *PJM Interconnection, L.L.C.*
Docket No. ER16–1004, *PJM Interconnection, L.L.C.*
Docket No. ER16–1150, *PJM Interconnection, L.L.C.*
Docket No. ER16–1232, *PJM Interconnection, L.L.C.*
Docket No. ER16–1335, *PJM Interconnection, L.L.C.*
Docket No. ER16–1336, *PJM Interconnection, L.L.C.*

For additional meeting information, see: *http://www.pjm.com/committees-and-groups.aspx* and *http://www.pjm.com/Calendar.aspx.*

The meetings are open to stakeholders. For more information, contact Valerie Martin, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6139 or *Valerie.Martin@ferc.gov.*

Dated: April 25, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10095 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1466–000]

Palmco Power NH LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Palmco Power NH LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10138 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1411–000]

CNR Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of CNR Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

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Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10134 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL16–58–000; QF15–793–001; QF15–794–001; QF15–795–001]

SunE B9 Holdings, LLC; Notice of Petition for Declaratory Order

Take notice that on April 25, 2016, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,[1] SunE B9 Holdings, LLC (SunE), filed a petition for a declaratory order requesting that the Commission provide a limited waiver of the filing requirements applicable to small power production facilities set forth in Section 292.203(a)(3) of the Commission's regulations (QF Filing Requirements).[2] SunE request waiver of QF filing requirements for the time-period beginning when various qualifying small power production facilities (QFs) owned by SunE, were placed into operation during December 2010 and ending on May 27, 2015, when SunE filed QF self-certifications with respect to such facilities, all as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. eastern time on May 25, 2016.

Dated: April 25, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10099 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 385.207.

[2] 18 CFR 292.203(a)(3).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1464–000]

Palmco Power ME, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Palmco Power ME, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard

to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10136 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP15–18–000; CP15–18–001; CP15–498–000]

Eastern Shore Natural Gas Company; Notice of Availability of the Environmental Assessment for the Proposed White Oak Mainline Expansion Project and System Reliability Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the White Oak Mainline Expansion (White Oak) Project and System Reliability Project, proposed by Eastern Shore Natural Gas Company (Eastern Shore) in the above-referenced docket. Eastern Shore requests authorization to construct, install, own, operate, and maintain certain facilities located in Chester County, Pennsylvania and New Castle, Kent, and Sussex, Counties, Delaware.

The EA assesses the potential environmental effects of the construction and operation of the White Oak and System Reliability Projects in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed projects, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Specifically, the proposed White Oak Project includes the following facilities:

- 3.3 miles of 16-inch-diameter looping pipeline (the Daleville Loop) in Chester County, Pennsylvania;
- 2.1 miles of 16-inch-diameter looping pipeline (Kemblesville Loop) in Chester County, Pennsylvania; and
- 3,550 horsepower of additional compression at Eastern Shore's existing Delaware City Compressor Station in New Castle County, Delaware.

Specifically, the proposed System Reliability Project includes the following facilities:

- 2.5 miles of 16-inch-diameter looping pipeline (Porter Road Loop) in New Castle County, Delaware;
- 7.6 miles of 16-inch-diameter looping pipeline (Dover Loop) in Kent County, Delaware;
- installation of associated underground and aboveground facilities (two mainline valves, a meter and regulator station); and
- an additional 1,775 horsepower of compression at Eastern Shore's existing Bridgeville Compressor Station in Sussex County, Delaware.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in each project area; and parties to this proceeding.

In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on these projects, it is important that we receive your comments in Washington, DC on or before May 25, 2016.

For your convenience, there are three methods you can use to file your comments with the Commission. In all instances, please reference the project docket number (CP15–18–001 or CP15–498–000 [as applicable]) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent.

[1] See the previous discussion on the methods for filing comments.

Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the projects is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (*i.e.,* CP15–18 or CP15–498). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: April 25, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10097 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1440–000]

Roswell Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Roswell Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10135 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12496–002]

Rugraw, LLC; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major Original License.

b. *Project No.:* P–12496–002.

c. *Date filed:* April 21, 2014.

d. *Applicant:* Rugraw, LLC.

e. *Name of Project:* Lassen Lodge Hydroelectric Project.

f. *Location:* On the South Fork Battle Creek near the Town of Mineral in Tehama County, California. The project would be located on private lands. No federal lands or Indian reservations are located within the proposed project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Charlie Kuffner, 70 Paseo Mirasol, Tiburon, CA 94920; (415) 652–8553

i. *FERC Contact:* Kenneth Hogan at (202) 502–8434; or via email at *kenneth.hogan@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–12496–002.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

l. The proposed Lassen Lodge Project would consist of: (1) A 6-foot-high and 94-foot-long diversion dam; (2) an impoundment of approximately 0.5

acre; (3) a 20-foot by 10-foot enclosed concrete intake structure; (4) a 7,258-foot-long pipeline and a 5,230-foot-long penstock with a net head of 791 feet; (5) a 50-foot by 50-foot powerhouse containing one generating unit with a 5,000-kilowatt capacity; (6) a 50-foot by 50-foot substation area; (7) a 40-foot by 35-foot switchyard; (8) 100-foot by 100-foot multipurpose area; and (9) a new 12-mile-long, 60-kilovolt transmission line. The project is estimated to produce approximately 25,000,000 kilowatt hours annually.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. *Procedural Schedule:* The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target
Notice that application is ready for environmental analysis.	April 2016.
Filing of comments, recommendations, terms and conditions, and prescriptions.	June 2016.
Filing of reply comments	July 2016.
Notice of the availability of the draft EIS.	October 2016.
Initiate 10(j) process	December 2016.
Notice of the availability of the final EIS.	May 2017.

p. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: April 25, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10096 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3472–022]

Summit Hydropower, Inc.; Aspinook Hydro, LLC; Notice of Application for Transfer of License and Soliciting Comments, Motions To Intervene, and Protests

On April 12, 2016, Summit Hydropower, Inc. (transferor) and Aspinook Hydro, LLC (transferee) filed an application for transfer of license of the Wyre Wynd Project No. 3472. The project is located on the Quinebaug River in New London County, Connecticut. The project does not occupy Federal lands.

The applicants seek Commission approval to transfer the license for the Wyre Wynd Project from the transferor to the transferee.

Applicant Contact: For transferor: Mr. Duncan Broatch, Summit Hydropower, Inc., 6 Far Hills Drive, Avon, CT 06001, telephone: 860–255–7744, email: *dbroatch@earthlink.net* and Ms. Katie McGinnes, Day Pitney LLP, 242 Trumbull Street, Hartford, CT 06103–1212. For transferee: Mr. Mark Boumansour, Aspinook Hydro, LLC, c/o Gravity Renewables, Inc., 1401 Walnut Street, Suite 220, Boulder, CO 80302, telephone: 303–440–3378, email: *mark@gravityrenewables.com* and copies to: Mr. Karl F. Kumli, III, Dietze and Davis, P.C., 2060 Broadway, Suite 400, Boulder, CO 80302 and Mr. Robert A. Panasci, Esq., Young/Sommer, LLC Executive Woods, 5 Palisades Drive, Albany, NY 12205.

FERC Contact: Patricia W. Gillis, (202) 502–8735, *patricia.gillis@ferc.gov*.

Deadline for filing comments, motions to intervene, and protests: 30 days from the date that the Commission issues this notice. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–3472–022.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10141 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1406–000]

Peak View Wind Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Peak View Wind Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR

part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10156 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1467–000]

Palmco Power VA LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Palmco Power VA LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10139 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13212–005]

Kenai Hydro, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Application for Original License for Major Project—Unconstructed.

b. *Project No.:* P–13212–005.

c. *Date filed:* April 18, 2016.

d. *Applicant:* Kenia Hydro, LLC.

e. *Name of Project:* Grant Lake Hydroelectric Project.

f. *Location:* On Grant Creek, near the Town of Moose Pass, Kenai Peninsula Borough, Alaska. The proposed project would occupy 1,741.3 acres of federal land within the Chugach National Forest managed by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mikel Salzetti, Manager of Fuel Supply & Renewable Energy Development, 280 Airport Way, Kenai, AK 99611. (907) 283–2375.

i. *FERC Contact:* Kenneth Hogan, (202) 502–8434; *Kenneth.Hogan@ferc.gov*.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in

order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* June 17, 2016.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–13212–005.

m. The application is not ready for environmental analysis at this time.

n. The proposed Grant Lake Hydroelectric Project would consists of: (1) An intake structure within Grant Lake; (2) a 3,300-foot-long water conveyance; (3) a 72-inch-diameter, 150-feet-long, welded steel penstock; (4) a power house containing two 2.5 megawatt Francis turbine/generator units; (5) a 95-foot-long open channel tailrace; (6) a 3.6-acre tailrace detention pond; (6) a 1.1-mile-long, 115-kilovolt transmission line; and (7) appurtenant facilities. The project is estimated to generate an average of 18,600 megawatt hours (MWh) annually.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

q. Procedural schedule: The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Notice of Acceptance or Deficiency Letter *—June 2016
Request Additional Information (if needed) *—June 2016
Issue Scoping Document 1 for comments—July 2016
Scoping Meeting (if needed)—August 2016
Comments on Scoping Document 1—September 2016
Issue Scoping Document 2—November 2016
Issue notice of ready for environmental analysis—November 2016
Request Additional Information (if needed) *—November 2016
Comments, recommendations, terms and conditions, and prescriptions—January 2017
Reply Comments—March 2017
Notice of the availability of the draft NEPA document—June 2017
Comments on the draft NEPA document—July 2017
Initiate 10(j) process—July 2017
Notice of the availability of the final NEPA document—November 2017

* A deficiency letter and/or the need for additional information would result in subsequent delays to the processing schedule.

Dated: April 25, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10098 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1468–000]

Palmco Power RI LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Palmco Power RI LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 11, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 21, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–10140 Filed 4–29–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2016–0022; FRL–9945–54]

Certain New Chemicals; Receipt and Status Information for March 2016

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA) to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN); an application for a test marketing exemption (TME), both pending and/or expired; and a periodic status report on any new chemicals

under EPA review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document covers the period from March 1, 2016 to March 31, 2016.

DATES: Comments identified by the specific case number provided in this document, must be received on or before June 1, 2016.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2016–0022, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Jim Rahai, IMD 7407M, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8593; email address: *rahai.jim@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitters of the actions addressed in this document.

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

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

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. What action is the Agency taking?

This document provides receipt and status reports, which cover the period from March 1, 2016 to March 31, 2016, and consists of the PMNs both pending and/or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

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

Under TSCA, 15 U.S.C. 2601 *et seq.,* EPA classifies a chemical substance as either an ''existing'' chemical or a ''new'' chemical. Any chemical substance that is not on EPA's TSCA Inventory is classified as a ''new chemical,'' while those that are on the TSCA Inventory are classified as an ''existing chemical.'' For more information about the TSCA Inventory go to: *http://www.epa.gov/opptintr/newchems/pubs/inventory.htm.*

Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for ''test marketing'' purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *http://www.epa.gov/oppt/newchems.*

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic reports on the status of new chemicals under review and the receipt of NOCs to manufacture those chemicals.

IV. Receipt and Status Reports

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that the information in the table is generic information because the specific information provided by the submitter was claimed as CBI.

For the 58 PMNs received by EPA during this period, Table 1 provides the following information (to the extent that such information is not claimed as CBI): The EPA case number assigned to the PMN; The date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer/importer; the potential uses identified by the manufacturer/importer in the PMN; and the chemical identity.

TABLE 1—PMNS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0086	3/24/2016	6/22/2016	CBI	(G) Coating component.	(G) Mixed metal oxide-halide complex.
P–16–0130	3/18/2016	6/16/2016	CBI	(G) Polymeric dye carrier.	(G) Amide ester polymer.
P–16–0130	3/18/2016	6/16/2016	CBI	(G) Intermediate for a polymeric dye carrier.	(G) Amide ester polymer.

TABLE 1—PMNS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0137	3/16/2016	6/14/2016	H.B.Fuller Company	(G) Industrial adhesive.	(S) Dicarboxylic acid polymers with alkane diols and desmodur e23.
P–16–0138	3/16/2016	6/14/2016	H.B.Fuller Company	(G) Industrial adhesive.	(S) Dicarboxylic acid polymers with alkane diols and e23.
P–16–0186	3/16/2016	6/14/2016	CBI	(G) Surfactant	(G) Sodium branched chain alkyl hydroxyl and branched chain alkenyl sulfonates.
P–16–0193	3/10/2016	6/8/2016	CBI	(S) Intermediate	(G) Branched alkenes.
P–16–0204	3/4/2016	6/2/2016	Gaco Western	(G) Reactant spray foam insulation.	(G) Per acetoacetylated sucrose.
P–16–0218	3/4/2016	6/2/2016	Gaco Western	(G) Reactant spray foam insulation.	(G) Acetoacetylated glycerin.
P–16–0218	3/4/2016	6/2/2016	Gaco Western	(G) Reactant architectural coating.	(G) Acetoacetylated glycerin.
P–16–0219	3/4/2016	6/2/2016	Gaco Western	(G) Reactant architectural coating.	(G) Per acetoacetylated sorbitol.
P–16–0219	3/4/2016	6/2/2016	Gaco Western	(G) Reactant spray foam insulation.	(G) Per acetoacetylated sorbitol.
P–16–0231	3/11/2016	6/9/2016	CBI	(G) Functional polymer used in industrial/commercial sealants adhesives and coatings.	(G) Polysiloxane with functional groups.
P–16–0232	3/2/2016	5/31/2016	CBI	(G) Lubricant additive.	(G) Zinc, bis[2-(hydroxyl-ko)benzoate-ko]-,(t-4)-, ar, arã¿ã¿ã¿ã¿ã¿ã¿ã¿â¢ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿ã¿-bis(alkyl) derivs.
P–16–0234	3/2/2016	5/31/2016	CBI	(G) Site contained intermediate.	(G) Benzoic acid, alkylol-, branched and linear, monosodium salts.
P–16–0237	3/1/2016	5/30/2016	CBI	(G) Friction modifier	(S) 2-propenoic acid, dodecyl ester, polymer with 2-hydroxyethyl 2-propenoate.
P–16–0238	3/2/2016	5/31/2016	H.B. Fuller Company	(G) Industrial adhesive.	(G) Soybean oil, ester with tetra functional alcohol, polymer with 1,1'-methylenebis[4-isocyanatobenzene] and glycol ether.
P–16–0239	3/2/2016	5/31/2016	H.B. Fuller Company	(G) Industrial adhesive.	(G) Soybean oil, ester with tetra functional alcohol, polymer with 1,1'-methylenebis [isocyanatobenzene] and glycol ether.
P–16–0240	3/3/2016	6/1/2016	CBI	(G) Resin for industrial coatings.	(G) Styrene(ated) copolymer with alkylmethacrylate, hydroxyalkylacrylate and acrylic acid.
P–16–0241	3/4/2016	6/2/2016	CBI	(G) Component of coatings.	(G) Polyester.
P–16–0241	3/4/2016	6/2/2016	CBI	(G) Component in ink formulations.	(G) Polyester.
P–16–0241	3/4/2016	6/2/2016	CBI	(G) Component in adhesive formulations.	(G) Polyester.
P–16–0242	3/3/2016	6/1/2016	International Flavors And Fragrances Inc..	(S) The notified substance will be used as a fragrance ingredient, being blended (mixed) with other fragrance ingredients to make fragrance oils that will be sold to industrial and commercial customers for their incorporation into soaps detergents cleaners air fresheners candles and other similar industrial, household and consumer products.	(S) Cyclopentanol, 1-ethyl-2-(3-methylbutyl)-.
P–16–0243	3/3/2016	6/1/2016	CBI	(S) Binder for paint and coatings.	(S) Propanedioic acid, 1,3-diethyl ester, polymer with 2,2-dimethyl-1,3-propanediol and hexahydro-1,3-isobenzofurandione.

TABLE 1—PMNS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0246	3/4/2016	6/2/2016	CBI	(G) Chemical intermediate.	(S) 2-pyridinecarboxylic acid, 6-(4-chloro-2-fluoro-3-methoxyphenyl)-4,5-difluoro-, phenylmethyl ester.
P–16–0247	3/18/2016	6/16/2016	CBI	(G) As a stabilizer	(S) 2-propenoic acid, 2-methyl-, polymer with hexadecyl 2-methyl-2-propenoate and octadecyl 2-methyl-2-propenoate.
P–16–0248	3/8/2016	6/6/2016	CBI	(S) resin used for fiberglass reinforced plastic (frp) applications.	(G) Methacrylate blocked polyurethane.
P–16–0249	3/10/2016	6/8/2016	CBI	(G) Surface treatment substance.	(G) Hydrazine derivatives.
P–16–0250	3/8/2016	6/6/2016	Allnex Usa Inc.	(S) Resin for improving mechanical properties in automotive paints.	(G) Substituted carbomonocycle, polymer with substituted alkanediol, alkanedioic acid, alkanediol, substituted alkanoic acid and substituted carbomonocycle, compd. with substituted alkane.
P–16–0251	3/11/2016	6/9/2016	CBI	(G) Pulp bleaching catalyst.	(G) Organic manganese catalyst.
P–16–0252	3/11/2016	6/9/2016	CBI	(G) A reactive additive in polymeric formulations. This functional polymer may be used in industrial/commercial sealants, adhesives and coatings upon end-use it would be fully incorporated and bound into the cured polymers and resins.	(G) Polysiloxane with functional groups.
P–16–0253	3/10/2016	6/8/2016	CBI	(G) Fatty acid based glyceride blend.	(G) Partial esters of fatty acids with glycerol.
P–16–0254	3/10/2016	6/8/2016	CBI	(G) Oil & gas extraction.	(G) Polymer of substituted acrylic acid and bromohexane.
P–16–0260	3/16/2016	6/14/2016	CBI	(G) Gas generant in automotive air bag inflators.	(G) Melamine nitrate.
P–16–0261	3/11/2016	6/9/2016	CBI	(S) Intermediate	(S) Propanoic acid, 3-(dimethylamino)-2-methyl-, methyl ester.
P–16–0262	3/25/2016	6/23/2016	CBI	(G) Bio-based base oil.	(S) 9-octadecenoic acid (9z)-, homopolymer, reaction products with lauric acid, 2-ethylhexyl esters, hydrogenated.
P–16–0263	3/11/2016	6/9/2016	CBI	(G) Fuel additive	(G) Alkene polymer with anhydride and imides.
P–16–0264	3/24/2016	6/22/2016	CBI	(G) Reclaimed silicones.	(G) Reclaimed fluorinated phenylmethyl siloxane volatiles.
P–16–0265	3/24/2016	6/22/2016	CBI	(G) Lubricant	(G) Fluorinated phenylmethyl siloxane.
P–16–0266	3/17/2016	6/15/2016	CBI	(G) Adhesives	(G) Polyester polyurethane polyol.
P–16–0267	3/16/2016	6/14/2016	Allnex Usa Inc.	(S) Electro-deposition primer.	(G) Fatty acids, polymers with substituted carbomonocycle, substituted alkylamines, heteromonocycle, substituted alkanoate, and alkyleneamine, lactates (salts).
P–16–0268	3/16/2016	6/14/2016	Colonial Chemical, Inc..	(G) Personal care use.	(S) Fatty acids, C_{18}-unsaturated, dimers, hydrogenated, polymers with *N*-[3-(dimethylamino)propyl] coco amides, *N*1, *N*1-dimethyl -1,3-dipropanediamine and epichlorohydrin.
P–16–0269	3/16/2016	6/14/2016	Weylchem US Inc. ...	(S) Reactant in the reaction.	(S) Benzene,2-isothiocyanato-1,3-bis(1-methylethyl)-5-phenoxy-.
P–16–0270	3/18/2016	6/16/2016	CBI	(G) Rheology modifier.	(G) Derivative of substituted acrylamides copolymer.
P–16–0271	3/18/2016	6/16/2016	Oxea Corporation	(S) Flexible pvc plasticizer for wire insulation.	(S) 1,2,4-benzenetricarboxylic acid, 1,2,4-trinonyl ester.
P–16–0272	3/18/2016	6/16/2016	CBI	(G) Ingredient in a formulated product.	(S) Lecithins, soya, hydrogenated.

TABLE 1—PMNS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0273	3/21/2016	6/19/2016	CBI	(G) Ingredient in metal working fluids.	(G) Alkyl heteromonocycle, polymer with heteromonocycle, carboxyalkyl alkyl ether.
P–16–0274	3/21/2016	6/19/2016	CBI	(G) Ingredient In metal working fluid.	(G) Alkyl heteromonocycle, polymer with heteromonocycle, carboxyalkyl alkyl ether.
P–16–0275	3/21/2016	6/19/2016	CBI	(G) Surfactant	(G) Rhamnolipid salt.
P–16–0276	3/21/2016	6/19/2016	CBI	(G) Surfactant	(G) Rhamnolipids.
P–16–0278	3/24/2016	6/22/2016	CBI	(G) Polymeric Film Former For Coatings.	(G) 2-(chloromethyl)oxirane and 4,4′-methylenebis[alkylphenol] polymer with diphenol, reaction products with 2-propenoic acid, 2-methyl-, ethenylbenzene, ethyl 2-propenoate and 2-(dimethylamino)ethanol.
P–16–0280	3/25/2016	6/23/2016	CBI	(G) Co-initiator	(G) Polyether polyol with aromatic dialkylamine.
P–16–0281	3/30/2016	6/28/2016	CBI	(G) Reactive polyol ..	(G) Fatty alcohols—dimers, trimmers, polymers.
P–16–0282	3/28/2016	6/26/2016	CBI	(S) Paint dryier	(G) Manganese complexes.
P–16–0283	3/29/2016	6/27/2016	Allnex Usa Inc.	(S) Resin for automotive coatings.	(G) Alkanedioic acid, polymer with substituted carbomonocycle, substituted alkane, substituted alkanoic acid and substituted alkyldiamine, compd. with substituted alkanol.
P–16–0284	3/29/2016	6/27/2016	Deepak Nitrite Corporation Inc..	(S) Optical brightener for textiles paper and paperboard.	(G) Anilino substituted bis-triazinyl derivative of 4,4′-diaminostilbene-2,2′disulfonic acid.
P–16–0285	3/31/2016	6/29/2016	CBI	(G) Intermediate	(G) Ester amine.
P–16–0286	3/31/2016	6/29/2016	CBI	(G) Wellbore additive	(G) Quaternary ammonium salts.

For the 39 NOCs received by EPA during this period, Table 3 provides the following information (to the extent that such information is not claimed as CBI): The EPA case number assigned to the NOC; the date the NOC was received by EPA; the projected date of commencement provided by the submitter in the NOC; and the chemical identity.

TABLE 2—NOCS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016

Case No.	Received date	Commencement date	Chemical
P–00–1105	3/4/2016	11/18/2004	(G) Hydroxy functional amino ester.
P–06–0205	3/31/2016	3/22/2016	(S) Butanenitrile, 4-(dimethoxymethylsilyl)-2-methyl-.
P–09–0044	3/2/2016	2/23/2016	(S) Ruthenium, [1,3-bis(2,4,6-trimethylphenyl)-2-imidazolidinylidene]dichloro[[2-(1-methylethoxy-ko)phenyl]methylene-kc]-, (sp-5–41).
P–13–0622	3/31/2016	3/27/2016	(S) 1-propanamine,3-(diethoxymethylsilyl)-*N, N*-dimethyl-.
P–13–0879	3/24/2016	3/22/2016	(G) Alkylphenol.
P–14–0035	3/22/2016	3/17/2016	(S) Butanedioic acid, 2-methylene-, polymer with 2-propenoic acid and sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), sodium salt.
P–14–0079	3/28/2016	6/25/2014	(G) Synthetic polyol esters.
P–14–0334	3/1/2016	2/21/2016	(S) 2-propenoic acid, 2-methyl-, heptadecyl ester, branched.
P–15–0028	3/30/2016	3/29/2016	(S) Silicon oxycarbide, carbon silicon oxide.
P–15–0373	3/14/2016	3/12/2016	(G) Substituted carbopolycycle, polymer with disubstituted alkane substituted alkyl methacrylate-blocked.
P–15–0438	3/8/2016	3/2/2016	(G) Zinc carboxylate.
P–15–0550	3/22/2016	3/4/2016	(G) Tetrahydroalkyl aromatic heterocyclic diketone, polymer with dialkyleneglycol, trialkyleneglycol, heterocyclic diketone and aromatic heterocyclic diketone.
P–15–0551	3/22/2016	3/4/2016	(G) Aromatic heterocyclic diketone, polymer with dialkyleneglycol, trialkyleneglycol and alkenoic acid glycidyl ester.
P–15–0568	3/15/2016	3/9/2016	(G) Alicyclic polycarboxylic acid, polymer with alkyl methacrylate, alkyldiol, alkyldioic acid, polyalkyleneoxide, alkoxy methacrylate, aromatic heterocyclic diketone, aromatic diisocyanate, heterocyclic ketone and dialkyleneglycol.
P–15–0574	3/3/2016	2/19/2016	(G) 1,3-isobenzofurandione, 5,5à-[2,2,2-trifluoro-1-(trifluoromethyl) ethylidene]bis-, polymer with aromatic amines.
P–15–0583	3/3/2016	2/25/2016	(G) Butanedioic acid, 2-[[(alkyl)amino]methyl]-, 1,4-bis(alkyl) ester.
P–15–0601	3/18/2016	2/23/2016	(G) Polymer of humic acid salt, acrylamide and substituted sulfonic acid.
P–15–0646	3/29/2016	2/29/2016	(S) Silane, (3-chloropropyl)diethoxymethyl-.
P–15–0651	3/23/2016	3/11/2016	(G) Siloxanes and silicones, di methyl, polyether modified.

TABLE 2—NOCS RECEIVED FROM MARCH 1, 2016 TO MARCH 31, 2016—Continued

Case No.	Received date	Commencement date	Chemical
P–15–0735	3/16/2016	2/26/2016	(S) Hydrocarbons, C_5-rich, polymers with (6e)-7,11-dimethyl-3-methylene-1,6,10-dodecatriene, 2-methylbutene and methylstyrene.
P–15–0736	3/31/2016	3/30/2016	(G) Castor oil, polymer with substituted alkanoic acid, substituted carbomonocycle, dialkyl substituted alkanediol and tdi, substituted alkanone-blocked.
P–15–0740	3/14/2016	3/11/2016	(G) Disubstituted alkanedioic acid, polymer with substituted carbomonocycle, dialkyl carbonate, alkanediol and (alkylimino) bis [alkanol], acetate (salt).
P–15–0752	3/23/2016	3/3/2016	(G) Polysiloxane, di-me, epoxyfunctional.
P–15–0765	3/3/2016	2/9/2016	(S) 1,3-propanediol, 2-(dimethylamino)-2-(hydroxymethyl)-.
P–16–0014	3/23/2016	3/8/2016	(G) Silicon, tris[dialkyl phenyl]-dialkyl-dioxoalkane-naphthalene disulfonate.
P–16–0020	3/9/2016	3/8/2016	(G) Polyethyleneglycol modified polyacrylate, compd. with alcohol amine.
P–16–0037	3/16/2016	2/26/2016	(S) Hydrocarbons, C_5-rich, polymers with (6e)-7,11-dimethyl-3-methylene-1,6,10-dodecatriene, 2-methylbutene and methylstyrene, manuf. of, by-products from, $C_{20–40}$ fraction.
P–16–0041	3/4/2016	2/22/2016	(G) Alkohol alkoxylate.
P–16–0052	3/31/2016	3/3/2016	(G) Dialkylol amine, polymer with succinic anhydride and aromatic carboxylic acid.
P–16–0053	3/28/2016	3/21/2016	(G) Acrylated polycarbonate polyol.
P–16–0073	3/4/2016	2/11/2016	(G) Styrene-acrylate polymer.
P–16–0077	3/22/2016	3/20/2016	(S) 5-octenoic acid, methyl ester, (5z)-.
P–16–0087	3/30/2016	3/27/2016	(G) Dicaroxylic acid, polymer with aminoalkanoic acid and polyether polyol.
P–16–0105	3/7/2016	2/25/2016	(G) Alkyl polyol salt.
P–16–0111	3/9/2016	3/4/2016	(G) Fatty acids, reaction products with alkylamine, polymers with substituted carbomonocycle, substituted alkylamines, heteromonocycle and substituted alkanoate, acetates (salts).
P–16–0112	3/9/2016	3/4/2016	(G) Substituted heteromonocycle, polymer with substituted carbomonocycle and alkyl (hydroxyalkyl)alkanediol, alkoxyalkanol-blocked.
P–16–0118	3/30/2016	3/21/2016	(S) 2-propenoic acid, 2-methyl-, 2-dodecylhexadecyl ester, polymer with methyl 2-methyl-2-propenoate and 2-tetradecyloctadecyl 2-methyl-2-propenoate.
P–92–0038	3/16/2016	2/25/2016	(S) Polytitanocarbosilane.
P–99–0100	3/23/2016	3/21/2016	(G) Polyether amino acrylate.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: April 26, 2016.

Pamela S. Myrick,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–10229 Filed 4–29–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 16–16; DA 16–187]

Termination of Dormant Proceedings

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission seeks comment on whether certain docketed Commission proceedings should be terminated as dormant. The Commission's procedural rules, which were revised to streamline and improve the agency's docket management practices, delegate authority to the Chief, CGB to periodically review all open dockets and, in consultation with the responsible Bureaus or Offices, to identify those dockets that appear to be candidates for termination.

DATES: Comments are due on or before June 1, 2016, and reply comments are due on or before June 16, 2016.

ADDRESSES: Interested parties may submit comments, identified by [CG Docket No. 16–16], by any of the following methods:

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS) at *http://fjallfoss.fcc.gov/ecfs2/*. Filers should follow the instructions provided on the Web site for submitting comments. In completing the transmittal screen, ECFS filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, which in this instance is CG Docket No. 16–16.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express mail and Priority mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Lauren Wilson, Consumer and Governmental Affairs Bureau at (202) 418–1607 or by email at *lauren.wilson@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant,* document DA 16–187, released on February 22, 2016 in CG Docket No. 16–16. The full text of document DA 16–187 and copies of any subsequently filed documents in this matter will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554.

Document DA 16–187 can also be downloaded in Word or Portable Document Format (PDF) at: *https://www.fcc.gov/document/cgb-seeks-comments-termination-certain-proceedings-dormant.* The spreadsheet associated with document DA 16–187 listing the proceedings proposed for termination for dormancy is available in Excel or Portable Document Format at *https://www.fcc.gov/document/cgb-seeks-comments-termination-certain-proceedings-dormant* as an Appendix.

Pursuant to 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the respective dates indicated in the **DATES** section of this document.

Pursuant to 47 CFR 1.1200 *et seq.,* this matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

Synopsis: On February 4, 2011, the Commission released document FCC 11–16, *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Report and Order,* 76 FR 24383, May 2, 2011, which revised portions of its Part 1—Practice and Procedure and Part 0—Organizational rules.

The revised rules, in part, delegate authority to the Chief, CGB to periodically review all open dockets and, in consultation with the responsible Bureaus or Offices, to identify those dockets that appear to be candidates for termination. These candidates include dockets in which no further action is required or contemplated, as well as those in which no pleadings or other documents have been filed for several years. However, the Commission specified that proceedings in which petitions addressing the merits are pending should not be terminated absent the parties' consent. The termination of a dormant proceeding also includes dismissal as moot of any pending petition, motion, or other request for relief that is procedural in nature or otherwise does not address the merits of the proceeding.

Prior to the termination of any particular proceeding, the Commission was directed to issue a Public Notice identifying the dockets under consideration for termination and affording interested parties an opportunity to comment. Thus, CGB has identified the dockets for possible termination in document DA 16–187, available at *https://www.fcc.gov/document/cgb-seeks-comments-termination-certain-proceedings-dormant.*

Federal Communications Commission.

D'wana Terry,

Associate Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2016–10206 Filed 4–29–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission

DATE AND TIME: Tuesday, April 12, 2016 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC.

STATUS: This Meeting Will be Closed to the Public.

FEDERAL REGISTER NOTICE OF PREVIOUS ANNOUNCEMENT: 81 FR 20383.

CHANGE IN THE MEETING: This meeting was continued on April 26, 2016.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary.

[FR Doc. 2016–10329 Filed 4–28–16; 4:15 pm]

BILLING CODE 6715–01–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 applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 27, 2016.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Sandhills Financial Services, LLC,* Bassett, Nebraska; to acquire 100

percent of the voting shares of Keystone Investment, Inc., and thereby indirectly acquire voting shares of Bank of Keystone, both in Keystone, Nebraska.

Board of Governors of the Federal Reserve System, April 27, 2016.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2016–10238 Filed 4–29–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 17, 2016.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *William C. Wetzeler, individually and acting in concert with Carol L. Schultz, Judith K. Nece, and Andrew J. Schultz,* all of Spirit Lake, Iowa, to join the Wetzeler Family Control Group; to retain voting shares of State Banco, LTD, and thereby indirectly retain voting shares of The State Bank, both in Spirit Lake, Iowa.

B. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Robert R. Hermann, Jr.,* Palm Beach, Florida; as co-trustee of the Central Bancompany Voting Trust; to acquire voting shares of Central Bancompany, Inc., Jefferson City, Missouri, and thereby indirectly acquire voting shares of Central Bank of Audrain County, Mexico, Missouri; Central Bank of Boone County, Columbia, Missouri; Central Bank of Branson, Branson, Missouri; Central Bank of Lake of The Ozarks, Osage Beach, Missouri; Central Bank of Moberly, Moberly, Missouri; Central Bank of Oklahoma, Tulsa, Oklahoma; Central Bank of Sedalia, Sedalia, Missouri; Central Bank of St. Louis, Clayton, Missouri; Central Bank of The Midwest, Lee's Summit, Missouri; Central Bank of The Ozarks, Springfield, Missouri; Central Bank of Warrensburg, Warrensburg, Missouri; The Central Trust Bank, Jefferson City, Missouri; and Jefferson Bank of Missouri, Jefferson City, Missouri.

Board of Governors of the Federal Reserve System, April 27, 2016.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2016–10239 Filed 4–29–16; 8:45 am]

BILLING CODE 6210–01–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 applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 26, 2016.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *Comments.applications@clev.frb.org:*

1. *Ohio Valley Banc Corp,* Gallipolis, Ohio; to acquire Milton Bancorp, Inc., and thereby indirectly acquire Milton Banking Company, both in Wellston, Ohio.

B. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *The First National Bank of Bemidji ESOP & Trust,* Bemidji, Minnesota; to acquire additional voting shares, for a total of 36.63 percent, of First Bemidji Holding Company, and thereby indirectly acquire additional voting shares of The First National Bank of Bemidji, both in Bemidji, Minnesota.

Board of Governors of the Federal Reserve System, April 26, 2016.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2016–10102 Filed 4–29–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–16–16AFR; Docket No. CDC–2016–0040]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on an information collection request proposal entitled ''Continuing International and Domestic Information Collections from the 2016 Zika Virus Emergency Response.'' These collections will allow CDC to continue its ongoing response to the Zika virus outbreak.

DATES: Written comments must be received on or before July 1, 2016.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0040 by any of the following methods:

• *Federal eRulemaking Portal:* Regulation.gov. Follow the instructions for submitting comments.

• *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to Regulations.gov, including any personal information provided. For access to the docket to read background documents or comments received, go to Regulations.gov.

Please note: All public comment should be submitted through the Federal eRulemaking portal (Regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Continuing International and Domestic Information Collections from the 2016 Zika Virus Emergency Response—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In May 2015, the Pan American Health Organization (PAHO) issued an alert regarding the first confirmed Zika virus infections in Brazil. Since then, CDC has been responding to increased reports of Zika and has assisted in investigations with PAHO and the Brazil Ministry of Health. The first regional travel notices for Zika in South America and Mexico were posted in December 2015. In December 2015, the Commonwealth of Puerto Rico, a United States territory, reported its first confirmed locally transmitted Zika virus case. Cases of local transmission have recently been confirmed in two other US territories, the United States Virgin Islands and American Samoa. As of April 6, 2016, US territories had reported 351 locally acquired Zika cases and 3 travel-associated Zika cases to CDC. Of the 354 cases reported, 37 were in pregnant women. Zika has not been spread by mosquitoes in the continental United States. However, lab tests have confirmed Zika virus in travelers returning to the United States. These travelers have gotten the virus from mosquito bites and a few non-travelers got Zika through sex. With the recent outbreaks in the Americas, the number of Zika cases among travelers visiting or returning to the United States is increasing. CDC monitors and reports to the public cases of Zika, which will help improve our understanding of how and where Zika is spreading.

Zika virus is spread to people primarily through the bite of an infected *Aedes* species mosquito (*A. aegypti* and *A. albopictus*). Mosquitoes that spread Zika virus are aggressive daytime biters, but they can also bite at night. A pregnant woman can pass Zika virus to her fetus during pregnancy. CDC is studying how Zika affects pregnancies. Zika is linked to microcephaly, a severe birth defect that is a sign of incomplete brain development. Microcephaly is a condition where a baby's head is much smaller than expected. During pregnancy, a baby's head grows because the baby's brain grows. Microcephaly can occur because a baby's brain has not developed properly during pregnancy or has stopped growing after birth.

In February and March 2016, CDC used OMB emergency clearance procedures to initiate and expedite multiple urgently needed information collections in American Samoa, Puerto Rico, Brazil, and domestically within state, tribal, local, and territorial (STLT) jurisdictions. These procedures have allowed the agency to target and refine public health interventions to arrest ongoing spread of infection.

With this notice, the CDC is announcing its intention to seek OMB clearances to continue four Zika-related information collections beyond their current emergency expiration dates. These four projects will be submitted to OMB as standalone ICRs:

1. A call center in CDC's Emergency Operations Center (EOC) to respond to inquiries on clinical care of persons potentially of interest for Zika virus infection [OMB Control No. 0920–1101, expiration date 8/31/16]. Respondents to this information collection include the general public, clinicians, and employees at STLT health departments. The purpose of this information collection is to document and track clinical inquiries made to the CDC EOC call center and to systematically collect standardized clinical/demographic/epidemiological information about suspected cases. The emergency clearance for this information collection dealt specifically with Zika-related clinical inquiries. However, the new ICR will cover this project for any EOC activation. Regardless of the disease or hazard being responded to, the EOC operates this call center to answer and respond to clinical inquiries. This information collection is a necessary part of operating this call center and responding to emergency situations.

2. A study, in Puerto Rico, on the persistence of Zika virus in bodily fluids [OMB Control No. 0920–1106, expiration date 9/30/16]. Since getting OMB approval in March 2016, CDC has

investigated the persistence of Zika virus in different body fluids (shedding) and its relation to immune response to provide a basis for development of non-blood-based diagnostic tools, and target and refine public health interventions to arrest ongoing spread of infection. CDC has begun a prospective cohort study of symptomatic individuals with reverse transcription-polymerase chain reaction (RT–PCR) positive Zika virus infection and a cross-sectional study of their household contacts. Information collection is expected to conclude within one year. Results and analyses will be used to update relevant counseling messages and recommendations from the CDC. Participants for the shedding study are patients with laboratory-confirmed Zika virus infection and their household contacts.

3. A study, carried out in the United States, on the persistence of Zika virus in the semen and urine of men with laboratory-confirmed Zika virus infection [OMB Control No. 0920–1109, expiration date 9/30/2016]. Since getting emergency OMB approval in March, 2016, specimens have been tested for Zika RNA by reverse transcriptase polymerase chain reaction assay (RT–PCR) at CDC; those testing positive may be further evaluated by virus isolation techniques. Zika virus disease is a nationally notifiable condition, and participants are recruited through contact with CDC personnel. Urine and semen specimens are self-collected using home collection kits, a short questionnaire is self-administered, and participants receive a token of appreciation. Results of testing will be provided to participants at the conclusion of testing. The results of this study are expected to have immediate implications for public health recommendations and disease prevention. The results of this study will be of great relevance to provide evidence-based information to circumvent Zika virus transmission. They will inform the development of recommendations used in the current epidemic setting, as well as in future Zika virus situations. Results and analysis will be used to update and refine relevant counseling messages and recommendations.

4. Registry of pregnant women with laboratory-confirmed Zika virus infections in the U.S. [OMB Control No. 0920–1101, expiration date 8/31/16]. As part of the public health response to the Zika virus disease outbreak, CDC has been collecting information from clinicians in the U.S. about pregnant women they treat who are diagnosed with Zika virus infection. CDC also plans to collect information from clinicians about their patients' infants in order to better understand the clinical consequences of Zika virus infection in pregnancy and its impact on newborn infants. Information gathered directs public health messages provided by CDC on reducing the risk of adverse outcomes for pregnant women and their infants.

These information collections will align with their legislative authority, Section 301 of the Public Health Service Act (42 U.S.C. 241).

There are no costs to the respondents other than their time. The total annualized burden requested is 1,146 hours. This number represents the number of burden hours yet to be imposed. It does not include the burden hours sustained during the initial six-month emergency clearance period.

ESTIMATED ANNUALIZED BURDEN HOURS

1—CLINICAL INQUIRIES DATABASE

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
Local health departments	Clinical inquiries database	420	1	15/60	105
Clinicians and other providers	Clinical inquiries database	800	1	15/60	200
Total					305

2—PERSISTENCE OF ZIKA VIRUS IN BODILY FLUIDS STUDY, PUERTO RICO

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
Public health personnel	Questionnaire (Symptomatics)	200	8	10/60	267
	Questionnaire (Cross-Sectional household contacts).	600	1	10/60	100
General public	Eligibility Form	1,000	1	2/60	33
Total					400

3—PERSISTENCE OF ZIKA VIRUS IN BODILY FLUIDS STUDY, UNITED STATES

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
General public	Introductory survey	175	1	2/60	6
	Follow-Up survey	175	12	1/60	35
Total					41

4—PREGNANCY REGISTRY

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
State and Local Health Departments	Maternal Health History Form	100	5	30/60	250
	Specimen Collection Form	100	1	15/60	25
Clinicians and other providers	Assessment at Delivery Form	100	1	30/60	50
	Infant Health Follow-Up Form	100	1	30/60	50
Total					400

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–10113 Filed 4–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–R–131 and CMS–R–244]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including 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.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by June 1, 2016.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR,* Email: *OIRA_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*
3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Advance Beneficiary Notice of Noncoverage (ABN); *Use:* The Advance Beneficiary Notice (ABN) is delivered by Part B paid physicians, providers (including institutional providers like outpatient hospitals), practitioners (such as chiropractors), and suppliers, as well as hospice providers and Religious Non-medical Health Care Institutions paid under Part A. Home health agencies providing items and services under Part A or Part B also use the ABN. Other Medicare institutional providers paid under Part A use other approved notices for this purpose. With this PRA submission, minimal formatting changes have been made to the ABN form, including the addition of language informing beneficiaries of their rights under Section 504 of the Rehabilitation Act of 1973 (Section 504) by alerting the beneficiary to CMS's nondiscrimination practices and the availability of alternate forms of this notice, if needed. Additionally, minor language and grammatical changes have been made to the form's instructions to improve provider/supplier comprehension and decrease the probability of errors in completing the ABN. There are no substantive changes to the form or to the instructions. *Form Number:* CMS–R–131 (OMB control number: 0938–0566); *Frequency:* Occasionally; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 1,540,850; *Total Annual Responses:* 63,601,300; *Total Annual Hours:* 7,420,364. (For policy questions regarding this collection contact Evelyn Blaemire at 410–786–1803.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* The PACE Organization (PO) Application Process in 42 CFR part 460; *Use:* In general, Programs of All-Inclusive Care for the Elderly (PACE) services are provided through a PO. An entity wishing to

become a PO must submit an application to CMS that describes how the entity meets all the requirements in the PACE program. An entity's application must be accompanied by an assurance from the State Administering Agency (SAA) of the State in which the PO is going to be located.

Beginning in 2016, initial PACE applications will be submitted via a new automated, electronic submission process. An application also must be submitted for a PO that seeks to expand its service area and/or add a new PACE center site.

The purpose of this PRA package is to enable the submission of both initial PACE applications, as well as service area expansion applications. We have successfully transitioned the Medicare Advantage application and Prescription Drug Plan (PDP) application to a fully electronic submission process, enabling a more organized and streamlined review, and would like to bring those same efficiencies to all PACE application processes. OMB approval would help ensure applicant compliance with CMS' requirements and ability to gather data used to support approval or denial of either an initial PACE application or a service area expansion application submitted by an existing PO. *Form Number:* CMS–R–244 (OMB control number: 0938–0790); *Frequency:* Once and occasionally; *Affected Public:* Private sector (Not-for-profit institutions); *Number of Respondents:* 730; *Total Annual Responses:* 55,060; *Total Annual Hours:* 5,748. (For policy questions regarding this collection contact Debbie Vanhoven at 410–786–6625.)

Dated: April 27, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–10231 Filed 4–29–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–367 and CMS–10243]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are require; to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including 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.

DATES: Comments must be received by July 1, 2016

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ___, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–367 Medicaid Drug Program—Monthly and Quarterly Drug Reporting Format

CMS–10243 Testing Experience and Functional Tools: Functional Assessment Standardized Items (FASI) Based on the CARE Tool

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Drug Program—Monthly and Quarterly Drug Reporting Format; *Use:* Labelers transmit drug product and pricing data to CMS within 30 days after the end of each calendar month and quarter. CMS calculates the unit rebate amount (URA) and the unit rebate offset amount (UROA) for each new drug application (NDC) and distributes to all State Medicaid agencies. States use the URA to invoice the labeler for rebates and the UROA to report onto the CMS–64. The monthly data is used to calculate Federal Upper Limit (FUL) prices for applicable drugs and for states that opt to use this data to establish their pharmacy reimbursement methodology. *Form Number:* CMS–367 (OMB control number: 0938–0578); *Frequency:* Monthly and Quarterly; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 610;

Total Annual Responses: 12,810; *Total Annual Hours:* 3,618,703. (For policy questions regarding this collection contact Samone Angel at 410–786–1123.)

2. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Testing Experience and Functional Tools: Functional Assessment Standardized Items (FASI) Based on the CARE Tool; *Use:* In 2012, CMS funded a project entitled, Technical Assistance to States for Testing Experience and Functional Tools (TEFT) Grants. One component of this demonstration is to amend and test the reliability of a setting-agnostic, interoperable set of data elements, called ''items,'' that can support standardized assessment of individuals across the continuum of care. Items that were created for use in post-acute care settings using the Continuity Assessment Record and Evaluation (CARE) tool have been adopted, modified, or supplemented for use in community-based long-term services and supports (CB–LTSS) programs. This project will test the reliability and validity of the function-related assessment items, now referred to as Functional Assessment Standardized Items (FASI), when applied in community settings, and in various populations: Elders (65 years and older); younger adults (18–64) with physical disabilities; and adults of any age with intellectual or developmental disabilities, with severe mental illness, or with traumatic brain injury.

Individual-level data will be collected two times using the TEFT FASI Item Set. The first data collection effort will collect data that can be analyzed to evaluate the reliability and validity of the FASI items when used with the five waiver populations. Assessors will conduct functional assessments in client homes using the TEFT FASI Item Set. Changes may be recommended to individual TEFT FASI items, to be made prior to releasing the TEFT FASI items for use by the states. The FASI Field Test Report will be released to the public.

The second data collection will be conducted by the states to demonstrate their use of the FASI data elements. The assessment data could be used by the states for multiple purposes. They may use the standardized items to determine individual eligibility for state programs, or to help determine levels of care within which people can receive services, or other purposes. In the second round of data collection, states will demonstrate their proposed uses, manage their FASI data collection and conduct their own analysis, to the extent they propose to do such tasks. The states have been funded under the demonstration grant to conduct the round 2 data collection and analysis. These states will submit reports to CMS describing their experience in the Round 2 data collection, including the items they collected, how they planned to use the data, and the types of challenges and successes they encountered in doing so. The reports may be used by CMS in their evaluation of the TEFT grants. *Form Number:* CMS–10243 (OMB control number: 0938–1037); *Frequency:* On occasion; *Affected Public:* Individuals and households; *Number of Respondents:* 5,650; *Total Annual Responses:* 5,650; *Total Annual Hours:* 2,825. (For policy questions regarding this collection contact Allison Weaver at 410–786–4924.)

Dated: April 27, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–10232 Filed 4–29–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0755]

Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended To Diagnose, Cure, Mitigate, Treat, or Prevent Diseases; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a compliance policy guide (CPG) entitled ''Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases.'' This CPG provides guidance to FDA staff on issues related to dog and cat diets that are labeled and/or marketed as intending to diagnose, cure, mitigate, treat, or prevent diseases and to provide all or most nutrients in support of meeting the animal's total daily nutrient requirements. This CPG finalizes the draft CPG entitled ''Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Nutritional Products Intended for Use to Diagnose, Cure, Mitigate, Treat, or Prevent Disease in Dogs and Cats,'' dated September 10, 2012.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://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 *http://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)*: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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–2012–D–0755 for ''Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets

Management between 9 a.m. and 4 p.m., Monday through Friday.

• *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 *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: William J. Burkholder, Center for Veterinary Medicine, Division of Animal Feeds (HFV–220), Food and Drug Administration, 7519 Standish Place, Rockville, MD 20855, 240–402–5900; email: *William.Burkholder@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 10, 2012 (77 FR 55480), FDA published the notice of availability for a draft CPG entitled ''Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Nutritional Products Intended for Use to Diagnose, Cure, Mitigate, Treat, or Prevent Disease in Dogs and Cats'' giving interested persons until November 9, 2012, to comment on the draft CPG. FDA received several comments on the draft CPG and those comments were considered as the CPG was finalized.

FDA revised the title of the final CPG. The final CPG is entitled ''Compliance Policy Guide Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases.'' In addition to revising the title, editorial changes were made to improve clarity.

The CPG announced in this notice finalizes the draft CPG dated September 10, 2012.

II. Significance of Guidance

This level 1 CPG is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on labeling and marketing of dog and cat food diets intended to diagnose, cure, mitigate, treat, or prevent diseases. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. In the **Federal Register** of September 10, 2012 (77 FR 55480), FDA published a notice announcing the availability of the draft CPG. This document contained a Paperwork Reduction Act burden analysis and requested comments on a proposed collection of information (77 FR 55480 at 55481). We have concluded that our guidance to FDA staff with respect to factors to consider when determining whether to take regulatory action against an article of dog or cat food does not impose collection of information burdens on the public. In addition, to the extent that we obtain information during an enforcement action, this collection is exempt from OMB review under 44 U.S.C. 3518(c)(1)(B) and 5 CFR 1320.4(a)(2) as collection of information obtained during the conduct of a civil action to which the United States or any official or agency thereof is a party, or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities. The regulations in 5 CFR 1320(c) provide that the exception in 5 CFR 1320.4(a)(2) applies during the entire course of the investigation, audit, or action, but only after a case file or equivalent is opened with respect to a particular party. Such a case file would be opened, for example, as part of the decision to detain a drug or an article of food.

IV. Electronic Access

Persons with access to the Internet may obtain the CPG at either *http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/default.htm* under ''Compliance Policy Guides'' or *http://www.regulations.gov.*

Dated: April 25, 2016.

Katherine Bent,

Assistant Commissioner for Compliance Policy.

[FR Doc. 2016–10234 Filed 4–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Health

[Document Identifier: HHS–OS–0990–New–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Assistant Secretary for Health (OASH), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, OASH seeks comments from the public

regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before July 1, 2016.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–0990–New—60D for reference.

Information Collection Request Title: Evaluation of the *Second Decade Project* Community Planning Guide Abstract: The Office of the Assistant Secretary for Health (OASH) is requesting approval from the Office of Management and Budget (OMB) for an evaluation of the *Second Decade Project* Community Planning Guide.

OASH has a long history of collaborating with communities to improve adolescent health outcomes. To further help communities build an environment that promotes adolescent health, OASH recently developed Promoting Health and Healthy Development in the Second Decade of Life: A Planning Guide for Communities (''the Guide''). The purpose of the Guide is to provide an easy to follow tool that community leaders can use to (1) establish a community coalition with broad membership, and (2) develop a community plan for improving adolescent health and well-being that includes multi-impact strategies. To understand whether and how community leaders are able to use the Guide to achieve these two goals, OASH needs information about the Guide's utility and effectiveness. The evaluation of the Second Decade Project Community Planning Guide (''the evaluation'') is intended to support the goals of OASH's Second Decade Project of helping community leaders incorporate the needs of children, adolescents and young adults in community growth and development plans, and to improve outcomes of young adults and adolescents. Five communities will participate in the piloting and evaluation of the Guide. The evaluation will provide OASH with critical information regarding the components of the Guide that community leaders found most useful and effective in accomplishing their goals of improving adolescent health and wellbeing; the compilation and inclusiveness of the coalitions implementing the Guide; and the demographic and environmental context of these communities. While secondary data will be collected from sources such as the U.S. Census Bureau American Community Survey and Youth Risk Behavior and National Health Interview Surveys, these sources do not provide nuanced information needed by OASH to understand the contexts in which the Guide is most effective.

Likely Respondents—Qualitative data will be collected through semi-structured telephone interviews and through focus groups. Telephone interviews will be conducted with community leaders (Community Leader Interview) in the five pilot sites to explore how the use of the Guide supported key leaders in their development of a diverse coalition and educating the community about issues facing adolescents. Focus groups will be conducted with coalition members (Coalition Member Focus Groups) from the five pilot sites to assess how the Guide facilitated the work of the coalition to develop a comprehensive community plan that addresses critically important adolescent health issues.

Quantitative data will be collected through Web-based surveys with coalition members from the five communities and with secondary stakeholders—specifically, adolescent health experts and state/local health department officials—selected by OASH. The Coalition Assessment Survey will assess coalition members' perspectives on the usefulness and ease of implementing the Guide. The Secondary Stakeholder Survey will engage Adolescent Health researchers and practitioners to garner additional feedback and assessment of the Guide.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Community Leader Interview (CLI)	50	1	1	50
Coalition Member Focus Group (CFG)	80	1	1	80
Coalition Assessment Survey (CAS)	250	1	.25	63
Secondary Stakeholder Survey (SSS)	50	1	.5	25
Total	430			218

OASH specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Terry S. Clark,

Asst. Information Collection Clearance Officer.

[FR Doc. 2016–10199 Filed 4–29–16; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Nominations for Membership on the National Vaccine Advisory Committee

AGENCY: National Vaccine Program Office, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

AUTHORITY: 42 U.S.C. 300aa–5, Section 2105 of the Public Health Service (PHS) Act, as amended. The National Vaccine

Advisory Committee (NVAC) is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The National Vaccine Program Office (NVPO), a program office within the Office of the Assistant Secretary for Health, Department of Health and Human Services (HHS), is soliciting nominations of qualified candidates to be considered for appointment as public members to the NVAC. The activities of this Committee are governed by the Federal Advisory Committee Act (FACA). Management and support services of the NVAC and its activities are the responsibility of the NVPO.

The NVAC serves an advisory role, providing recommendations to the Assistant Secretary for Health in his/her capacity as the Director of the National Vaccine Program, on matters related to the Program's responsibilities. Specifically, the Committee studies and recommends ways to encourage the availability of an adequate supply of safe and effective vaccination products in the United States; and recommends research priorities and other measures to enhance the safety and efficacy of vaccines. The Committee also advises the Assistant Secretary for Health in the implementation of Sections 2102 and 2103 of the PHS Act; and identifies annually the most important areas of government and non-government cooperation that should be considered in implementing Sections 2102 and 2103 of the PHS Act.

DATES: All nominations for membership on the Committee must be received no later than 5:00 p.m. EDT on June 1, 2016, to the address listed below.

ADDRESSES: *Hardcopy nominations should be mailed or delivered to:* Bruce Gellin, M.D., M.P.H., Executive Secretary, NVAC, Office of the Assistant Secretary for Health, Department of Health and Human Services, 200 Independence Avenue SW., Room 715–H, Washington, DC 20201. Electronic nominations should be emailed to *nvpo@hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Gordon, Ph.D., Alternate Designated Federal Official, NVAC; Science Advisor, National Vaccine Program Office, Department of Health and Human Services, 200 Independence Avenue SW., Room 733G, Washington, DC 20201; (202) 260–6619; *Jennifer.Gordon@hhs.gov.*

A copy of the Committee charter which includes the NVAC's structure and functions, as well as a list of the current membership, can be obtained by contacting Dr. Gordon or by accessing the NVAC Web site at: *www.hhs.gov/nvpo/nvac.*

SUPPLEMENTARY INFORMATION:

Committee Function, Qualifications, and Information Required: As part of an ongoing effort to enhance deliberations and discussions with the public on vaccine and immunization policy, nominations are being sought for interested individuals to serve on the NVAC. Committee members provide peer review, consultation, advice, and recommendations to the Assistant Secretary for Health, in his/her capacity as the Director of the National Vaccine Program, on matters related to the Program's responsibilities. Individuals selected for appointment to the NVAC will serve as voting members. The NVAC consists of 17 voting members: 15 public members, including the Chair, and two representative members. Individuals selected for appointment to the NVAC can be invited to serve terms of up to four years. Selection of members is based on candidates' qualifications to contribute to the accomplishment of NVAC's objectives. Interested candidates should demonstrate a willingness to commit time to NVAC activities and the ability to work constructively and effectively on committees.

Public Members: Public members are individuals who are appointed to the NVAC to exercise their own independent, best judgment on behalf of the government. It is expected that public members will discuss and deliberate in a manner that is free from conflicts of interest. Public members to the NVAC shall be selected from individuals who are engaged in vaccine research or the manufacture of vaccines, or who are physicians, members of parent organizations concerned with immunizations, representatives of state or local health agencies, or public health organizations.

Representative Members: Representative members are individuals who are appointed to the NVAC to provide the views of industry or a special interest group. While they may be experts in various topic areas discussed by the Committee, they should not present their own viewpoints, but rather those of the industry or special interest group they represent. NVAC representative members shall serve specifically to represent the viewpoints or perspectives of the vaccine manufacturing industry or groups engaged in vaccine research or the manufacture of vaccines.

This announcement is to solicit nominations of qualified candidates to fill positions in the public member category of the NVAC, including positions that are scheduled to be vacated during the 2016 calendar year.

Travel reimbursement and compensation for services provided to the committee: All voting NVAC members, public and representatives, are authorized to receive the prescribed per diem allowance and reimbursement for travel expenses that are incurred to attend meetings and conduct authorized NVAC-related business, in accordance with standard government travel regulations. Members appointed to the NVAC as public members (see definition above) also are authorized to receive a stipend for services provided at public meetings of the Committee. All other services that are performed by the public members outside the Committee meetings shall be provided without compensation. Representative members (see definition above) will serve without compensation.

Expertise sought for the National Vaccine Advisory Committee: In accordance with the charter, persons nominated for appointment as members of the NVAC should be among authorities knowledgeable in areas related to vaccine safety, vaccine effectiveness, and vaccine supply. In order to enhance the diversity of expertise included in Committee discussions, NVPO is seeking nominations of individuals to serve on the NVAC as public members in the following disciplines/topic areas:

- Vaccine research and development, vaccine clinical trials, and vaccine regulatory science;
- vaccine safety and post-marketing surveillance;
- vaccine access and financing;
- health information technologies and immunization information systems;
- immunization program implementation and management;
- vaccine communications;

How to submit nominations: Nominations should be typewritten. The following information is required to be included in the package of material submitted for each individual being nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity); and a statement that the nominee is willing to serve as a member of the Committee (2) the nominator's name, address and daytime telephone number, home and/or work address, telephone number, and email address; (3) a copy of the nominee's current curriculum vitae (no longer than ten pages); and (4) a short biographical

sketch (no more than 350 words). All required documentation must be received in order for a nomination to be considered. Please note that nominees will not receive updates on the status of their nomination. Information on nominees appointed to the Committee by the Department will be posted to the NVAC Web site (*http://www.hhs.gov/nvpo/nvac/roster/index.html*). Individuals can nominate themselves for consideration of appointment to the Committee. All nominations must include the required information. Incomplete nominations will not be processed for consideration. The names of federal employees should not be nominated for consideration of appointment to this Committee.

The Department makes every effort to ensure that the membership of HHS federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made that a broad representation of geographic areas, gender, ethnic and minority groups, and the disabled are given consideration for membership on HHS federal advisory committees. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

Individuals appointed to serve as public members of federal advisory committees are classified as special government employees (SGEs). SGEs are government employees for purposes of the conflict of interest laws. Therefore, individuals appointed to serve as public members of NVAC are subject to an ethics review. The ethics review is conducted to determine if the individual has any interests and/or activities in the private sector that may conflict with performance of their official duties as a member of the NVAC. Individuals appointed to serve as public members of the NVAC will be required to disclose information regarding financial holdings, consultancies, research grants and/or contracts, and the absence of an appearance of a loss of impartiality.

Dated: April 25, 2016.

Bruce Gellin,

Executive Secretary, National Vaccine Advisory Committee Deputy Assistant Secretary for Health, Director, National Vaccine Program Office.

[FR Doc. 2016–10205 Filed 4–29–16; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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 Advisory Council on Alcohol Abuse and Alcoholism.

Date: June 9, 2016.

Closed: 9:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Terrace Conference Rooms, 5635 Fishers Lane, Rockville, MD 20892.

Open: 10:15 a.m. to 4:00 p.m.

Agenda: Presentations and other business of the council.

Place: National Institutes of Health, Terrace Conference Rooms, 5635 Fishers Lane, Rockville, MD 20892.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Institute on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Rockville, MD 20852, 301–443–9737, *bautista@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niaaa.nih.gov/AboutNIAAA/AdvisoryCouncil/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(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: April 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10145 Filed 4–29–16; 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 (5 U.S.C. App.), 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/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/contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Development of Protein Standards.

Date: May 31, 2016.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W114, Rockville, MD 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, 9609 Medical Center Drive, Room 7W238, Bethesda, MD 20892–9750, 240–276–6371, *decluej@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Member Conflict SEP.

Date: June 27, 2016.

Time: 11:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W530, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Scientific Review Officer, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W530, Bethesda, MD 20892–9750, 240–276–6442, *ss537t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Quantitative Imaging for Evaluation of Response to Cancer Therapies (U01).

Date: June 30, 2016.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 2W030, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Kenneth L. Bielat, Ph.D., Scientific Review Officer, Research and Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, 7W244, Rockville, MD 20850, 240–276–6373, *bielatk@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Innovative Technologies for Cancer-Relevant Biospecimen Science.

Date: July 14, 2016.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W030, Rockville, MD 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, 9609 Medical Center Drive, Room 7W238, Bethesda, MD 20892–9750, 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: April 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10143 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Conduct the initial scientific peer review and assess the merit of P01 applications.

Date: May 26, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3An.12N, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Saraswathy Seetharam, Ph.D., Scientific Review Officer, Office Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12C, Bethesda, MD 20892, 301–594–2763, *seetharams@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10127 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Cancellation of Meetings

Notice is hereby given of the cancellation of the National Center for Advancing Translational Sciences Advisory Council and cancellation of the Cures Acceleration Network Review Board, May 12, 2016, 8:30 a.m. to May 12, 2016, 4:30 p.m., National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD, 20892 which was published in the **Federal Register** on April 19, 2016, 81 FR 22998.

Meetings were cancelled.

Dated: April 26, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10130 Filed 4–29–16; 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 Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Epidemiology, Prevention and Behavior Research Review Subcommittee, June 06, 2016, 08:30 a.m. to June 06, 2016, 06:00 p.m., National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, T-Level Conference Room 508/509, Rockville, MD, 20852 which was published in the **Federal Register** on April 07, 2016, 81FR20406.

This meeting is being amended to change the Contact Person from Katrina L. Foster, Ph.D. to Beata Buzas, Ph.D. The meeting is closed to the public.

Dated: April 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10133 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: Cardiovascular and Respiratory Sciences Integrated Review Group; Lung Cellular, Molecular, and Immunobiology Study Section.

Date: June 1–2, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications

Place: Renaissance Harborplace Hotel, 202 E Pratt Street, Baltimore, MD 21202.

Contact Person: George M. Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Immunity and Host Defense Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Scott Jakes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301–435–1506, *jakesse@mail.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neuroendocrinology, Neuroimmunology, Rhythms and Sleep Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202.

Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov.*

Name of Committee: Emerging Technologies and Training Neurosciences Integrated Review Group; Molecular Neurogenetics Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group, Innate Immunity and Inflammation Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Tampa Marriott Waterside Hotel, 700 South Florida Avenue, Tampa, FL 33602.

Contact Person: Tina McIntyre, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892, 301–594–6375, *mcintyrt@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Development—2 Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Rass M. Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Nanotechnology Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Grand Chicago Riverfront, 71 East Wacker Drive, Chicago, IL 60601.

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Clinical, Integrative and Molecular Gastroenterology Study Section.

Date: June 2, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Lorien Hotel & Spa, 1600 King Street, Alexandria, VA 22314.

Contact Person: Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC 7850, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Hypersensitivity, Autoimmune, and Immune-mediated Diseases Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Capital View, 2850 South Potomac Avenue, Arlington, VA 22202.

Contact Person: Bahiru Gametchu, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–408–9329, *gametchb@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Kidney, Nutrition, Obesity and Diabetes Study Section.

Date: June 2–3, 2016.

Time: 8:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, 301–408–9436, *fungai.chanetsa@nih.hhs.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 26, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10129 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; MSM Program Review (2016/10).

Date: June 16, 2016.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Suite 920, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 451–3397, *sukharem@mail.nih.gov.*

Dated: April 26, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10131 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: NIGMS Initial Review Group; Training and Workforce Development Subcommittee—C.

Date: June 27, 2016.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Ritz Carlton Tysons Corner, 1700 Tysons Blvd., Tysons Corner, VA 22102.

Contact Person: Mona R. Trempe, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–3998, *trempemo@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 26, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–10125 Filed 4–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Renewal From OMB of One Current Public Collection of Information: Pipeline Corporate Security Review Program

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 1652–0056, abstracted below that we will submit to OMB for renewal in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection allows TSA to assess the current security practices in the pipeline industry through TSA's Pipeline Corporate Security Review (PCSR) program. The PCSR program is part of the larger domain awareness, prevention, and protection program supporting TSA's and the Department of Homeland Security's missions.

DATES: Send your comments by July 1, 2016.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, 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 is available at *http://www.reginfo.gov.* 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 1652–0056; Pipeline Corporate Security Review (PCSR) Program. Under the Aviation and Transportation Security Act (ATSA)[1] and delegated authority from the Secretary of Homeland Security, TSA has broad responsibility and authority for ''security in all modes of transportation . . . including security responsibilities . . . over modes of transportation that are exercised by the Department of Transportation.''[2] TSA is specifically empowered to develop policies, strategies, and plans for dealing with threats to transportation,[3] oversee the implementation and adequacy of security measures at transportation facilities,[4] and carry out other appropriate duties relating to transportation security.[5] TSA has developed the PCSR program to assess the current security practices in the pipeline industry.

The purpose of the PCSR program is to develop first-hand knowledge of a pipeline owner/operator's corporate security policies and procedures, establish and maintain working relationships with key pipeline security personnel, and identify and share smart security practices observed at individual facilities to help enhance and improve the security of the pipeline industry. To this end, the PCSR Program provides TSA with a method to discuss security-related matters with pipeline owners/operators.

Focusing on the security of pipelines and the crude oil and petroleum

[1] Public Law 107–71 (115 Stat. 597, Nov. 19, 2001), codified at 49 U.S.C. 114.

[2] *See* 49 U.S.C. 114(d). The TSA Administrator's current authorities under ATSA have been delegated to him by the Secretary of Homeland Security. Section 403(2) of the Homeland Security Act (HSA) of 2002, Public Law 107–296 (116 Stat. 2135, Nov. 25, 2002), transferred all functions of TSA, including those of the Secretary of Transportation and the Under Secretary of Transportation of Security related to TSA, to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Administrator of TSA, subject to the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in section 403(2) of the HSA.

[3] 49 U.S.C. 114(f)(3).

[4] 49 U.S.C. 114(f)(11).

[5] 49 U.S.C. 114(f)(15).

products, such as gasoline, diesel, jet fuel, home heating oil, and natural gas, moving through the system infrastructure, the PCSR program subject matter experts:

- Meet with senior corporate officers and security managers.
- Develop knowledge of security planning at critical pipeline infrastructure sites.
- Establish and maintain a working relationship with key security staff who operate critical pipeline infrastructure.
- Identify industry smart practices and lessons learned.
- Maintain a dynamic modal network through effective communications with the pipeline industry and government stakeholders.

In carrying out PCSRs, subject matter experts from TSA, using a risk-based approach, visit select pipeline owners/operators throughout the nation. These are voluntary face-to-face visits, usually at the headquarters facility of the pipeline owner/operator. Typically, TSA sends one to three employees to conduct a three- to four-hour interview with representatives from the owner/operator. The TSA representatives analyze the owner/operator's security plan and determine if the mitigation measures included in the plan are being properly implemented. TSA then may visit one or two of the owner/operator's assets to further assess the implementation of the owner/operator's security plan.

TSA has developed a question set to aid in the conducting of PCSRs. The PCSR Question Set drives the TSA-owner/operator discussion and is the central data source for all security information collected. The PCSR Question Set was developed based on government and industry guidance to obtain information from a pipeline owner/operator about its security plan and processes. The questions are designed to examine the company's current state of security, as well as to address measures that are applied if there is a change in the National Terrorism Advisory System.

In application, topics such as security program management, vulnerability assessments, components of the security plan, security training, and emergency communications enable the PCSR Teams to assess the owner/operator's security plan by evaluating a broad range of security issues such as physical security, cyber security, communication, and training. The PCSR Question Set also includes sections for facility site visits and owner/operator contact information. The questions and subsequent answers help provide TSA with a snapshot of a company's security posture and are instrumental in developing smart practices and security measures.

This PCSR information collection provides TSA with real-time information on current security practices within the pipeline mode of the surface transportation sector. This information allows TSA to adapt programs to the changing security threat, while incorporating an understanding of the improvements owners/operators make in their security measures. Without this information, the ability of TSA to perform its security mission would be severely hindered.

Additionally, the relationships these face-to-face contacts foster are critical to the Federal government's ability to reach out to the pipeline stakeholders affected by the PCSRs. TSA assures respondents that the portion of their responses that is deemed Sensitive Security Information (SSI) will be protected in accordance with procedures meeting the transmission, handling, and storage requirements of SSI set forth in 49 Code of Federal Regulations (CFR) parts 15 and 1520.

The annual hour burden for this information collection is estimated to be 120 hours based upon 15 PCSR visits per year, each lasting a total of eight hours.

Dated: April 26, 2016.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2016–10211 Filed 4–29–16; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2016–N053; FXES11130200000–167–FF02ENEH00]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications; request for public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activities. Both the Act and the National Environmental Policy Act require that we invite public comment before issuing these permits.

DATES: To ensure consideration, written comments must be received on or before June 1, 2016.

ADDRESSES: Susan Jacobsen, Chief, Division of Classification and Restoration, by U.S. mail at Division of Classification and Recovery, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, NM 87103; or by telephone at 505–248–6920. Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Susan Jacobsen, Chief, Division of Classification and Restoration, by U.S. mail at P.O. Box 1306, Albuquerque, NM 87103; or by telephone at 505–248–6920.

SUPPLEMENTARY INFORMATION: The Act (16 U.S.C. 1531 *et seq.*) prohibits activities with endangered and threatened species unless a Federal permit allows such activities. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of survival or propagation, or interstate commerce. Our regulations regarding implementation of section 10(a)(1)(A) permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, Tribal, and Federal agencies and the public to comment on the following applications. Please refer to the appropriate permit number (*e.g.,* Permit No. TE–123456) when requesting application documents and when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit TE–066229

Applicant: Whitenton Group, Inc. Environmental Consultants, San Marcos, Texas.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/

absence surveys for gray bat (*Myotis grisescens*) and Indiana bat (*Myotis sodalis*) in Alabama, Arkansas, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

Permit TE–66060A

Applicant: Janine A. Spencer, Marana, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona.

Permit TE–67491A

Applicant: Permits West, Inc., Santa Fe, New Mexico.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona, Colorado, New Mexico, and Utah.

Permit TE–89853B

Applicant: Rachel A. More-Hla, Safford, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona.

Permit TE–89853B

Applicant: Shawn P. Stone, Safford, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona.

Permit TE–87020B

Applicant: Andrew M. Mooso, San Antonio, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for black-capped vireo (*Vireo atricapilla*) and golden-cheeked warbler (*Dendroica chrysoparia*) within Texas.

Permit TE–91694B

Applicant: Steven S. Cramer, San Antonio, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) within Texas.

Permit TE–65178A

Applicant: Jennifer L. Reidy, Liberty, Missouri.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys, capture, and banding of golden-cheeked warbler (*Dendroica chrysoparia*) within Texas.

Permit TE–89788B

Applicant: Eric Attwodd, Austin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) within Texas.

Permit TE–87862B

Applicant: Wanda J. Bruhns, Tempe, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona.

Permit TE–88214B

Applicant: John N. Macey, Temple, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*) within Texas.

Permit TE–89697B

Applicant: Crystal Datri, Austin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for the following species within Texas:

- Golden-cheeked warbler (*Dendroica chrysoparia*)
- Austin blind salamander (*Eurycea waterlooensis*)
- Barton Springs salamander (*Eurycea sosorum*)
- Georgetown salamander (*Eurycea naufragia*)
- Jollyville Plateau salamander (*Eurycea tonkawae*)
- Salado salamander (*Eurycea chisholmensis*)
- San Marcos salamander (*Eurycea nana*)
- Texas blind salamander (*Typhlomolge rathbuni*)

Permit TE–836329

Applicant: Blanton & Associates, Inc., Austin, Texas.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for the following species within Arizona, New Mexico, Oklahoma, and Texas:

- Jaguar (*Panthera onca*)
- whooping crane (*Grus americana*)
- hawksbill sea turtle (*Eretmochelys imbricata*)
- Kemp's ridley sea turtle (*Lepidochelys kempii*)
- leatherback sea turtle (*Dermochelys coriacea*)
- Pecos assiminea (*Assiminea pecos*)
- diminutive amphipod (*Gammarus hyalleloides*)
- Pecos amphipod (*Gammarus pecos*)
- Diamond tryonia (*Pseudotryonia adamantina*)
- Phantom springsnail (*Pyrgulopsis texana*)
- Phantom tryonia (*Tryonia cheatumi*)
- Gonzales tryonia (*Tryonia circumstriata* (=*stocktonensis*))
- American burying beetle (*Nicrophorus americanus*)

Permit TE–87857B

Applicant: Eric Green, Flagstaff, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for gray bat (*Myotis grisescens*) and Indiana bat (*Myotis sodalis*) in Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia.

Permit TE–87860B

Applicant: Dana Green, Flagstaff, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for gray bat (*Myotis grisescens*) and Indiana bat (*Myotis sodalis*) in Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia.

Permit TE–88227B

Applicant: Jay B. Deatherage, Nacogdoches, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for Indiana bat (*Myotis sodalis*) in Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia.

Permit TE–87818B

Applicant: Melanie Gregory, Austin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for Ozark big-eared bat (*Corynorhinus* (=*plecotus*) *townsendii ingens*) within Arkansas, Missouri, and Oklahoma.

Permit TE–082492

Applicant: Charles Hathcock, Los Alamos, New Mexico.

Applicant requests an amendment to a current permit for research and recovery purposes to capture, band, and collect blood and feathers from southwestern willow flycatchers (*Empidonax traillii extimus*) within New Mexico.

Permit TE–87751B

Applicant: Christine Cooley, Tulsa, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for American burying beetle (*Nicrophorus americanus*) within Arkansas, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, and Texas.

Permit TE–88788B

Applicant: Jefferson Summerlin, Eunice, Louisiana.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Oklahoma.

Permit TE–92103B

Applicant: Mary McBryar, Tulsa, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Oklahoma and Texas.

Permit TE–91812B

Applicant: Minaly Agosto, Tulsa, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Arkansas, Kansas, Oklahoma, and Texas.

Permit TE–91831B

Applicant: Cody Vicenki, Tomball, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Arkansas, Kansas, Oklahoma, and Texas.

Permit TE–89699B

Applicant: Sam Houston State University, Huntsville, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Oklahoma and Texas.

Permit TE–88789B

Applicant: Sharon Davis, Evening Shade, Arkansas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Arkansas, Kansas, Nebraska, Oklahoma, South Dakota, and Texas.

Permit TE–55151B

Applicant: Bureau of Land Management–Roswell Field Office, Roswell, New Mexico.

Applicant requests a new permit for research and recovery purposes to maintain and display live Colorado pikeminnow (*Ptychocheilus lucius*) and razorback sucker (*Xyrauchen texanus*) within New Mexico.

Permit TE–106816

Applicant: Douglas High School, Douglas, Arizona.

Applicant requests an amendment to a current permit for research and recovery purposes to rear and maintain Chiricahua leopard frog (*Lithobates chiricahuensis*), Yaqui topminnow (*Poeciliopsis occidentalis*), and Yaqui chub (*Gila purpurea*) within Arizona.

Permit TE–046447

Applicant: U.S. Geological Survey–Columbia Environmental Research Center, Yankton, South Dakota.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct laboratory toxicity studies on razorback suckers (*Xyrauchen texanus*) within South Dakota.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*)

Dated: April 15, 2016.

Benjamin N. Tuggle,

Regional Director, Southwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2016–10203 Filed 4–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS00000 L58530000.PN0000 241A; N–92525; 10–08807; MO#4500090607; TAS:14X5232]

Notice of Realty Action: Recreation and Public Purposes Act Classification (N–92525) for a Department of Motor Vehicles Facility, Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) has examined and found suitable for classification for lease and conveyance under the provisions of the Taylor Grazing Act and the Recreation and Public Purposes (R&PP) Act, as amended, approximately 20 acres of public land located near the corner of West Silverado Ranch Boulevard and South Valley View Boulevard in Clark County, Nevada. The State of Nevada proposes to use the land for a Department of Motor Vehicles (DMV) facility.

DATES: Interested parties may submit written comments regarding the proposed classification of the land for lease and/or subsequent conveyance of the land, and the environmental assessment (EA), until June 16, 2016.

ADDRESSES: Send written comments to the BLM Division of Lands, Assistant Field Manager, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130, faxed to

702–515–5010, Attn: Kerri-Anne Thorpe, or emailed to *kthorpe@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Kerri-Anne Thorpe, (702) 515–5196, or *kthorpe@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The parcel of public land is located in the southern part of the Las Vegas Valley near the corner of West Silverado Ranch Boulevard and South Valley View Boulevard in Las Vegas, Nevada and is legally described as:

Mount Diablo Meridian, Nevada

T. 22 S., R. 61 E.,
Sec. 29, NE¼NW¼NW¼NW¼,
E½NW¼NW¼NW¼NW¼,
SW¼NW¼NW¼NW¼,
W½SE¼NW¼NW¼NW¼,
SW¼NW¼NW¼,
W½NW¼SE¼NW¼NW¼ and
W½SW¼SE¼NW¼NW¼.

The area described contains 20 acres, more or less, in Clark County.

In accordance with the R&PP Act, the State of Nevada has filed an application in which it proposes to develop the above-described land as a DMV facility that will consist of a full service DMV building with related facilities. The related facilities include a drive test parking lot, motorcycle test course, Commercial Drivers' License test course, employee and visitor parking lots, landscaping, lighting, walkways, drainage, irrigation, restrooms, concessions, utilities, and ancillary improvements. Additional detailed information pertaining to this application, plan of development, and site plan is located in case file N–92525, which is available for review at the BLM Las Vegas Field Office at the above address.

The land identified is not needed for any Federal purpose. The lease and conveyance is consistent with the BLM Las Vegas Resource Management Plan dated October 5, 1998, and would be in the public interest. The State of Nevada, a qualified applicant under the R&PP Act, has not applied for more than the 640 acre limitation consistent with the regulations at 43 CFR 2741.7(a)(2), and has submitted a statement in compliance with the regulations at 43 CFR 2741.4(b). Subject to limitations prescribed by law and regulation, prior to patent issuance, the holder of any right-of-way grant within the lease area may be given the opportunity to amend the right-of-way grant for conversion to a new term, including perpetuity, if applicable.

The lease and conveyance, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945); and

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

3. Any lease and conveyance will also be subject to valid existing rights.

Upon publication of this notice in the **Federal Register**, the land described above will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for conveyance under the R&PP Act, leasing under the mineral leasing laws, and disposals under the mineral material disposal laws.

Interested parties may submit written comments on the suitability of the land for a DMV Facility. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with state and federal programs.

Interested parties may also submit written comments regarding the specific use proposed in the application and plan of development, and whether the BLM followed proper administrative procedures in reaching the decision to convey under the R&PP Act.

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.

Any adverse comments will be reviewed by the BLM Nevada State Director, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the decision will become effective on July 1, 2016. The lands will not be available for lease and subsequent conveyance until after the decision becomes effective.

Authority: 43 CFR 2741.5(h).

Frederick Marcell,

Acting Assistant Field Manager, Las Vegas Field Office, Division of Lands.

[FR Doc. 2016–10207 Filed 4–29–16; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

[NPS–MWR–BRVB–20948, PPMWBRVBS0, PPMPSPD1Z.YM0000 (166)]

Proposed Information Collection; Brown v. Board of Education National Historic Site Education Program Forms

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) will ask the Office of Management and Budget (OMB) to approve the information collection described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. We 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.

DATES: To ensure we are able to consider your comments, we must receive them on or before July 1, 2016.

ADDRESSES: Please send your comments on the ICR to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive, Mail Stop 242, Reston, VA 20192 (mail); or via email at *madonna_baucum@nps.gov.* Please reference OMB Control Number ''1024–BRVB'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Sherda K. Williams, Superintendent, Brown v. Board of Education National Historic Site. 1515 SE Monroe Avenue, Topeka, Kansas 66612–1143 (mailing address); or via email at *sherda_williams@nps.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Organic Act of 1916 (54 U.S.C. 100101) directs the NPS to preserve America's natural wonders unimpaired for future generations, while also making them available for the enjoyment of the visitor. On October 26, 1992, President George H.W. Bush signed the Brown v. Board of Education

National Historic Site Act of 1992, establishing the Monroe Elementary School in Topeka, Kansas as a national park. The Brown vs. Board of Education National Historic Site (BRVB) provides education programs which preserve African American history and culture. Education programs presented at BRVB utilize the following forms in order to more effectively manage the registration for and delivery of quality education programs to the public:

- Form 10–975, ''Brown vs. Board of Education—Distance Learning Request Form'' is used by BRVB to schedule and provide distance learning programs via H.323 equipment or the Internet. The information requested on Form 10–975 includes:
  - Contact name and title,
  - School/organization name,
  - Mailing address, telephone number,
  - Age/grade and type of group/class for attendees,
  - Technical connectivity availability (H.323 equipment, Internet, webcam)
  - Type of material covered prior to the distance learning program (for school groups),
  - What information is pertinent for the interpretive ranger to know in advance about the group, and
  - Selection of program desired.
- Form 10–976, ''Brown vs. Board of Education—Reservation Request Form'' is used by BRVB to schedule and provide ranger-guided programs to high school aged students which vary from brief overview talks to in-depth presentations. The information requested on Form 10–976 includes:
  - Contact name and cell phone number,
  - School name,
  - Mailing address,
  - Email address,
  - Group information to include number of students, grades, and number of adult chaperones,
  - Date/time of visit to include primary and alternate dates,
  - Type and length of program,
  - What information is pertinent for the interpretive ranger to know in advance about the group, and
  - Special needs/interests of group.
- Form 10–977, ''Brown vs. Board of Education—Reservation Request Form'' is used by BRVB to schedule and provide ranger-guided programs to elementary and middle school aged students which vary from brief overview talks to in-depth presentations. The information requested on Form 10–977 includes:
  - Contact name, title, and phone number,
  - School name,
  - Mailing address,
  - Email address,
  - Group information to include grade/age, number of students, and number of adult chaperones,
  - Date/time of visit to include primary and alternate dates,
  - Type and length of program, and
  - Additional relevant comments.
- Form 10–978, ''Brown vs. Board of Education—Transportation Grant Request'' is used by BRVB to obtain estimated transportation cost and determine eligibility for approval of bus transportation support to schools, based on guidelines. Supports access to ranger-guided on-site tours for youth. The information requested on Form 10–978 includes:
  - Contact name and phone number,
  - School name,
  - Mailing address,
  - Email address,
  - Date of visit,
  - Number of students,
  - Is requestor located within a 75 mile radius of Topeka,
  - Is the requestor a Title I school,
  - Estimated transportation cost (fuel and vehicle cost only),
  - Does the transportation provider accept credit card payments,
  - Name and phone number of point of contact to process credit card payments, and
  - The number of buses to be used by the group.

II. Data

OMB Number: 1024-New.

Title: Brown v. Board of Education National Historic Site Education Program Forms.

Form(s): NPS Forms 10–975, ''Brown vs. Board of Education—Distance Learning Request Form'', 10–976, ''Brown vs. Board of Education—Reservation Request Form'', 10–977, ''Brown vs. Board of Education—Reservation Request Form'', and 10–978, ''Brown vs. Board of Education—Transportation Grant Request''.

Type of Request: Existing collection in use without approval.

Description of Respondents: Individuals; businesses; educational institutions; nonprofit organizations; and local, State, and tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of annual respondents	Number of annual responses	Completion time per response (minutes)	Total annual burden hours
10–975, ''Brown vs. Board of Education—Distance Learning Request Form''	25	25	5	2
10–976, ''Brown vs. Board of Education—Reservation Request Form''	25	25	5	2
10–977, ''Brown vs. Board of Education—Reservation Request Form''	75	75	5	6
10–978, ''Brown vs. Board of Education—Transportation Grant Request''	50	50	3	2.5
Totals	175	175		10.5

Estimated Annual Nonhour Burden Cost: None.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden to respondents, including use of automated information techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. 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 it will be done.

Dated: April 25, 2016.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2016–10198 Filed 4–29–16; 8:45 am]

BILLING CODE 4310–EH–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–20774; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Office of the State Archaeologist, University of Iowa, Iowa City, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Office of the State Archaeologist Bioarchaeology Program, previously listed as the Office of the State Archaeologist Burials Program, has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Office of the State Archaeologist Bioarchaeology Program. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Office of the State Archaeologist Bioarchaeology Program at the address in this notice by June 1, 2016.

ADDRESSES: Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S. Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Office of the State Archaeologist, University of Iowa, Iowa City, IA. The human remains and associated funerary objects were removed from several archeological sites in Buena Vista, Cherokee, Plymouth, and Woodbury Counties, Iowa.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Office of the State Archaeologist Bioarchaeology Program professional staff in consultation with representatives of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

History and Description of the Remains

In 1940, human remains representing, at minimum, two individuals were removed from site 13BV1 in Buena Vista County, IA. Avocational archeologist Frank L. Van Voorhis conducted the excavations at the site; all of the human remains were recovered from an area referred to by Van Voorhis as Pitlodge I. The human remains were donated to the Storm Lake School District in the 1950s, and were transferred to the Buena Vista County Historical Society at an unknown date. In 1996, the human remains from the Van Voorhis collection were transferred to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are young to middle-aged adult males, each of whom is represented by cranial fragments and mandibular remains (Burial Project 963). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from the Bultman Site (13BV2) in Buena Vista County, IA. The human remains were collected from the site by a resident of Storm Lake, IA. In 1998, the human remains were identified among materials donated by the resident to the Sanford Museum in Cherokee, IA. Subsequently, the human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program. The individual is a young adult of indeterminate sex, and is represented by fragmented cranial remains and four incomplete postcranial bones (Burial Project 1270). No known individuals were identified. No associated funerary objects are present.

In 1969 or 1970, human remains representing, at minimum, one individual were removed from the Bultman Site (13BV2) in Buena Vista County, IA. The human remains were collected by a local resident and donated to the Sanford Museum in Cherokee, IA. The skeletal material was transferred to the Office of the State Archaeologist Bioarchaeology Program in 2007. The individual is an adult, possibly a young female, and is represented by fragmented cranial remains and long bone shafts (Burial Project 2156). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from the Bultman Site (13BV2) in Buena Vista County, IA. These human remains were donated to the Sanford Museum in Cherokee, IA, at an unknown date. The human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program in 2007. The individual is an adult of indeterminate sex, and is represented by a single parietal fragment (Burial Project 2157). No known individuals were identified. No associated funerary objects are present.

In the 1930s, human remains representing, at minimum, two individuals were removed from site 13CK1 in Cherokee County, IA. Avocational archeologist Frank L. Van Voorhis conducted the excavations at the site from 1934 to 1937. The human remains were donated to the Storm Lake School District in the 1950s, and were transferred to the Buena Vista County Historical Society at an unknown date. In 1996, the human remains from the Van Voorhis collection were transferred to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are an adult and an individual aged 15 to 20 years, each of whom is represented by dental remains (Burial Project 1103). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13CK1 in Cherokee County, IA. A single bone fragment was reportedly collected from the surface of the site and donated to the Sanford Museum in Cherokee, IA.

The Sanford Museum transferred the human remains to the Office of the State Archaeologist Bioarchaeology Program in 2007. The individual is an adult, and is represented by a parietal fragment (Burial Project 2158). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13CK3 in Cherokee County, IA. The human remains were part of the Frank L. Van Voorhis Collection, and were donated to the Storm Lake School District in the 1950s. At an unknown date, the remains were given to the Buena Vista County Historical Society. In 1996, the Office of the State Archaeologist Bioarchaeology Program received the human remains from the Van Voorhis collection. The individual is an older juvenile or young adult, and is represented by dental remains (Burial Project 1104). No known individuals were identified. No associated funerary objects are present.

At an unknown date, possibly May 20, 1984, human remains representing, at minimum, one individual were removed from the Brewster Site (13CK15) in Cherokee County, IA. The human remains were collected by an unknown individual and ended up in the collections of the Sanford Museum in Cherokee, IA. In 1998, the human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program. The individual is a juvenile approximately 12–15 years old, and is represented by a single tooth (Burial Project 1372). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, two individuals were removed from the Brewster Site (13CK15) in Cherokee County, IA. The human remains were collected by an unknown individual and ended up in the collections of the Sanford Museum in Cherokee, IA. The human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program in two donations, one in 2007 and the second in 2014. The two individuals are a middle-aged adult, represented by a left maxilla (Burial Project 2159), and a subadult 8–10 years old is represented by three loose teeth (Burial Project 3038). No known individuals were identified. No associated funerary objects are present.

In 1970, human remains representing, at minimum, two individuals were removed from the Brewster Site in Cherokee County, IA. These human remains were excavated by the University of Wisconsin-Madison and were transferred, along with other materials, to the repository at the Office of the State Archaeologist. In 2011, the human remains were discovered in the repository and were transferred to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are an adult, represented by cranial and dental remains, and a two to four-year-old child, represented by a cranial fragment (Burial Project 2584). No known individuals were identified. No associated funerary objects are present.

In the 1950s, human remains representing, at minimum, one individual were removed from the Phipps Site (13CK21) in Cherokee County, IA. Archeologist Reynold Ruppé supervised excavations at the site from 1952 to 1956, and most of the material collected during this work was housed in the repository of the Office of the State Archaeologist. In 2002, human remains were identified during an examination of the material from the site, and were immediately transferred to the Office of the State Archaeologist Bioarchaeology Program. The individual is a subadult between 1.0 and 5.6 years old, and is represented by a single tooth (Burial Project 1538). No known individuals were identified. No associated funerary objects are present.

On several different dates, human remains representing, at minimum, seven individuals were removed from the Phipps Site (13CK21) in Cherokee County, IA, and were stored at the Sanford Museum in Cherokee, IA. Some human remains were collected during Ellison Orr's 1934 excavations. Reynold J. Ruppé's 1952–1956 excavations also recovered human remains. In 1963, the University of Wisconsin-Madison conducted excavations and collected human remains. Human remains were also collected from the site surface by avocational archeologists. In 2007 and 2014, all human remains collected from the Phipps Site were transferred from the Sanford Museum to the Office of the State Archaeologist Bioarchaeology Program. Two of the individuals are a juvenile 16.1–16.9 years old and an infant 1.8–2.1 years old, both of whom are represented by dental remains. Additional human remains represent a young adult male, an adult female of indeterminate age, an older juvenile/young adult, a young to middle-aged adult, and an older adult (Burial Projects 2160 and 3060). No known individuals were identified. No associated funerary objects are present.

In 1999, human remains representing, at minimum, two individuals were removed from the Broken Kettle Site (13PM1) in Plymouth County, IA. The human remains were excavated during the summer archeological field school conducted by the University of Iowa, Department of Anthropology. These human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are a young adult and a subadult (Burial Project 1330). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, two individuals were removed from the Broken Kettle Site (13PM1) in Plymouth County, IA. The human remains were identified among archeological materials donated to the Office of the State Archaeologist by an avocational archeologist in 2002. These human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are an older juvenile/young adult and a subadult aged 7.1–9.6 years, and are represented by a phalanx and two teeth (Burial Project 1593). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from the Broken Kettle Site (13PM1) in Plymouth County, IA. The site was the subject of amateur investigations in 1895 and 1910, and excavation by Ellison Orr in 1934 and 1939. Additional excavations also took place in 1967. It is unknown which fieldwork resulted in the collection of the human remains, which consisted of a single tooth. In 2010, the tooth was found in materials transferred from the University of Wisconsin-Madison to the repository at the Office of the State Archaeologist. The tooth was then transferred to the Office of the State Archaeologist Bioarchaeology Program. The individual is approximately 15 to 20 years old, and is represented by the tooth (Burial Project 2586). No known individuals were identified. No associated funerary objects are present.

In June 1969, human remains representing, at minimum, one individual were removed from the Kimball Site (13PM4) in Plymouth County, IA. A partial mandible was collected from the surface of the site and ended up in the repository of the Luther College Archaeology Laboratory in Decorah, IA. A long bone fragment from the Kimball Site, collected at an unknown date, was also found in the Luther College repository. At an unknown date, the human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program.

The individual is an older juvenile or young adult of indeterminate sex (Burial Project 2000). No known individuals were identified. No associated funerary objects are present.

In 1963, human remains representing, at minimum, four individuals were removed from the Kimball Site (13PM4) in Plymouth County, IA. Archeological excavations at the site were conducted by the University of Wisconsin in 1963. Material from the excavation was transferred to the Office of the State Archaeologist in 2010. In addition to the human remains from a primary burial excavated at this site, human remains were also found among the faunal remains collected during the 1963 fieldwork. The four individuals are a young female, an adult of indeterminate age and sex, a subadult of unknown age, and a subadult 2.5 to 3.5 years old (Burial Project 2671). No known individuals were identified. The 165 associated funerary objects are one bone fish gorge, one bone beaming tool or flesher, one possible flaker, one pipe fragment, 24 nonhuman bones or fragments, one noncultural rock, one piece of burned earth, one piece of flaking debris, two pieces of unworked paralava, 11 fire-cracked rocks, and 121 pot sherds.

At an unknown date, human remains representing, at minimum, two individuals were removed from 13WD402 in Woodbury County. These human remains were transferred to the Office of the State Archaeologist in the late 1970s, and most of them were reburied in 1980 at a cemetery in Iowa designated for the reinterment of Native American human remains. In 2014, nine skeletal elements and partial elements that had not been reburied were discovered in the Office of the State Archaeologist Bioarchaeology Laboratory. The two individuals are an older male and an adult of indeterminate age and sex (Burial Project 57). No known individuals were identified. No associated funerary objects are present.

Around 1970, human remains representing, at minimum, one individual were removed from site 13WD402 in Woodbury County, IA. A Sioux City resident had collected the human remains from the surface of the site. In 2000, the resident gave the human remains to the Department of Natural Resources officer from Stone State Park (Woodbury County, IA). The human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program in 2000. The individual is a young to middle-age adult, possibly male, and is represented by the cranial and postcranial remains (Burial Project 1428). No known individuals were identified. No associated funerary objects are present.

In the 1970s, human remains representing, at minimum, 21 individuals were removed from site 13WD402 in Woodbury County, IA. A Sioux City resident collected the human remains from the surface of the site and had kept them in his garage. The Sioux City Police Department recovered the human remains from the garage in 2009 and transferred them to the Office of the State Archaeologist Bioarchaeology Program. The 21 individuals are one infant, four children, six adolescents, one young to middle-aged adult male, one young to middle-aged adult female, two young to middle-aged adults of indeterminate sex, one old adult of indeterminate sex, three females of indeterminate age, and two adults of indeterminate age and sex, each of whom is represented by cranial and postcranial remains (Burial Project 2378). No known individuals were identified. No associated funerary objects are present.

Around May 2013, human remains representing, at minimum, two individuals were removed from site 13WD402 in Woodbury County, IA. A hiker found the bones on the surface of the site and turned them over to Kevin Pape, Park Ranger at Stone State Park. Subsequent surface collections were performed by archeologist Christy Rickers and by Shirley Schermer, then director of the Office of the State Archaeologist Bioarchaeology Program. All the human remains were transferred to the Bioarchaeology Program. The two individuals are one subadult aged two to six years old, and a possible male adult of indeterminate age (Burial Project 2894). No known individuals were identified. No associated funerary objects are present.

All of the above described human remains have been identified as Native American based on documented association with ancient Native American sites classified as Mill Creek culture (A.D. 1100–1300). Mill Creek manifestations are grouped within the Initial variant of the Middle Missouri Tradition. Archeological and ethnohistorical evidence links later Middle Missouri groups with the Mandan and Hidatsa, who are present-day members of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

At an unknown date, human remains representing, at minimum, three individuals were removed from an unknown location in Cherokee County, IA. These human remains were collected by a local avocational archeologist and donated to the Sanford Museum in Cherokee, IA. The Sanford Museum transferred the human remains to the Office of the State Archaeologist Bioarchaeology Program in 2001. The three individuals are an adult male, a possible male 15.9–20.7 years old, and a subadult 5.0–5.5 years old, each of whom is represented by mandibular, cranial, and dental remains (Burial Project 1460). No known individuals were identified. No associated funerary objects are present.

These human remains have been identified as Native American based on the condition of the bone and on archival information. Sanford Museum documentation lists the human remains as ''probably local Mill Creek.'' Mill Creek manifestations are grouped within the Initial variant of the Middle Missouri Tradition. Archeological and ethnohistorical evidence links later Middle Missouri groups with the Mandan and Hidatsa, who are present-day members of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Around 1910, human remains representing, at minimum, two individuals were removed from an unknown site in Woodbury County, IA. A boy collected the human remains from the ground surface in the vicinity of Stone State Park, in Woodbury County. In 2000, the human remains were donated by the collector's son to the Office of the State Archaeologist Bioarchaeology Program. The two individuals are a middle-aged to old adult female and a young adult of indeterminate sex, each of whom is represented by the cranial remains and femora (Burial Project 1424). No known individuals were identified. No associated funerary objects are present.

These human remains have been identified as likely Mill Creek culture due to the proximity of several known Mill Creek sites to the discovery area, Stone State Park. Mill Creek manifestations are grouped within the Initial variant of the Middle Missouri Tradition. Archeological and ethnohistorical evidence links later Middle Missouri groups with the Mandan and Hidatsa, who are present-day members of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Determinations Made by the Office of the State Archaeologist Bioarchaeology Program

Officials of the Office of the State Archaeologist Bioarchaeology Program have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice

represent the physical remains of 63 individuals of Native American ancestry.

• Pursuant to 25 U.S.C. 3001(3)(A), the 165 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

• Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S. Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu,* by June 1, 2016. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota may proceed.

The Office of the State Archaeologist Bioarchaeology Program is responsible for notifying the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota that this notice has been published.

Dated: March 31, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–10184 Filed 4–29–16; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–20775; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Office of the State Archaeologist, University of Iowa, Iowa City, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Office of the State Archaeologist Bioarchaeology Program, previously the Office of the State Archaeologist Burials Program, has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Office of the State Archaeologist Bioarchaeology Program. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Office of the State Archaeologist Bioarchaeology Program at the address in this notice by June 1, 2016.

ADDRESSES: Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, 700 S. Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Office of the State Archaeologist Bioarchaeology Program, Iowa City, IA. The human remains were removed from Allamakee, Clay, Des Moines, Louisa and Woodbury Counties, Iowa.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Office of the State Archaeologist Bioarchaeology Program professional staff in consultation with representatives of the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Otoe-Missouria Tribe of Indians, Oklahoma; the Omaha Tribe of Nebraska; the Ponca Tribe of Indians of Oklahoma; and the Ponca Tribe of Nebraska.

History and Description of the Remains

At an unknown date, human remains representing, at minimum, five individuals were removed from site 13AM1 in Allamakee County, IA, by avocational archeologist H.P. Field. These human remains were discovered by Luther College in Decorah, IA, among the archeological materials from the site that had not received from Field. Following their discovery, Luther College transferred the human remains to the Office of the State Archaeologist Bioarchaeology Program in 2001. Four of the individuals are adults and are represented by four incomplete femora. The fifth individual, a child or young juvenile, is represented by a hand phalanx. Other incomplete adult bone fragments could not be assigned to any specific individual (Burial Project 1518). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13AM10 in Allamakee County, IA. These human remains were discovered among archeological materials received from Luther College, in Decorah, IA, by the Missouri Department of Transportation. After being identified as originating from Iowa, the human remains were returned to Iowa and transferred to the Office of the State Archaeologist Bioarchaeology Program. Former Luther College anthropology professor Dale Henning reported the tooth originally may have been part of the Gavin Sampson Collection at the Luther College Archaeological Repository. The tooth represents a middle-aged to older adult of indeterminate sex (BP 2385). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13AM21 in Allamakee County, IA, by avocational archeologist H.P. Field. These human remains were identified by Luther College, in Decorah, IA, among the archeological materials from the site that it had received from Field. Following their discovery, Luther College transferred the human remains to the Office of the State Archaeologist Bioarchaeology Program in 2001. The individual is represented by a nearly complete right temporal bone and is estimated to be approximately 2.5 to 3.5 years old (BP 1475). No known individuals were identified. No associated funerary objects are present.

In 1958, human remains representing, at minimum, one individual were removed from site 13AM43 in Allamakee County, IA. Additional human remains excavated from the same site, representing, at minimum, 29 individuals, were published in a previous Notice of Inventory Completion (62 FR, 53023–53025), and were reburied in Iowa in 1997 by the Office of the State Archaeologist Bioarchaeology Program. The human remains of one subadult had been mislabeled and were therefore not identified until recently. The individual is represented by a fairly complete skeleton and is estimated to be approximately 6–12 months old (BP 115). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, three individuals were removed from site 13AM52 in Allamakee County, IA. Gavin Sampson, an avocational archeologist, collected materials from archeological sites primarily in Winneshiek and Allamakee Counties from the 1940s through the 1960s. In 1969, he donated his collection to Luther College in Decorah, IA. Among the Sampson Collection were human skeletal remains from site 13AM52. In 1995, Luther College transferred the human remains to the Office of the State Archaeologist Bioarchaeology Program. A young to middle-aged adult, possibly male, is represented by a hand phalanx and 22 foot bones. Two of the individuals are subadults, each of whom is represented by a single tooth. Their respective ages are estimated to be 9.7 to 11.1 years and 15.1 to 15.8 years (Burial Project 921). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, seven individuals were removed from site 13AM59 in Allamakee County, IA. Somehow, these human remains were in the collections of Effigy Mounds National Monument. In 1987, Effigy Mounds National Monument transferred these human remains to the Office of the State Archaeologist Bioarchaeology Program. The incomplete and fragmentary human remains represent two subadults and five adults (BP 226). No known individuals were identified. No associated funerary objects are present.

In 1965, human remains representing, at minimum, one individual were removed from site 13AM60 in Allamakee County, IA. Avocational archeologist Gavin A. Sampson conducted several surface surveys of the Malone Cemetery (13AM60). Sampson salvaged several burials and the associated artifacts that had been disturbed by hog rooting activity. Human remains were also displaced from a burial on a ridge adjacent to the site. All human remains and artifacts were curated at Luther College in Decorah, IA. Human remains of the individual reported here were transferred from Luther College to the Office of the State Archaeologist Bioarchaeology Program, likely in the 1970s. The human remains represent an adult female approximately 25 to 35 years in age (BP 3094). No known individuals were identified. No associated funerary objects are present.

In 2002, human remains representing, at minimum, one individual were removed from site 13AM200 in Allamakee County, IA during an archeological field school conducted by Luther College, Decorah, IA. A bone fragment found at the base of a pit feature was identified as possibly human during laboratory analysis of the material recovered from the excavation. It was transferred to the Office of the State Archaeologist Bioarchaeology Program in 2002. The bone fragment, an incomplete left innominate fragment, represents an adult of indeterminate age and sex (BP 1589). No known individuals were identified. No associated funerary objects are present.

In either 1976 or 1980, human remains representing, at minimum, one individual were removed from site 13AM210 in Allamakee County, IA. Cultural and osteological material collected from the surface were housed at the Luther College Archaeological Laboratory, in Decorah, IA. During examination of the collections, two bone fragments collected in 1980 were identified as human. They were transferred to the Office of the State Archaeologist Bioarchaeology Program in 2003. The individual is represented by two long bone fragments. The individual is of an indeterminate age and sex (BP 1620). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13AM404 in Allamakee County, IA. The human remains consist of a single human tooth recovered from the Oneota component of 13AM404 during Phase II archeological testing conducted by Bear Creek Archaeology Inc. in Cresco, IA. In 2006, the tooth was transferred to the Office of the State Archaeologist Bioarchaeology Program from the Luther College Archaeology Lab, Decorah, IA. The molar represents an adult of unknown age and sex (Burial Project 1971). No known individuals were identified. No associated funerary objects are present.

In 1998, human remains representing, at minimum, one individual were recovered from site 13CY2, Gillet Grove, in Clay County, IA, during an excavation by the Iowa Lakeside Laboratory Archaeological Field School under the direction of Joseph Tiffany. Soil samples were taken from storage pit features at the site, and then processed at the Iowa State University Archaeological Laboratory (ISUAL), in Ames, IA. A human tooth recovered from one of the samples and was transferred to the Office of the State Archaeologist Bioarchaeology Program in 1998. The tooth represents a young to middle-aged adult of unknown sex (Burial Project 1248). No known individuals were identified. No associated funerary objects are present.

In 1968, human remains representing, at minimum, three individuals were removed from site 13DM3 in Des Moines County, IA, during a summer field school excavation of the site by Grinnell College and University of Iowa students under the direction of Dean Straffin. All materials excavated were taken to the University of Iowa Geology Repository. In December 1996, University of Iowa geology professor Holmes Semken identified human skeletal remains in the Geology Repository collection from site 13DM3. The human remains were removed from the collection and transferred to the Office of the State Archaeologist Bioarchaeology Program. A radiocarbon date reported from the feature from which the human remains were removed is A.D. 1400 ± 95 years. The three individuals represent an older juvenile to young adult, and two subadults, aged about 3.5–4.5 years old and about 7–9 years (Burial Project 1097). No known individuals were identified. No associated funerary objects are present.

In 1971 and 1972, human remains representing, at minimum, two individuals were removed from site 13DM101 in Des Moines County, IA, during archeological excavations. The excavations were carried out by Dean Straffin, then of Parsons College, Fairfield, IA, under the auspices of the Office of the State Archaeologist. One cranial fragment was recovered, and was identified as human during laboratory examination of the collections in 1994 and 1995. The human remains were immediately transferred to the Office of the State Archaeologist Bioarchaeology Program. The human remains represent two older juvenile to young adult

individuals (BP 995). No known individuals were identified. No associated funerary objects are present.

In 1972, human remains representing, at minimum, two individuals were removed from site 13DM140 in Des Moines, IA. The human remains were exposed during the digging of a house foundation by homeowner Mike Kelley, who immediately stopped construction, removed the exposed bones, and contacted the Iowa Assistant State Archaeologist. An emergency archeological excavation was conducted at the site. The materials collected during the archeological excavation were kept at Parsons College in Fairfield, IA. Following the closure of Parsons College, the 13DM140 site collection was transferred to the Office of the State Archaeologist. During a meeting with R. Eric Hollinger in 1996, Kelley turned over the human skeletal remains he himself had collected from the exposed burial in 1972. These human remains were then transferred to the Office of the State Archaeologist Bioarchaeology Program, where they joined additional human remains from the same site. The human remains represent two adults, one aged 25–35 years, possibly female, and a possible male of unknown age (Burial Project 993). No known individuals were identified. No associated funerary objects are present.

In 1970 and 1996, human remains representing, at minimum, 14 individuals were removed from site 13LA1 in Louisa County, IA. The site has been the subject of archeological excavations on several occasions. Several test units were excavated at 13LA1 in 1970. In 1996, a summer field school was conducted by the University of Illinois-Urbana Department of Anthropology and the Iowa Archaeological Society at the site. All materials recovered in both 1970 and 1996 were housed in the Office of the State Archaeologist. All human remains collected were transferred to the Office of the State Archaeologist Bioarchaeology Program. The human remains represent four subadults, two older juveniles to young adults, six adults, and two individuals who could be either subadults or adults (BP 973, 1029, 1422). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, two individuals were removed from site 13WD6 in Woodbury County, IA. These human remains were housed at the Sanford Museum in Cherokee, IA, until their transfer to the Office of the State Archaeologist Bioarchaeology Program, in 1997 and 2009. The human remains were likely removed during salvage excavations conducted in 1957 by members of the Iowa Archaeological Society, following disturbance to the site caused by quarrying operations. Other human remains known to have been recovered from this site in 1957 have previously been published in a notice (62 FR, 53023–53025) and reburied in Iowa. The human remains reported here represent one juvenile and one adult (Burial Project 1160, 3035). No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from site 13WD7 in Woodbury County, IA. These human remains were collected by Amy Harvey, whose doctoral research focused on Oneota sites in Iowa. She received her doctorate degree from the University of Wisconsin-Madison in the 1960s. Later, she took a teaching position at Stephens College in Columbia, MO, and stored the materials she had collected for her doctoral research there. In 2010, the Office of the State Archaeologist located the human skeletal remains from site 13WD7 still stored at Stephens College, and in 2013, it transferred them to the Office of the State Archaeologist Bioarchaeology Program. How the human remains came to be in Harvey's possession is unknown. The individual is estimated to be an older juvenile or young adult (BP 2952). No known individuals were identified. No associated funerary objects are present.

In 1993, 1994, and 1996, human remains representing, at minimum, seven individuals were removed from site 13WD8 in Woodbury County, IA. In 1993, flood damage and erosion of 13WD8 exposed human remains at the site. On two separate occasions, an unknown collector, on an unknown date removed exposed human remains from the site. Human remains were also recovered during an archeological salvage excavation of the site in 1994. In 1996, students on a field trip reported additional human remains eroding from the west cut-bank of the Little Sioux River to the Woodbury County Sheriff, and the Office of the State Archaeologist was notified. All human remains were transferred to the Office of the State Archaeologist Bioarchaeology Program. They represent two young adults (one possible female and one of indeterminate sex), an adult of indeterminate sex, an older adult of indeterminate sex, a 25 to 35 year old male, a young juvenile of indeterminate sex, and a subadult approximately one to three years old (BP 950). No known individuals were identified. No associated funerary objects are present.

In 2000, human remains representing, at minimum, one individual were removed from site 13WD55 in Woodbury County, IA. In the spring of 2000, the Office of the State Archaeologist Bioarchaeology Program and members of the office's Indian Advisory Council visited site 13WD55 after being contacted by the Woodbury County Medical Examiner's office regarding exposed human remains in a burial near the Little Sioux River. Site 13WD55 is a late prehistoric, open habitation Oneota site with isolated burials. The individual is represented by a nearly complete skeleton and is estimated to be approximately 8–10 years of age (Burial Project 1391). No known individuals were identified. No associated funerary objects are present.

All human remains originating from the sites described above were determined to be associated with the Oneota tradition based on archeological evidence.

At an unknown date, human remains representing, at minimum, 14 individuals were removed from site 13AM60 in Allamakee County, IA. These human remains were part of the Collection made by Amy Harvey (described above). Human skeletal remains from 13AM60, which had been stored at Stephens College, were transferred to the Office of the State Archaeologist Bioarchaeology Program in 2013. How the human remains came to be in Harvey's possession is unknown. The commingled human remains represent 11 adults and three subadults. Among the adults are five possible males and two females. The three subadults represented are: A newborn–1.5 year-old, a 2.5–3.5 year-old, and a 7.5–9.5 year-old (Burial Project 2566, 2567). No known individuals were identified. No associated funerary objects are present.

The human remains from site 13AM60 are identified as associated with the Oneota tradition based on archeological and archival evidence.

At an unknown date, human remains representing, at minimum, two individuals were removed from an unknown site somewhere in Woodbury County, IA. The human remains were found by an unknown individual along the Little Sioux River, south of Correctionville, IA. Deputies from the Correctionville Sheriff's Office collected the human remains and additional materials from two other areas located farther south along the river. All human remains and artifacts collected were transferred to the Office of the State

Archaeologist Bioarchaeology Program in early 2014. The individuals are young adults of indeterminate sex, each represented by cranial remains (Burial Project 2971). No known individuals were identified. No associated funerary objects are present.

The human remains from Woodbury County, IA, have been identified as associated with the Oneota tradition based on their proximity to several other Oneota sites in the area.

At an unknown date, human remains representing, at minimum, two individuals were removed from an unknown site in Iowa. These human remains were part of the collection made by Amy Harvey (described above). Human skeletal remains found in material labeled as ''NE Iowa, Orr Focus,'' which had been stored at Stephens College, were transferred to the Office of the State Archaeologist Bioarchaeology Program in 2010 and 2013. How the human remains came into Harvey's possession is unknown. The human remains represent an adult male aged approximately 30–50 years and an older adult of indeterminate sex (Burial Project 2893, 2955). No known individuals were identified. No associated funerary objects are present.

The human remains from the unknown site in Iowa have been identified as associated with the Oneota tradition based on osteological and archival evidence. All human remains reported in this Notice were identified as Native American based on documented association with, or proximity to, Oneota archeological sites.

Determinations Made by the {Museum or Federal Agency}

Officials of the Office of the State Archaeologist Bioarchaeology Program have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 73 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), there are no associated funerary objects included in this Notice.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Otoe-Missouria Tribe of Indians, Oklahoma; the Omaha Tribe of Nebraska; the Ponca Tribe of Nebraska; and the Ponca Tribe of Indians of Oklahoma.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S. Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu,* by June 1, 2016. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Otoe-Missouria Tribe of Indians, Oklahoma; the Omaha Tribe of Nebraska; the Ponca Tribe of Nebraska; and the Ponca Tribe of Indians of Oklahoma may proceed.

The Office of the State Archaeologist Bioarchaeology Program is responsible for notifying the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Otoe-Missouria Tribe of Indians, Oklahoma; the Omaha Tribe of Nebraska; the Ponca Tribe of Nebraska; and the Ponca Tribe of Indians of Oklahoma that this notice has been published.

Dated: March 31, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–10185 Filed 4–29–16; 8:45 am]

BILLING CODE 4312–50–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–934]

Certain Windshield Wiper Devices and Components; Commission Final Determination of Violation of Section 337; Termination of Investigation; Issuance of Limited Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337'') in the above-captioned investigation. The Commission has determined to issue a limited exclusion order. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 27, 2014, based on a Complaint filed by Nobel Biocare Services AG of Kloten, Switzerland and Nobel Biocare USA, LLC of Yorba Linda, California (collectively, ''Nobel''), as supplemented. 79 FR 63940–41 (Oct. 27, 2014). The Complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), in the sale for importation, importation, and sale within the United States after importation of certain dental implants by reason of infringement of certain claims of U.S. Patent Nos. 8,714,977 (''the '977 patent'') and 8,764,443 (''the '443 patent''). The Complaint further alleges the existence of a domestic industry. The Commission's Notice of Investigation named as respondents Neodent USA, Inc., of Andover, Massachusetts and JJGC Indústria e Comércio de Materiais Dentários S/A of Curitiba, Brazil (collectively, ''Respondents''). The Commission previously terminated the investigation in part as to certain claims of the '443 patent. Notice (Apr. 29, 2015); Order No. 22 (Apr. 8, 2015). The Commission also amended the Notice of Investigation to reflect the corporate name change of Neodent USA, Inc. to Instradent USA, Inc. Notice (May 6, 2015); Order No. 24 (Apr. 9, 2015). The use of the term ''Respondents'' herein refers to the current named respondents.

On October 27, 2015, the ALJ issued his final ID, finding a violation of section 337 with respect to asserted claims 15, 18, 19, 30, and 32 of the '443 patent, and finding no violation with respect to asserted claim 17 of the '443 patent and all of the asserted claims of the '977 patent. In particular, the final ID finds that the accused products infringe claims 1–5 and 19 of the '977

patent and claims 15, 18, 19, 30, and 32 of the '443 patent, but do not infringe claim 17 of the '443 patent. The final ID also found that Respondents have shown that the asserted claims of the '977 patent are invalid for anticipation under 35 U.S.C. 102, but have not shown that the asserted claims of the '443 are invalid. In addition, the final ID found that Respondents failed to show that the asserted claims of the '977 and '443 patents are unenforceable due to inequitable conduct. The final ID further found that Nobel has satisfied the domestic industry requirement with respect to both the '977 and '443 patents.

On November 10, 2015, the ALJ issued his recommended determination (''RD'') on remedy and bonding. The RD recommended that the appropriate remedy is a limited exclusion order barring entry of Respondents' infringing dental implants. The RD did not recommend issuance of a cease and desist order against any respondent. The RD recommended the imposition of a bond of $120 per imported unit during the period of Presidential review.

On November 9, 2015, Nobel filed a petition for review of the final ID's finding of no violation with respect to claims 1–5 of the '977 patent. In particular, Nobel requested review of the final ID's finding that the March 2003 Product Catalog of Alpha Bio Tec, Ltd. (''the 2003 Alpha Bio Tec Catalog'') constitutes prior art under 35 U.S.C. 102(b), arguing that the catalog was not sufficiently publicly accessible prior to the critical date. Nobel also requested, if the Commission determines not to review the ID's prior art finding, that the Commission review the final ID's construction of the limitation ''the coronal region having a frustoconical shape'' recited in claim 1 of the '977 patent and, accordingly, review the final ID's finding that the accused products do not infringe claims 1–5 of the '977 patent under Nobel's proposed construction of that limitation. Nobel further argued that, should the Commission agree partially with Nobel concerning the proper construction of the limitation ''the coronal region having a frustoconical shape,'' the 2003 Alpha-Bio Tec Catalog does not anticipate the asserted claims of the '977 patent.

No party petitioned for review of the final ID's finding that there is a violation of section 337 with respect to the '443 patent.

On November 17, 2015, Respondents and the Commission investigative attorney each filed responses opposing Nobel's petition for review.

On December 10, 2015, Respondents submited a post-RD statement on the public interest pursuant to Commission Rule 210.50(a)(4). On December 14, 2015, Nobel submited a post-RD statement on the public interest pursuant to Commission Rule 210.50(a)(4). No responses were filed by the public in response to the post-RD Commission Notice issued on November 12, 2015. *See* Notice of Request for Statements on the Public Interest, 80 FR 76574–75 (Dec. 9, 2015), *see also* Correction of Notice, 80 FR 77376–77 (Dec. 14, 2015).

On January 14, 2016, the Commission determined to review the Final ID in part with respect to the '977 patent. 81 FR 3471–3473 (Jan. 21, 2016). Specifically, the Commission determined to review the final ID's construction of the limitation ''coronal region having a frustoconical shape'' recited in claim 1 of the '977 patent with regard to whether or not the term ''frustoconical shape'' is an adjective that modifies the claimed ''coronal region'' or whether the term is an independent structure that may comprise only a portion of the claimed ''coronal region.'' In accordance with its claim construction review, the Commission further determined to review the final ID's infringement findings with respect to claims 1–5 of the '977 patent, as well as the final ID's finding that the technical prong of the domestic industry requirement is satisfied with respect to claims 1–5 of the '977 patent. The Commission also determined to review the final ID's finding that the 2003 Alpha Bio Tec Catalog is a printed publication under 35 U.S.C. 102. The Commission further determined to review the final ID's finding that the 2003 Alpha Bio Tec Catalog anticipates claims 1–5 of the '977 patent. In connection with its review, the Commission requested briefing on several questions. *Id.* at 3472.

The Commission determined not to review the remaining issues decided in the final ID, including any of the Final ID's findings with respect to the '443 patent. The Commission also denied a motion filed by Nobel to amend the Administrative Protective Order issued in this investigation to add specific provisions permitting the use of discovery from this investigation in two co-pending proceedings in the U.S. Patent and Trademark Office captioned as *Instradent USA, Inc.* v. *Nobel Biocare Services AG,* IPR2015–01784, and *Instradent USA, Inc.* v. *Nobel Biocare Services AG,* IPR2015–01786, as well as Nobel's motion for leave to file a reply in support of its motion. *Id.* at 3473.

On January 21, 2016, the parties filed initial submissions in response to the Commission's request for written submissions. On January 28, 2016, the parties filed response submissions.

Having examined the record of this investigation, including the final ID, the petitions for review, and the responses thereto, and the parties' submissions on review, the Commission has determined to find that a violation of section 337 has occurred. The Commission has determined that the appropriate form of relief is a limited exclusion order under 19 U.S.C. 1337(d)(1), prohibiting the unlicensed entry of dental implants that infringe any of claims 1–5 of the '977 patent and claims 15, 18, 19, 30, and 32 of the '443 patent.

The Commission has further determined that consideration of the public interest factors enumerated in section 337(d) (19 U.S.C. 1337(d)) does not preclude issuance of the limited exclusion order. The Commission has determined that the bond for temporary importation during the period of Presidential review (19 U.S.C. 1337(j)) shall be in the amount of $120 per unit of articles subject to the exclusion order. The Commission's order was delivered to the President and the United States Trade Representative on the day of its issuance.

The investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: April 26, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–10173 Filed 4–29–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–808 (Third Review)]

Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Russia; Institution of a Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping

duty order on Hot-Rolled Flat-Rolled Carbon-Quality Steel Products (''hot-rolled steel'') from Russia would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission;[1] to be assured of consideration, the deadline for responses is June 1, 2016. Comments on the adequacy of responses may be filed with the Commission by July 14, 2016.

DATES: *Effective Date:* May 2, 2016.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), 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 (*http://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—Effective July 12, 1999, Commerce suspended the antidumping duty investigation on hot-rolled steel imports from Russia (64 FR 38642, July 19, 1999). Following first five-year reviews by Commerce and the Commission, effective May 12, 2005, Commerce issued a continuation of the suspended investigation on imports of hot-rolled steel from Russia (70 FR 32571, June 3, 2005). Following second five-year reviews by Commerce and the Commission, effective June 17, 2011, Commerce issued a continuation of the suspended investigation on imports of hot-rolled steel from Russia (76 FR 35400, June 17, 2011). Effective December 19, 2014, Commerce terminated the agreement suspending the antidumping duty investigation on hot-rolled steel from Russia and issued an antidumping duty order (79 FR 77455, December 24, 2014). The Commission is now conducting a third review pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, Subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is Russia.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determination and its full first and second five-year review determinations, the Commission found one *Domestic Like Product* consisting of all hot-rolled steel, as defined in Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination and its full first and second five-year review determinations, the Commission defined the *Domestic Industry* as all producers of hot-rolled steel.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 16–5–355, expiration date June 30, 2017. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is June 1, 2016. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is July 14, 2016. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determination in the review.

Information to Be Provided In Response to this Notice of Institution: As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2010.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2015, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S.

commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2015 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2010, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: April 25, 2016.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2016–09928 Filed 4–29–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Meeting of the CJIS Advisory Policy Board

AGENCY: Federal Bureau of Investigation (FBI), DOJ.

ACTION: Meeting notice.

SUMMARY: The purpose of this notice is to announce the meeting of the Federal Bureau of Investigation's Criminal Justice Information Services (CJIS) Advisory Policy Board (APB). The CJIS APB is a federal advisory committee established pursuant to the Federal Advisory Committee Act (FACA). This meeting announcement is being published as required by Section 10 of the FACA.

DATES: The APB will meet in open session from 8:30 a.m. until 5 p.m., on June 8–9, 2016.

ADDRESSES: The meeting will take place at Norfolk Waterside Marriott Hotel & Convention Center, 235 East Main Street, Norfolk, VA 23510, telephone (757) 627–4200.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to Ms. Kara Delmont; Management Program Assistant; CJIS Training and Advisory Process Unit, Resources Management Section; FBI CJIS Division, Module C2, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306–0149; telephone (304) 625–5859, facsimile (304) 625–5090.

SUPPLEMENTARY INFORMATION: The FBI CJIS APB is responsible for reviewing policy issues and appropriate technical and operational issues related to the programs administered by the FBI's CJIS Division, and thereafter, making appropriate recommendations to the FBI Director. The programs administered by the CJIS Division are the Next Generation Identification, Interstate Identification Index, Law Enforcement Enterprise Portal, National Crime Information Center, National Instant Criminal Background Check System, National Incident-Based Reporting System, National Data Exchange, and Uniform Crime Reporting.

This meeting is open to the public. All attendees will be required to check-in at the meeting registration desk. Registrations will be accepted on a space available basis. Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the Designated Federal Officer (DFO). Any member of the public may file a written statement with the Board. Written comments shall be focused on the APB's current issues under discussion and may not be repetitive of previously submitted written statements. Written comments should be provided to Mr. R. Scott Trent, DFO, at least seven (7) days in advance of the meeting so that the comments may be made available to the APB for their consideration prior to the meeting.

Anyone requiring special accommodations should notify Mr. Trent at least seven (7) days in advance of the meeting.

Dated: April 6, 2016.

R. Scott Trent,

CJIS Designated Federal Officer, Criminal Justice Information Services Division, Federal Bureau of Investigation.

[FR Doc. 2016–08606 Filed 4–29–16; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decrees Under the Comprehensive Environmental Response, Compensation, and Liability Act

On April 22, 2016, the Department of Justice lodged two proposed consent decrees with the United States District Court for the Eastern District of Tennessee in the lawsuit entitled *United States and State of Tennessee* v. *OXY USA Inc.,* Civil Action No. 1:16–cv–103.

The United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), and the State of Tennessee, on behalf of the Tennessee Department of Environment and Conservation (''TDEC''), filed this lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The complaint requests performance of response actions to address Operable Units 3 and 5 of the Copper Basin Mining District Superfund Site in Polk County, Tennessee, recovery of costs that the United States has incurred responding to releases of hazardous substances at the site, and recovery of costs that the United States and the State of Tennessee will incur overseeing implementation of the remedies at Operable Units 3 and 5 at the site.

The proposed consent decrees would resolve the claims alleged in the complaint and provides for implementation of remedies at Operable Units 3 and 5 that EPA and TDEC will oversee. The proposed Operable Unit 3 consent decree requires OXY USA Inc. to implement the remedy selected by EPA for Operable Unit 3, pay EPA $10,779,509 in unreimbursed response costs at the site, and to pay future response costs incurred by EPA and TDEC at Operable Unit 3. The proposed Operable Unit 3 consent decree also includes the United States Departments of the Army, Commerce, and Defense as settling federal agencies as the successor to the former federal government owner and operator of the site, and provides that the United States, on behalf of those agencies, will reimburse OXY USA Inc. for a portion of its costs incurred at the site.

The proposed Operable Unit 5 consent decree requires OXY USA Inc. to implement the remedy selected by EPA for Operable Unit 5, and to pay future response costs incurred by EPA and TDEC at Operable Unit 5. The proposed Operable Unit 5 consent decree also includes the Tennessee Valley Authority as an implementing federal agency that will participate in the implementation of the remedial action selected by EPA.

The publication of this notice opens a period for public comment on the consent decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and State of Tennessee* v. *OXY USA Inc.,* D.J. Ref. No. 90–11–3–10404/1 (Operable Unit 3 consent decree) or D.J. Ref. No. 90–11–3–10404 (Operable Unit 5 consent decree). Comments should specify whether they address the proposed Operable Unit 3 consent decree, the proposed Operable Unit 5 consent decree, or both. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed consent decrees may be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide paper copies of the proposed consent decrees upon written request and payment of reproduction costs. Please mail your request (specify which proposed consent decree you are requesting) and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $79.25 for the proposed Operable Unit 3 consent decree and/or $102 for the proposed Operable Unit 5 consent decree (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $12.25 for the proposed Operable Unit 3 consent decree and $13 for the proposed Operable Unit 5 consent decree.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–10114 Filed 4–29–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Consumer Expenditure Surveys: Quarterly Interview and Diary

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) revision titled, ''Consumer Expenditure Surveys: Quarterly Interview and Diary,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 1, 2016.

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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201512-1220-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–BLS, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Consumer Expenditure Surveys: Quarterly Interview and Diary. The BLS uses the Consumer Expenditure Surveys to gather information on expenditures, income, and other related subjects. These data are used periodically to update the national Consumer Price Index. In addition, the data are used by a variety of researchers in academia, government agencies, and the private sector. The data are collected from a national probability sample of households designed to represent the total civilian non-institutional population. This information collection has been classified as a revision, because of the

addition of the Incentives/Outlets test, elimination of the Proof of Concept Test and bounding interview, and the full implementation of a new sample. The Census Authorizing Statute and BLS Authorizing Statute authorize this information collection. *See* 13 U.S.C. 8b and 29 U.S.C. 2.

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 it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to 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. The DOL obtains OMB approval for this information collection under Control Number 1220–0050. The current approval is scheduled to expire on December 31, 2017; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on December 1, 2015 (80 FR 75135).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1220–0050. The OMB 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–BLS.

Title of Collection: Consumer Expenditure Surveys: Quarterly Interview and Diary.

OMB Control Number: 1220–0050.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 6,900.

Total Estimated Number of Responses: 66,510.

Total Estimated Annual Time Burden: 58,835 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: April 25, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–10186 Filed 4–29–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; American Time Use Survey—Eating and Health Supplement

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) titled, ''American Time Use Survey—Eating and Health Supplement,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 1, 2016.

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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201511-1220-003* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–BLS, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the American Time Use Survey-Eating and Health Supplement information collection. The Eating and Health module supplement includes questions about respondents' eating and drinking behaviors, food assistance participation, grocery and meal shopping, food preparation, and food sufficiency. It also includes questions on general health and physical exercise. Information collected in the supplement will be published as a public use data set to facilitate research on numerous topics, such as the association between eating patterns, body mass index, and obesity; time-use patterns of food assistance program participants and low-income nonparticipants; time-use patterns and eating and activity levels; and how time-use varies by health status. The supplement is asked of respondents immediately upon their completion of the American Time Use Survey. The supplement surveys individuals aged 15 and up from a nationally representative sample of approximately 2,100 sample households each month. The BLS Authorizing Statue authorizes this information collection. *See* 29 U.S.C. 1, 2.

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 it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject

to 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. The DOL obtains OMB approval for this information collection under Control Number 1220–0187.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on June 30, 2016. The DOL seeks to extend PRA authorization for this information collection for use through June 2017, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 5, 2016 (81 FR 253).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1220–0187. The OMB 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–BLS.

Title of Collection: American Time Use Survey-Eating and Health Supplement.

OMB Control Number: 1220–0187.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 11,200.

Total Estimated Number of Responses: 11,200.

Total Estimated Annual Time Burden: 933 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: April 25, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–10187 Filed 4–29–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Requests To Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Wage and Hour Division (WHD) sponsored information collection request (ICR) titled, ''Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 1, 2016.

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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201510-1235-002* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–WHD, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act information collection. Regulations 29 CFR part 5 prescribe labor standards for Federally financed and assisted construction contracts subject to the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.;* the Davis-Bacon Related Acts (DBRA); and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 3701 *et seq.* The DBA and DBRA require payment of locally prevailing wages and fringe benefits, as determined by the DOL, to laborers and mechanics on most Federally financed or assisted construction projects. *See* 40 U.S.C. 3142(a)–(b) and 29 CFR 5.5(a)(1). The CWHSSA requires the payment of one and one-half times the basic rate of pay for hours worked over forty in a week on most Federal contracts involving the employment of laborers or mechanics. *See* 40 U.S.C. 3702(a) and 29 CFR 5.5(b)(1). The requirements of this information collection consist of: (A) Reports of conformed classifications and wage rates and (B) requests for approval of unconventional fringe benefit plans.

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 it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to 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. The DOL obtains OMB approval for this

information collection under Control Number 1235–0023.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on May 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 18, 2015 (80 FR 56496).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1235–0023. The OMB 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–WHD.

Title of Collection: Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act.

OMB Control Number: 1235–0023.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 8,503.

Total Estimated Number of Responses: 8,503.

Total Estimated Annual Time Burden: 2,128 hours.

Total Estimated Annual Other Costs Burden: $4,422.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: April 26, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–10189 Filed 4–29–16; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Worker Profiling and Reemployment Services Activities and Worker Profiling and Reemployment Outcomes

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Worker Profiling and Reemployment Services Activities and Worker Profiling and Reemployment Outcomes,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 1, 2016.

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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201602-1205-002* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Worker Profiling and Reemployment Services Activities and Worker Profiling and Reemployment Outcomes information collection. Reporting Forms ETA–9048 and ETA–9049 are used to identify those claimants who are most likely to exhaust their Unemployment Insurance benefits and to provide reemployment services to expedite those beneficiaries return to suitable work. The ETA–9048 report provides a count of the claimants who were referred to Worker Profiling and Reemployment Services (WPRS) and a count of those who completed the services. The ETA–9049 report provides the subsequent collection of wage records, which is a useful management tool for monitoring the success of the WPRS program in the State. This ICR also covers preliminary activities when States collect information from program beneficiaries. Social Security Act sections303 (a)(6) and (j) authorize this information collection. *See* 42 U.S.C. 503(a)(6) and (j).

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 it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to 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. The DOL obtains OMB approval for this information collection under Control Number 1205–0353.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on May 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that

existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 28, 2015 (80 FR 58300).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0353. The OMB 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–ETA.

Title of Collection: Worker Profiling and Reemployment Services Activities and Worker Profiling and Reemployment Outcomes.

OMB Control Number: 1205–0353.

Affected Public: Individuals or Households and State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 5,354,509.

Total Estimated Number of Responses: 6,697,635.

Total Estimated Annual Time Burden: 10,834,294 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: April 25, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–10188 Filed 4–29–16; 8:45 am]

BILLING CODE 4510–FW–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (16–031)]

Notice of Intent To Grant Partially Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of intent to grant exclusive license.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive license in the United States to practice the invention described and claimed NASA Case Number MFS–33317–1 entitled ''Disruptive Tuned Mass (DTM)'' to Linc Research, Inc., having its principal place of business in Huntsville, Alabama. The patent rights in this invention have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration and to Linc Research, Inc. The prospective exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

DATES: The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to Mr. James J. McGroary, Chief Patent Counsel/LS01, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–0013.

FOR FURTHER INFORMATION CONTACT: Mr. Sammy A. Nabors, Technology Transfer Office/ZP30, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–5226. Information about other NASA inventions available for licensing can be found online at *http://technolgy.nasa.gov.*

Mark P. Dvorscak,

Agency Counsel for Intellectual Property.

[FR Doc. 2016–10182 Filed 4–29–16; 8:45 am]

BILLING CODE 7510–13–P

THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Request: Grants to States, State Program Report, Enhancements in Outcome-Based, Performance Measures and Evaluation

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Service (''IMLS'') as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning enhancements to the State Program Report for the Grants to State Program for evaluation including performance measurements of beneficiary outcomes beginning with FY 2015 reporting by up to 16 pilot states.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before June 28, 2016.

IMLS is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;

• Enhance the quality, utility and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submissions of responses.

ADDRESSES: For a copy of the documents contact: Kim A. Miller, Grants Specialist (Detailee), Office of the Chief Financial Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024–2135. Ms. Miller can be reached by *Telephone:* 202–653–4762, *Fax:* 202–653–4762, or by email at *kmiller@imls.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services (IMLS) is an independent Federal grant-making agency and is the primary source of federal support for the Nation's 123,000 libraries and 35,000 museums. IMLS provides a variety of grant programs to assist the Nation's museums and libraries in improving their operations and enhancing their services to the public. The IMLS Grants to States program is the largest source of federal funding support for library services in the United States. Using a population-based formula, more than $150 million is distributed among the State Library Administrative Agencies.

II. Current Actions

The Library Services and Technology Act requires each State Library Administrative Agency to submit a plan that details library services goals for a five-year period. Pursuant to 20 U.S.C. 9134, each State Library Administrative Agency (SLAA) that receives an IMLS grant under the Grants to States Program is required to evaluate and report to the agency, prior to the end of their five-year plan, regarding the activities assisted under the LSTA. Each SLAA receives IMLS funding to support the five year period through a series of overlapping two year grant awards. Each SLAA must file interim and final financial reports, as well as final performance reports for each of these two year grants through IMLS' State Program Reporting (SPR) system. The purpose of the proposed information collection is to enhance the reporting of the two year grants through enhanced evaluation and performance measures of beneficiaries.

Agency: Institute of Museum and Library Services.

Title: Grants to States, State Program Report, Enhancements in Outcome-Based, Performance Measures and Evaluation.

OMB Number: 3137–0071.

Agency Number: 3137.

Type of Review: Revision to an existing collection.

Affected Public: State Library Administrative Agencies.

Number of Respondents: 55.

Note: 55 is the number of State Library Administrative Agencies that are responsible for the collection of this information and for reporting it to IMLS.

Frequency: Once every two years.

Burden hours per respondent: To be determined.

Total burden hours: To be determined.

Total Annualized capital/startup costs: To be determined.

Total Annual Costs: To be determined.

FOR FURTHER INFORMATION CONTACT: Stephanie Burwell, Chief Information Officer, Office of the Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024–2135. Ms. Burwell can be reached by *Telephone:* 202–653–4684, *Fax:* 202–653–4625, or by email at *sburwell@imls.gov* or by teletype (TTY/TDD at 202–653–4614. Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

Dated: April 27, 2016.

Kim A. Miller,

Grants Specialist (Detailee), Office of the Chief Financial Officer.

[FR Doc. 2016–10183 Filed 4–29–16; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Tuesday, May 17, 2016.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The one item is open to the public.

MATTER TO BE CONSIDERED:

8714B *Railroad Accident Report*—Derailment of Amtrak Passenger Train 188, Philadelphia, Pennsylvania, May 12, 2015.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 or by email at *Rochelle.Hall@ntsb.gov* by Wednesday, May 11, 2016.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing at (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Peter Knudson at (202) 314–6100 or by email at *peter.knudson@ntsb.gov.*

Dated: April 28, 2016.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2016–10280 Filed 4–28–16; 11:15 am]

BILLING CODE 7533–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77705; File No. SR–Nasdaq–2016–002]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To List and Trade Shares of the First Trust Municipal High Income ETF of First Trust Exchange-Traded Fund III

April 26, 2016.

I. Introduction

On January 6, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the First Trust Municipal High Income ETF (''Fund'') under Nasdaq Rule 5735. The proposed rule change was published for comment in the **Federal Register** on January 27, 2016.[3] On February 16, 2016, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 76944 (Jan. 21, 2016), 81 FR 4712 (''Notice'').

Exchange filed Amendment No. 1.[4] On March 8, 2016, 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] The Commission received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

Nasdaq proposes to list and trade Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by the First Trust Exchange-Traded Fund III (''Trust''), a Massachusetts business trust registered with the Commission as an open-end investment company.[8] First Trust Advisors L.P. will be the investment manager to the Fund (''Adviser''),[9] and First Trust Portfolios L.P. will serve as the principal underwriter and distributor for the Fund. Brown Brothers Harriman & Co. will act as the administrator, accounting agent, custodian and transfer agent to the Fund.

The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including other portfolio holdings and investment restrictions.[10]

A. Principal Investments of the Fund

The primary investment objective of the Fund will be to generate current income that is exempt from regular federal income taxes, and its secondary objective will be long-term capital appreciation. Under normal market conditions,[11] the Fund will seek to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in Municipal Securities.[12] Municipal Securities are generally issued by or on behalf of states, territories or possessions of the U.S. and the District of Columbia and their political subdivisions, agencies, authorities and other instrumentalities. The types of Municipal Securities in which the Fund may invest include municipal lease obligations (and certificates of participation in such obligations), municipal general obligation bonds, municipal revenue bonds, municipal notes, municipal cash equivalents, private activity bonds (including without limitation industrial development bonds), and pre-refunded and escrowed to maturity bonds. In addition, Municipal Securities include securities issued by entities whose underlying assets are municipal bonds (*i.e.,* tender option bond (TOB) trusts and custodial receipts trusts). The Fund may invest in Municipal Securities of any maturity.

Under normal market conditions, the Fund will invest at least 65% of its net assets in Municipal Securities that are, at the time of investment, rated below investment grade (*i.e.,* not rated Baa3/BBB— or above) by at least one nationally recognized statistical rating organization (''NRSRO'') rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality)[13]

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[4] In Amendment No. 1, the Exchange clarified that the Fund's portfolio will satisfy the following quantitative standards set forth NASDAQ 5705(b)(4)(A) except for those in Nasdaq Rule 5705(b)(4)(A)(ii): (i) The index or portfolio must consist of Fixed Income Securities; (ii) Components that in aggregate account for at least 75% of the weight of the index or portfolio must have a minimum original principal amount outstanding of $100 million or more; (iii) A component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio; (iv) No component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio; (v) An underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers; and (vi) Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (a) From issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion; (d) exempted securities as defined in section 3(a)(12) of the Act; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country. Because Amendment No. 1 to the proposed rule change is technical in nature and does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 is available on the Commission's Web site at: *http://www.sec.gov/comments/sr-nasdaq-2016-002/nasdaq2016002-1.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 34–77320, 81 FR 13429 (Mar. 14, 2016). The Commission designated April 26, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission. *See* Post-Effective Amendment No. 27 to Registration Statement on Form N–1A for the Trust, dated August 31, 2015 (File Nos. 333–176976 and 811–22245). In addition, the Exchange represents that the Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the Investment Company Act of 1940 (''1940 Act''). *See* Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812–13795).

[9] The Exchange represents that the Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer, and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of or changes to the portfolio. The Exchange further represents that personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event (a) the Adviser or any sub-adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with another broker-dealer, the adviser or sub-adviser will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition of and changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. *See* Notice, *supra* note 3, at 4713.

[10] The Commission notes that additional information regarding the Fund, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (''NAV''), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. *See* Notice and Registration Statement, *supra* notes 3 and 5, respectively.

[11] The term ''under normal market conditions'' as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. On a temporary basis, including for defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objectives. The Fund may adopt a defensive strategy when the Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

[12] According to the Exchange, the Fund may invest up to 100% of its net assets in Municipal Securities that pay interest that generates income subject to the federal alternative minimum tax, assuming compliance with the investment requirements and limitations described herein.

[13] Comparable quality of unrated Municipal Securities will be determined by the Adviser based on fundamental credit analysis of the unrated security and comparable rated securities. On a best efforts basis, the Adviser will attempt to make a rating determination based on publicly available data. In making a ''comparable quality'' determination, the Adviser may consider, for example, whether the issuer of the security has issued other rated securities, the nature and provisions of the relevant security, whether the

(commonly referred to as ''high yield'' or ''junk'' bonds);[14] however, the Fund will consider pre-refunded or escrowed to maturity bonds, regardless of rating, to be investment grade securities. The Fund may invest up to 35% of its net assets in Municipal Securities that are, at the time of investment, rated investment grade (*i.e.,* rated Baa3/BBB— or above) by each NRSRO rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality). If, subsequent to purchase by the Fund, a Municipal Security held by the Fund experiences an improvement in credit quality and becomes investment grade, the Fund may continue to hold the Municipal Security and it will not cause the Fund to violate the 35% investment limitation; however, the Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

B. Other (Non-Principal) Investments of the Fund

The Exchange represents that the non-principal investments listed below would consist of investments that are not included in the Fund's 80% Policy. Such assets may be invested in the Fixed Income Instruments and other instruments, as described below.

Under normal market conditions, the Fund will invest substantially all of its assets to meet its investment objectives as described above. In addition, the Fund may invest its assets or hold cash as generally described below.

The Exchange represents that the Fund may invest up to 10% of its net assets in taxable municipal securities. The Fund may also invest up to 10% of its net assets in short-term debt instruments,[15] money market funds, and other cash equivalents, or it may hold cash. The percentage of the Fund invested in such holdings or held in cash will vary and will depend on several factors, including market conditions.

With respect to up to 20% of its net assets, the Fund may (i) invest in the securities of other investment companies registered under the 1940 Act, including money market funds, other ETFs, open-end funds (other than money market funds and other ETFs), and closed-end funds and (ii) acquire short positions in the securities of the foregoing investment companies.

With respect to up to 20% of its net assets, the Fund may (i) invest in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts and (ii) acquire short positions in the foregoing derivatives. Transactions in the foregoing derivatives may allow the Fund to obtain net long or short exposures to selected interest rates. These derivatives may also be used to hedge risks, including interest rate risks and credit risks, associated with the Fund's portfolio investments. The Fund's investments in derivative instruments will be consistent with the Fund's investment objectives and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index.

C. Investment Restrictions

The Exchange represents that the Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser.[16] The Exchange further represents that the Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets.

The Fund may not invest 25% or more of the value of its total assets in securities of issuers in any one industry, although this restriction does not apply to (a) Municipal Securities issued by governments or political subdivisions of governments, (b) obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or (c) securities of other investment companies.

D. Nasdaq Rule 5705(b)(4)(A)

The Fund will be actively managed and will not be tied to an index. Under normal market conditions, on a continuous basis determined at the time of purchase, its portfolio of Municipal Securities[17] will generally meet, as applicable, all criteria for non-actively managed, index-based, fixed income ETFs contained in Nasdaq Rule 5705(b)(4)(A) except for those set forth in Nasdaq Rule 5705(b)(4)(A)(ii), which requires that components that in the aggregate account for at least 75% of the weight of the index or portfolio have a minimum original principal amount outstanding of $100 million or more. However, under normal market conditions, at least 40% (based on dollar amount invested) of the Municipal Securities in which the Fund invests will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum original principal amount outstanding of $75 million or more, which according to the Exchange, should provide support regarding the anticipated liquidity of the Fund's Municipal Securities portfolio.

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obligations under the relevant security are guaranteed by another entity and the rating of such guarantor (if any), relevant cash flows, macroeconomic analysis, and/or sector or industry analysis.

[14] The Municipal Securities in which the Fund will invest to satisfy this 65% investment requirement may include Municipal Securities that are currently in default and not expected to pay the current coupon (''Distressed Municipal Securities''). The Fund may invest up to 10% of its net assets in Distressed Municipal Securities. If, subsequent to purchase by the Fund, a Municipal Security held by the Fund becomes a Distressed Municipal Security, the Fund may continue to hold the Distressed Municipal Security and it will not cause the Fund to violate the 10% limitation; however, the Distressed Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

[15] Short-term debt instruments, which do not include Municipal Securities, are issued by issuers having a long-term debt rating of at least A−/A3 (as applicable) by Standard & Poor's Ratings Services (''S&P Ratings''), Moody's Investors Service, Inc. (''Moody's'') or Fitch Ratings (''Fitch'') and have a maturity of one year or less. According to the Exchange, the Fund may invest in the following short-term debt instruments: (1) Fixed rate and floating rate U.S. government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. government agencies or instrumentalities; (2) certificates of deposit issued against funds deposited in a bank or savings and loan association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements, which involve purchases of debt securities; (5) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; and (6) commercial paper (rated A–3 or higher by S&P Ratings, Prime-3 or higher by Moody's or F3 or higher by Fitch), which is short-term unsecured promissory notes.

[16] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades *(e.g.,* the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

[17] According to the Exchange, for purposes of this statement and the discussion of the requirements of Nasdaq Rule 5705(b)(4)(A), with respect to Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds, rather than the securities issued by such entities, will be taken into account.

III. Proceedings To Determine Whether To Approve or Disapprove SR–Nasdaq–2016–002 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [18] to determine whether the proposed rule change, as modified by Amendment No. 1 thereto, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[19] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' [20]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[21]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by May 23, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 6, 2016. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice [22] and in Amendment No. 1 to the proposed rule change,[23] in addition to any other comments they may wish to submit about the proposed rule change.

The Exchange provides that the Fund may invest in one or more of the following broad categories of Municipal Securities: [24] (a) Municipal lease obligations; (b) municipal general obligation bonds; (c) municipal revenue bonds; (d) municipal notes; (e) municipal cash equivalents; (f) private activity bonds; and (g) pre-refunded and escrowed to maturity bonds. Moreover, the Exchange represents that under normal market conditions: (i) No component fixed income security (excluding Treasury securities) will represent more than 30% of the weight of the index or portfolio, and that the five highest weighted component fixed income securities will not in the aggregate account for more than 65% of the weight of the index or portfolio; (ii) component securities that in the aggregate account for at least 90% of the weight of the index or portfolio be either exempted securities or from a specified type of issuer; (iii) at least 40% (based on dollar amount invested) of the Municipal Securities in which the Fund invests will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum original principal amount outstanding of $75 million or more; and (iv) the underlying index or portfolio (excluding one consisting entirely of exempted securities) will include securities from a minimum of 13 non-affiliated issuers.

Apart from these broad representations, the Exchange provides no other information about the kinds of municipal bonds in which the Fund may invest. Accordingly, the Commission seeks comment on whether the Exchange's representations relating to the Municipal Securities to be held by the Fund are sufficient to limit the susceptibility of the portfolio to manipulation, and are consistent with the requirements of Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices.

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–Nasdaq–2016–002 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 Numbers SR–Nasdaq–2016–002. 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 Web site (*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 Web site 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 these filings 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. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Nasdaq–2016–002 and should be submitted on or before May 23, 2016. Rebuttal comments should be submitted by June 6, 2016.

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[18] 15 U.S.C. 78s(b)(2)(B).

[19] *Id.*

[20] 15 U.S.C. 78f(b)(5).

[21] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[22] *See supra* note 3.

[23] *See supra* note 4.

[24] In addition, Municipal Securities include securities issued by entities whose underlying assets are municipal bonds (*i.e.,* tender option bond (TOB) trusts and custodial receipts trusts).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10146 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77708; File No. SR–NYSE–2016–16]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Rule 98 To Provide That, When Designated Market Makers Enter Interest for the Purpose of Facilitating the Execution of Customer Orders, Those Orders Would Not Be Required To Be Designated as DMM Interest

April 26, 2016.

I. Introduction

On March 4, 2016, New York Stock Exchange LLC (''Exchange'' or ''NYSE'') 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 to amend NYSE Rule 98 governing the operation of a Designated Market Maker (''DMM'') Unit. The proposed rule change was published for comment in the **Federal Register** on March 15, 2016.[3] The Commission received no comments on the proposed rule change. On April 15, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to amend NYSE Rule 98 to provide that when DMMs[5] enter interest on a proprietary basis for the purpose of facilitating the execution of customer orders, that interest would not be required to be designated as DMM interest.

A. Background

The Exchange represents that in 2014 it amended NYSE Rule 98 to adopt a principles-based approach to prohibit the misuse of material nonpublic information by a member organization that operates a DMM unit and to make conforming changes to other Exchange rules.[6] According to the Exchange, those rule changes provide member organizations operating DMM units with the ability to integrate DMM unit trading with other trading units, while maintaining tailored restrictions to address that DMMs, while on the Trading Floor,[7] may have access to certain Floor-based non-public information. The Exchange states that, by removing prescriptive restrictions, the 2014 Filing was designed to enable a member organization that engages in market-making operations on multiple exchanges to house its DMM operations together with the other market-making operations, even if those operations are customer-facing, or to enable a member organization to consolidate all of its equity trading, including customer-facing operations and the DMM unit, within a single independent trading unit.

The Exchange states that NYSE Rule 98(c) sets forth specific restrictions on the operation of a DMM unit.[8] Among other requirements, NYSE Rule 98(c)(4) provides that any interest entered into Exchange systems by the DMM unit in DMM securities[9] must be identifiable as DMM unit interest. NYSE Rule 98(c)(5) provides that a member organization must provide the Exchange, at such times and in the manner prescribed by the Exchange, with real-time net position information for trading in DMM securities by the DMM unit and any independent trading unit of which it is a part. NYSE Rule 98(d) further specifies that the DMM rules[10] will apply only to a DMM unit's quoting or trading in its DMM securities for its own accounts at the Exchange. Accordingly, the Exchange states, the DMM rules do not apply to any customer orders that a member organization that operates a DMM unit sends to the Exchange as agent.[11]

According to the Exchange, because NYSE Rule 98(c)(4) currently requires that any interest entered into Exchange systems by the DMM unit in DMM securities be identifiable as DMM interest, a DMM unit that is integrated with a customer-facing unit and that sends customer orders in DMM securities to the Exchange in a proprietary capacity must identify those customer orders as DMM interest. As a result, although agency orders are not subject to DMM rules, customer-driven interest entered by a DMM unit on a proprietary basis is subject to all DMM rules.

The Exchange states that none of its member organizations operating a DMM have integrated a DMM unit with a customer-facing trading unit. The Exchange believes that the current rule requiring customer-driven orders that are represented on a proprietary basis to be designated as DMM interest has served as a barrier to achieving such integration.[12] Specifically, according to

[25] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77332 (Mar. 9, 2016), 81 FR 13851 (''Notice'').

[4] Amendment No. 1 is publicly available at *http://www.sec.gov/comments/sr-nyse-2016-16/nyse2016-16.shtml.* Amendment No. 1 replaced the original filing in its entirety. In Amendment No. 1, the Exchange proposes: (1) To clarify that a DMM unit must have received a customer order before it enters a ''customer-driven order'' in DMM securities at the Exchange; (2) to specify that a DMM unit entering a customer-driven order in DMM securities may do so only if the order is entered on a riskless principal basis or if the order is entered on a principal basis to provide price improvement to the customer; and (3) to provide that a mnemonic used to identify a DMM's customer-driven orders in DMM securities may not be used for trading activity at the Exchange in DMM securities that are not customer-driven order, but may be used for trading activities in securities not assigned to the DMM. Furthermore, the Exchange has also added additional text to the filing to explain the revisions contained in Amendment No. 1; to clarify the application of Regulation SHO to DMM orders marked as ''customer-driven orders,'' *see infra* note 15; and to clarify other aspects of the proposed rule change.

[5] As defined in NYSE Rule 2(i), the term ''DMM'' means an individual member, officer, partner, employee or associated person of a Designated Market Maker Unit who is approved by the Exchange to act in the capacity of a DMM.

[6] *See* Securities Exchange Act Release Nos. 72534 (July 3, 2014), 79 FR 39019 (July 9, 2014) (Approval Order) and 71837 (Apr. 1, 2014), 79 FR 19146 (Apr. 7, 2014) (SR–NYSE–2014–12) (''2014 Filing'').

[7] *See* NYSE Rule 6A for the definition of ''Trading Floor.''

[8] As defined in NYSE Rule 98(b)(1), the term ''DMM unit'' means a trading unit within a member organization that is approved pursuant to NYSE Rule 103 to act as a DMM unit.

[9] As defined in NYSE Rule 98(b)(2), the term ''DMM securities'' means any securities allocated to the DMM unit pursuant to NYSE Rule 103B or other applicable rules.

[10] As defined in NYSE Rule 98(b)(3), the term ''DMM rules'' means any rules that govern DMM or DMM unit conduct or trading.

[11] *See* 2014 Filing, *supra* note 6 at 19152 (specifying that Rule 98(d) was added because DMM rules are not applicable to any customer orders routed to the Exchange by a member organization as agent).

[12] According to the Exchange, it is a common practice among market makers that operate as wholesalers, and thus have their own customer orders as well as retail order flow from another broker dealer, to facilitate the execution of customer order flow by representing it on a proprietary basis when those orders are routed to an exchange. Once a customer-driven order that has been represented on a proprietary basis on the Exchange has been executed, the market maker uses the position acquired on the Exchange to fill the customer order

Continued

the Exchange, there are certain scenarios when the rules governing DMMs may conflict with a member organization's obligations with respect to its customers' orders. For example, DMMs are not permitted to enter Market Orders, MOO Orders, CO Orders, MOC Order, LOC Orders, or orders with Sell ''Plus''—Buy ''Minus'' Instructions.[13] However, the Exchange represents that, to comply with customer instructions, a customer-driven order entered by a member organization on a proprietary basis may need to use one of these order types. As another example, the Exchange states that DMMs are restricted from engaging in specified trading in the last ten minutes of trading before the close of trading.[14] But, according to the Exchange, a member organization may have a best-execution obligation to route a customer-driven order to the Exchange in the last ten minutes of trading.

B. Proposed Modifications

The Exchange proposes to replace the phrase ''any interest'' with the phrase ''proprietary interest'' in NYSE Rule 98(c)(4) to clarify that the existing rule only governs proprietary interest of a DMM unit, *i.e.,* interest for the account of the member organization. As further proposed, the Exchange would amend NYSE Rule 98(c)(4) to provide that proprietary interest entered into Exchange systems by the DMM unit in DMM securities would not be required to be identifiable as DMM unit interest if that interest is (1) represented on a riskless principal basis, or on a principal basis to provide price improvement to the customer; and (2) for the purpose of facilitating the execution of an order received from a customer (whether the DMM unit's own customer or the customer of another broker-dealer). The Exchange proposes to define such interest as a ''customer-driven order.'' A member organization entering a customer-driven order would need to have received a customer order before entering a customer-driven order at the Exchange.

The Exchange also proposes to amend NYSE Rule 98(c)(4) to specify that a DMM unit must use a unique mnemonic that identifies to the Exchange its customer-driven orders in DMM securities. Such mnemonics may not be used for trading activity at the Exchange in DMM securities that are not customer-driven orders, but may be used for trading activities in securities not assigned to the DMM. The Exchange believes that requiring a separate mnemonic for customer-driven orders would assist the Exchange in monitoring DMM unit compliance with the proposed rule.

The Exchange further proposes to amend NYSE Rule 98(d) to specify that the rules, fees, or credits applicable to DMM quoting or trading activity would apply only to a DMM unit's quoting or trading in its DMM securities that is for its own account at the Exchange and that has been identified as DMM interest. In addition, the Exchange proposes to add text to NYSE Rule 98(d) to state that (1) customer-driven orders for the account of a DMM unit that have not been identified as DMM interest would not be subject to DMM rules or be eligible for any fees or credits applicable to DMM quoting or trading activity; and (2) customer-driven orders not designated as DMM interest would not be subject to DMM rules, which include restrictions on the availability of certain order types and the entry of specified orders during the last ten minutes of trading.

The Exchange represents that the NYSE Rule 98(c)(5) obligation to provide the Exchange with real-time net position information in DMM securities would continue to be applicable to the DMM unit's position in DMM securities together with any position of a Regulation SHO independent trading unit of which the DMM unit may be included, regardless of whether they are positions resulting from trades in away markets, trades as a result of DMM interest entered at the Exchange, or customer-driven orders routed to the Exchange that were not identified as DMM interest.[15] The Exchange also proposes a non-substantive amendment to NYSE Rule 98(c)(5) to delete the term ''for trading,'' which the Exchange believes is extraneous rule text.

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.[16] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[17] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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 believes that the proposed rule change will help to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, because the Exchange has proposed a mechanism that is reasonably designed to distinguish a DMM unit's own proprietary trading on the Exchange in its assigned securities from a DMM unit's activity in representing customer orders as principal. In light of the market-making privileges and obligations of DMMs, the Exchange has

either on a riskless-principal basis or with price improvement to the customer.

[13] *See* NYSE Rule 104(b)(vi).

[14] *See* NYSE Rule 104(g)(i)(A)(III) (defining Prohibited Transactions). Specifically, according to the Exchange, a DMM with a long position in a security is prohibited from making a purchase in a security that results in a new high price on the Exchange for the day, and a DMM with a short position in a security is prohibited from making a sale in that security that results in a new low price for the day.

[15] Under Regulation SHO, determination of a seller's net position is based on the seller's position in the security in all of its accounts, absent aggregation unit treatment under Rule 200(f) of Regulation SHO. *See* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48010, n.22 (Aug. 6, 2004); *see also* Securities Exchange Act Release Not 48709 (Oct. 29, 2003), 68 FR 62972, 62991 and 62994 (Nov. 6, 2003); Letter from Richard R. Lindsey, Director, Division of Market Regulation, to Roger D. Blanc, Wilkie Farr & Gallagher, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 1038, p. 5 (Nov. 23, 1998); Securities Exchange Act Release No. 30772 (June 3, 1992), 57 FR 24415, 24419 n.47 (June 9, 1992); Securities Exchange Act Release No. 27938 (Apr. 23, 1990), 55 FR 17949, 17950 (Apr. 30, 1990). The Commission adopted a narrow exception to Regulation SHO's ''locate'' requirement only for market makers engaged in bona-fide market making in the security at the time they effect the short sale. *See* 17 CFR 242.203(b)(2)(iii); *see also* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48015 (Aug. 6, 2004); Securities Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690, 61698–9 (Oct. 17, 2008). Broker-dealers would not be able to rely on the Exchange's or any self-regulatory organization's designation of market marking for eligibility for the bona-fide market making exception to the ''locate'' requirement, as such designations are distinct and independent from Regulation SHO. Further, the Exchange's designation of proprietary interest or any exclusion from proprietary interest for purposes of NYSE rules is not relevant for purposes of Regulation SHO. Eligibility for the bona-fide market making exception depends on the facts and circumstances and a determination of bona-fide market making is based on the Commission's factors outlined in the aforementioned Regulation SHO releases. It should also be noted that a determination of bona-fide market making is relevant for the purposes of the close-out obligations under Rule 204 of Regulation SHO. *See* 17 CFR 242.204(a)(3).

[16] 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).

[17] 15 U.S.C. 78f(b)(5).

imposed certain restrictions on a DMM unit's trading in assigned securities, but those restrictions, according to the Exchange, may cause a conflict with a DMM unit's obligations to its customer when representing that customer's order as principal. The Commission believes that the proposal is reasonably designed to permit DMM units to comply with their obligations when engaging in proprietary trading on the Exchange in assigned securities, while also allowing a DMM unit to comply with customer instructions and the duty of best execution when representing customer orders as principal.

The Commission also notes that the Exchange's proposal includes certain safeguards that should help to prevent potential mismarking of orders as ''customer-driven orders'' and to assist the Exchange in monitoring for compliance by DMM units with Rule 98 as amended. The Commission notes that, under the proposal, all proprietary interest entered into Exchange systems by the DMM unit in DMM securities will be considered DMM unit interest unless that interest is (1) for the purpose of facilitating the execution of an order that has already been received from a customer (whether the DMM unit's own customer or the customer of another broker-dealer); and (2) represented on a riskless principal basis, or on a principal basis to provide price improvement to the customer. Moreover, the Commission notes that a DMM unit must use a unique mnemonic that identifies to the Exchange its customer-driven orders in DMM securities.

Finally, the Commission notes that the Exchange represents that this proposed rule change would not alter in any way a member organization's existing obligations under Section 15(g) of the Act,[18] Regulation SHO,[19] NYSE Rule 5320, or to maintain policies and procedures to ensure that a member organization does not engage in any frontrunning of customer order information in violation of Exchange, FINRA, or federal securities laws.

For the above reasons, the Commission finds that the proposal, as modified by Amendment No. 1, is consistent with the requirements of the Act.

IV. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to 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–2016–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*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 Web site 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. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–16 and should be submitted on or before May 23, 2016.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice of Amendment No. 1 in the **Federal Register**. In Amendment No. 1, the Exchange proposes: (1) To clarify that a DMM unit must have received a customer order before it enters a ''customer-driven order'' in DMM securities at the Exchange; (2) to specify that a DMM unit entering a customer-driven order in DMM securities may do so only if the order is entered on a riskless principal basis or if the order is entered on a principal basis to provide price improvement to the customer; and (3) to provide that a mnemonic used to identify a DMM's customer-driven orders in DMM securities may not be used for trading activity at the Exchange in DMM securities that are not customer-driven order, but may be used for trading activities in securities not assigned to the DMM.

The Commission believes that the revisions proposed in Amendment No. 1 are designed to prevent abuse and facilitate surveillance of the new rules. Therefore, the Commission finds that Amendment No. 1 is consistent with the protection of investors and the public interest.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[20] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (NYSE–2016–16), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10149 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78o(g).

[19] 17 CRF 242.201.

[20] 15 U.S.C. 78s(b)(2).

[21] *Id.*

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

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 6a–3,File No. 270–0015, OMB Control No. 3235–0021

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission

(''Commission'') is soliciting comments on the existing collection of information provided for in Rule 6a–3 (17 CFR 240.6a–3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Section 6 of the Act sets out a framework for the registration and regulation of national securities exchanges. Under Rule 6a–3, one of the rules that implements Section 6, a national securities exchange (or an exchange exempted from registration as a national securities exchange based on limited trading volume) must provide certain supplemental information to the Commission, including any material (including notices, circulars, bulletins, lists, and periodicals) issued or made generally available to members of, or participants or subscribers to, the exchange. Rule 6a–3 also requires the exchanges to file monthly reports that set forth the volume and aggregate dollar amount of certain securities sold on the exchange each month.

The information required to be filed with the Commission pursuant to Rule 6a–3 is designed to enable the Commission to carry out its statutorily mandated oversight functions and to ensure that registered and exempt exchanges continue to be in compliance with the Act.

The Commission estimates that each respondent makes approximately 12 such filings on an annual basis at an average cost of approximately $20 per response. Currently, 19 respondents (19 national securities exchanges) are subject to the collection of information requirements of Rule 6a–3. The Commission estimates that the total burden for all respondents is 114 hours and $4,560 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 shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 26, 2016.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10107 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77709; File No. SR–NSCC–2016–001]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change To Remove From the DTCC Limit Monitoring Tool the 50% Early Warning Limit Alert and Make Technical Revisions to the Rules

April 26, 2016.

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 April 18, 2016, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to NSCC's Rules and Procedures (''Rules'') to remove from the DTCC Limit Monitoring tool the alert that is sent to Members when trading activity in any of their Risk Entities reaches 50% of the pre-set trading limits for that Risk Entity and to make technical revisions, as described in greater detail below.[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Terms not defined herein are defined in the Rules, *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(i) Reasons for Adopting the Proposed Rule Change

NSCC provides its Members with a risk management tool called DTCC Limit Monitoring, for which certain types of Members are required to register.[4] DTCC Limit Monitoring enables Members that use the tool to monitor post-trade activity and to be notified when pre-set trading limits are reached. To use the tool, Members must (1) define one or more ''Risk Entities,'' which may include (i) the trading activity of a single trading desk within the firm; (ii) for Members that clear trades for other firms, *i.e.*, their correspondents, the trading activity of a correspondent firm; (iii) for Members acting as a Special Representative or a QSR, as such terms are defined in the Rules,[5] the trading activity of a firm with which it has a clearing relationship; (iv) the trading activity of a single clearing number within the Member's NSCC account structure; or (v) all trading activity of the Member submitted to NSCC for clearing; and (2) set a trading limit, at a net notional value, for each Risk Entity. DTCC Limit Monitoring then sets early warning limits at 50%, 75%, and 90% of those trading limits.[6] Members receive alerts when trading activity for their Risk Entities reaches each of these early warning limits, as well as the pre-set trading limits.

Since the implementation of DTCC Limit Monitoring in 2014, NSCC has

[4] Rule 54 (DTCC Limit Monitoring) and Procedure XVII (DTCC Limit Monitoring), *supra* note 3; *see* Securities Exchange Act Release No. 71637 (February 28, 2014), 79 FR 12708 (March 6, 2014) (File No. SR–NSCC–2013–12).

[5] Rule 7 (Comparison and Trade Recording Operation) and Procedure IV (Special Representative Service), *supra* note 3.

[6] Rule 54 (DTCC Limit Monitoring) and Procedure XVII (DTCC Limit Monitoring, *supra* note 3.

periodically met with a working group of its Members to discuss the functioning of the tool and to confirm it provides Members with effective post-trade surveillance as intended. In response to Member feedback provided during these discussions, NSCC is proposing to remove the 50% early warning alert for the reasons described below.

Additionally, NSCC is proposing to make technical revisions to Procedure XVII (DTCC Limit Monitoring Procedure) primarily to revise the verb tense and add clarity regarding use of the tool.

(ii) Issues the Proposed Rule Change Is Intended To Address

The proposed rule change would address concerns that (1) the 50% early warning alert is set too low and, thus, may not provide Members with useful information for purposes of effective post-trade monitoring; (2) the frequency of the 50% early warning alert could have a negative impact on Member responsiveness to more critical alerts; and (3) the verb tense and certain other language in the Rule may be unclear and/or technically inaccurate.

(iii) Manner in Which the Proposed Rule Change Would Operate To Resolve the Issues

The proposed rule change would remove the 50% early warning alert from DTCC Limit Monitoring. DTCC Limit Monitoring would retain the 75% and 90% early warning alerts, which continue to provide Members with valuable notice of changes in their post-trade activity for purposes of effective risk management.

Additionally, the proposed rule change would make certain technical changes that would clarify the Rule, primarily by updating the verb tense from future tense to present tense to reflect the present applicability of the Rule and by making certain other technical clarifications to language used in the Rule.

(iv) Manner in Which the Proposed Rule Change Would Affect Various Persons

Members that use DTCC Limit Monitoring would no longer receive the 50% early warning alert, but they would continue to receive alerts when their trading activity in each Risk Entity reaches 75% and 90% of their pre-set trading limits. No other changes are proposed with respect to the functioning of DTCC Limit Monitoring.

The proposed technical changes are not anticipated to have any effect on Members that use DTCC Limit Monitoring.

(v) Significant Problems Known to the Self-Regulatory Organization That Persons Affected Are Likely To Have in Complying With the Proposed Rule Change

Members that use DTCC Limit Monitoring would not have to take any action as a result of the proposed rule change, and NSCC is not aware of any problems that Members would have in continuing to comply with the Rules [7] that address DTCC Limit Monitoring after the implementation of the proposed rule change.

As stated above, the proposed technical changes are not anticipated to have any effect on Members that use DTCC Limit Monitoring.

(vi) Description of the Proposed Rule Change

In order to implement this proposed rule change, NSCC would amend Section 4 of Procedure XVII (DTCC Limit Monitoring Procedure) of the Rules to remove reference to the 50% early warning alert and to make certain technical clarifications to language used in the Rule, primarily by updating the verb tense used therein. No other changes to the Rules are contemplated by this proposed rule change.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions and to protect investors and the public interest.[8]

By removing the 50% early warning limit alert, which may not provide Members with information that is useful for purposes of post-trade monitoring, but, rather, may distract Members from such information, the proposed rule change would make DTCC Limit Monitoring a more effective tool for Members to monitor their post-trade activity and would enhance their ability to manage risks, facilitating the protection of investors and the public interest from such risks.

Additionally, the proposed technical changes to the Rule, which primarily update the verb tense from future tense to present tense, would provide additional clarity to NSCC Members and would ensure the accuracy of it [sic] Rules by reflecting the current, rather than the future, applicability of the DTCC Limit Monitoring Rule.

Therefore, NSCC believes the proposed rule change would protect investors and the public interest, consistent with the requirements of Section 17A(b)(3)(F) of the Act, cited above.

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have any impact on competition because the proposal would apply equally to all Members that use DTCC Limit Monitoring.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not received any written comments relating to this proposal. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self- regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2016–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2016–001. 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

[7] *Id.*

[8] 15 U.S.C. 78q–1(b)(3)(F).

post all comments on the Commission's Internet Web site (*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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2016–001 and should be submitted on or before May 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10150 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

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 303, SEC File No. 270–450, OMB Control No. 3235–0505

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 303 (17 CFR 242.303) of Regulation ATS (17 CFR 242.300 *et seq.*) under the Securities and Exchange Act of 1934 (''Act'') (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.

Regulation ATS sets forth a regulatory regime for ''alternative trading systems'' (''ATSs''), which are entities that carry out exchange functions but which are not required to register as national securities exchanges under the Act. In lieu of exchange registration, an ATS can instead opt to register with the Commission as a broker-dealer and, as a condition to not having to register as an exchange, must instead comply with Regulation ATS. Rule 303 of Regulation ATS (17 CFR 242.303) describes the record preservation requirements for ATSs. Rule 303 also describes how such records must be maintained, what entities may perform this function, and how long records must be preserved.

Under Rule 303, ATSs are required to preserve all records made pursuant to Rule 302, which includes information relating to subscribers, trading summaries, and time-sequenced order information. Rule 303 also requires ATSs to preserve any notices provided to subscribers, including, but not limited to, notices regarding the ATSs operations and subscriber access. For an ATS subject to the fair access requirements described in Rule 301(b)(5)(ii) of Regulation ATS, Rule 303 further requires the ATS to preserve at least one copy of its standards for access to trading, all documents relevant to the ATS's decision to grant, deny, or limit access to any person, and all other documents made or received by the ATS in the course of complying with Rule 301(b)(5) of Regulation ATS. For an ATS subject to the capacity, integrity, and security requirements for automated systems under Rule 301(b)(6) of Regulation ATS, Rule 303 requires an ATS to preserve all documents made or received by the ATS related to its compliance, including all correspondence, memoranda, papers, books, notices, accounts, reports, test scripts, test results, and other similar records. As provided in Rule 303(a)(1), ATSs are required to keep all of these records, as applicable, for a period of at least three years, the first two in an easily accessible place. In addition, Rule 303 requires ATSs to preserve records of partnership articles, articles of incorporation or charter, minute books, stock certificate books, copies of reports filed pursuant to Rule 301(b)(2), and records made pursuant to Rule 301(b)(5) for the life of the ATS.

The information contained in the records required to be preserved by Rule 303 will be used by examiners and other representatives of the Commission, state securities regulatory authorities, and the self-regulatory organizations to ensure that ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. Without the data required by the Rule, regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

Respondents consist of ATSs that choose to register as broker-dealers and comply with the requirements of Regulation ATS. There are currently 84 respondents. To comply with the record preservation requirements of Rule 303, these respondents will spend approximately 1,260 hours per year (84 respondents at 15 burden hours/respondent).

Written comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 26, 2016.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10111 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77706; File No. SR–NASDAQ–2016–059]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Require an Issuer of Securities Listed Under the Rule 5700 Series To Notify Nasdaq About the Replacement of the Index, Portfolio, or Reference Asset Underlying the Security and Pay a Fee in Connection With the Change

April 26, 2016.

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 April 20, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to require that an issuer of securities listed under the Rule 5700 Series notify Nasdaq about the replacement of the index, portfolio, or reference asset underlying the security and pay a fee in connection with the change.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.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 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

Nasdaq rules require issuers to notify Nasdaq about substitution listing events and impose fees associated with those notifications. Specifically, Rule 5005(a)(40) defines a ''Substitution Listing Event'' as certain changes in the equity or legal structure of a company [3] and Rule 5250(e)(4) requires a listed company to provide notification to Nasdaq about these events no later than 15 days before implementation of the event. These events generally require Nasdaq to review the entity for compliance with the applicable listing requirements.

Nasdaq proposes to expand the definition of a Substitution Listing Event to include cases where an issuer of securities listed under the Rule 5700 Series replaces, or significantly modifies, the index, portfolio, or reference asset underlying its security (including, but not limited to, a significant modification to the index methodology, a change in the index provider, or a change in control of the index provider). This type of change requires that Nasdaq review the changes to the index, portfolio, or reference asset for compliance with the applicable listing requirements and may require Nasdaq to make a rule filing with the Commission to continue listing the product with the revised index, portfolio, or reference asset.[4]

Nasdaq believes it is appropriate to require notification of these changes in the same manner as other Substitution Listing Events,[5] which will increase to 15 days the time available to Nasdaq to conduct its initial review of the revised index, portfolio, or reference asset underlying the security, evaluate compliance with the listing requirements, and determine if a rule filing is required.[6]

Nasdaq also proposes to modify Rule 5701 to highlight that a change to the index, portfolio, or reference asset underlying a security is a Substitution Listing Event that requires 15 calendar days' notice. The new language also emphasizes that such a change may affect the company's compliance with the listing requirements and may require Nasdaq to file a new rule filing pursuant to Section 19(b)(1) of the Act [7] and for such rule filing to be approved by the SEC or otherwise take effect (as applicable), before the product can be listed or traded. The new rule language also indicates that Nasdaq will halt trading if a company effectuates a change that requires such a filing before it is approved by the SEC or otherwise takes effect (as applicable). The new rule language would also indicate that Nasdaq will commence delisting proceedings if a company effectuates a change in the case where Nasdaq determines not to submit a rule filing or withdraws a rule filing, or where the SEC disapproves a rule filing.[8]

Nasdaq also believes that it is appropriate in these instances to charge the $5,000 fee assessed for Substitution Listing Events,[9] which will offset the costs associated with Nasdaq's listing review and, if necessary, rule filing, as well as the costs to maintain and revise Nasdaq's records, and distribute information to market participants about the change. Therefore, Nasdaq is adding language to Rules 5730 and 5740 to clarify that the existing Substitution Listing Event fee also applies to situations where a company changes the index, portfolio, or reference asset underlying its security.

Finally, Nasdaq proposes to remove transitional language within Rule 5005(a)(40), which excluded a business combination that was publicly announced prior to October 15, 2013,

[3] A ''Substitution Listing Event'' means: A reverse stock split, re-incorporation or a change in the Company's place of organization, the formation of a holding company that replaces a listed Company, reclassification or exchange of a Company's listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, a business combination described in IM–5101–2 (unless the transaction was publicly announced in a press release or Form 8–K prior to October 15, 2013), or any technical change whereby the Shareholders of the original Company receive a share-for-share interest in the new Company without any change in their equity position or rights. *See* Rule 5005(a)(40).

[4] Other types of changes may also require Nasdaq to make a rule filing with the Commission to continue listing the changed product.

[5] Listed companies provide notification of a Substitution Listing Event via Nasdaq's Listing Center on the Company Event Notification Form.

[6] Currently, at a minimum, Nasdaq believes that an issuer must disclose such changes under Rule 5250(b)(1), which requires public disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions, and must notify Nasdaq's MarketWatch department 10 minutes prior to such announcement.

[7] 15 U.S.C. 78s(b)(1).

[8] The proposed rule change would also add language to Rule 5701 to encourage companies to consult with Nasdaq staff sufficiently in advance of such changes to allow review and preparation of a rule filing and SEC approval, if necessary, and to clarify that Nasdaq has sole discretion as to whether it chooses to submit a rule filing and, if submitted, whether to withdraw such rule filing.

[9] *See* Securities Exchange Act Release No. 76550 (December 3, 2015), 80 FR 76605 (December 9, 2015) (SR–NASDAQ–2015–146, adopting a Substitution Listing Event fee for securities listed under the Rule 5700 Series).

from being considered a Substitution Listing Event. Nasdaq does not believe that any company listed on Nasdaq has an uncompleted business combination announced prior to that date, which would be considered a Substitution Listing Event. As such, Nasdaq believes this is a technical change to remove an expired transition.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[10] in general, and with Sections 6(b)(4) and (5) of the Act,[11] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq believes that the proposed requirement that the issuer of securities listed under the Rule 5700 Series notify Nasdaq 15 calendar days in advance of changes to the index, portfolio, or reference asset underlying the security is consistent with the investor protection objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market system, and in general to protect investors and the public interest.

Specifically, the proposed change will help ensure that Nasdaq has sufficient time to review the revised index, portfolio, or reference asset and determine whether the product complies with Nasdaq's listing requirements and whether a rule filing must be filed by Nasdaq pursuant to Section 19(b)(1) of the Act and approved by the Commission or otherwise take effect (as applicable), which will help protect investors.

Moreover, by including this category of changes in the definition of a Substitution Listing Event, Nasdaq will charge a $5,000 fee in connection with the changes, which will help ensure that adequate resources are available for Nasdaq to conduct this review. In addition, the proposed change will clarify that Nasdaq will halt a security if the issuer implements a change that requires a rule filing before that rule filing is approved or effective (as applicable), and delist the security if Nasdaq determines not to file or withdraws the rule filing, or the SEC disapproves the rule filing, thereby protecting investors.

Including changes to the index, portfolio, or reference asset underlying a security in the list of Substitution Listing Events subject to a $5,000 fee is reasonable and equitably allocated in that it is designed to compensate Nasdaq for the work required in connection with effecting changes that the issuer has initiated. As noted above, changes made to a security's underlying index, portfolio or reference assets require Nasdaq to review the issuer's listing compliance and may require Nasdaq to submit a rule filing to the Commission. It is reasonable and equitable to allocate the costs of these actions to the issuer that implements the change or event, just as Nasdaq does in connection with other Substitution Listing Events.

The proposed change to eliminate transitional language from Rule 5005(a)(40) will simplify Nasdaq's rules, thereby removing a potential impediment to a free and open market and national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq 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, as amended. This rule proposal is not primarily based on competition, but rather is designed to ensure that Nasdaq staff has adequate time and resources to review a change to an index, portfolio, or reference asset for compliance with the listing requirements and to file and obtain approval or effectiveness of a rule change, if necessary. As such, Nasdaq believes the proposed change will have no impact on competition.

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

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 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 [12] and subparagraph (f)(6) of Rule 19b-4 thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) [14] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that such waiver will allow the Exchange to immediately receive the benefit of additional time to review changes to indices, portfolios, or reference assets underlying securities listed under the Rule 5700 Series for compliance with the listing requirements and federal securities law requirements. The Exchange further states that the additional notification time required by the proposal relating to such changes will help to prevent potential disruptions to listings of securities listed under the Rule 5700 Series, thereby helping to protect investors and the public interest.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Exchange states that the proposal will help ensure that the Exchange has sufficient time to review a revised index, portfolio, or reference asset underlying a security listed under the Rule 5700 Series to determine whether the product complies with the Exchange's listing requirements and

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

whether a rule filing must be filed by the Exchange pursuant to Section 19(b)(1) of the Act. Accordingly, the Commission designates the proposed rule change to be operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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–NASDAQ–2016–059 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–059. 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 Web site (*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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–059 and should be submitted on or May 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10147 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77716; File No. SR–ISEMercury-2016–09]

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing of Proposed Rule Change Relating to Preferenced Volume

April 26, 2016.

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 April 13, 2016, ISE Mercury, LLC (the ''Exchange'' or ''ISE Mercury'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

The purpose of this proposed rule change is to amend the Exchange's Schedule of Fees to explain that while 100% of eligible traded volume preferenced to a Market Maker counts towards that member's volume tiers, Market Makers not preferenced on an order will receive credit for the volume those non-preferenced members execute. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

On March 10, 2016, ISE Mercury introduced fee and rebate tiers for Market Maker[3] and Priority Customer[4] orders based on the average daily volume (''ADV'') that a member executes in Priority Customer orders.[5] The Exchange assesses fees and rebates for Market Maker and Priority Customer orders based on five tiers of Total Affiliated Priority Customer ADV, as described in Table 4 of the Fee Schedule:[6] 0—19,999 contracts (''Tier 1''), 20,000—39,999 contracts (''Tier 2''), 40,000—59,999 contracts (''Tier 3''), 60,000—79,999 contracts (''Tier 4''), and 80,000 or more contracts (''Tier 5'').[7] As

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term Market Makers refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively.

[4] A ''Priority Customer'' is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in ISE Mercury Rule 100(a)(37A).

[5] *See* Securities Exchange Act Release No. 77409 (March 21, 2016), 81 FR 16240 (March 25, 2016) (SR–ISE Mercury–2016–05).

[6] The Total Affiliated Priority Customer ADV category includes all Priority Customer volume executed on the Exchange in all symbols and order types, including volume executed in the PIM, Facilitation, and QCC mechanisms.

[7] The highest tier threshold attained applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants. Any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.

is the case on ISE Mercury's affiliated exchanges—the International Securities Exchange, LLC (''ISE'') and ISE Gemini, LLC (''ISE Gemini'')—the Exchange's ADV calculation includes volume executed by affiliated members. In particular, the Exchange aggregates all eligible volume from affiliated members in determining applicable tiers, provided that there is at least 75% common ownership between the members as reflected on the member's Form BD, Schedule A. While this method of aggregating volume is beneficial to large firms with multiple affiliated members, the Exchange believed that it was also important to give smaller firms the ability to compete for more favorable fees and rebates.

On March 10, 2016, the Exchange adopted ADV tiers that are based on preferenced volume [8]—*i.e.,* volume directed to a specific Market Maker as provided in Supplementary Material .03 to Rule 713.[9] In particular, the Exchange gives Market Makers volume credit for 100% of eligible traded volume preferenced to that member,[10] regardless of the actual allocation that the Market Maker receives. For example, assume Market Maker ABC is quoting at the national best bid or offer (''NBBO'') and receives a Preferenced Order for 10 contracts from an unaffiliated firm for the account of a Priority Customer. If there are other Market Makers quoting at the NBBO, Market Maker ABC may receive an allocation of 4 contracts—*i.e.,* 40% of the order. Rather than counting only the 4 contracts executed towards the Market Maker's volume total, the Exchange gives that Market Maker credit for the full 10 contracts preferenced to it. This is the same credit the member would receive if the 10 contracts were sent to the exchange by an affiliated member. The purpose of the current rule filing is to clarify that even though Market Maker ABC receives full credit for all 10 contracts when executing 4 contracts, the non-preferenced Market Makers that execute the remaining 6 contracts will still receive credit for those 6 contracts as they normally would.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[11] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[12] because it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed clarification is reasonable and equitable because it will eliminate member confusion regarding how volume is counted among Market Makers when contracts are preferenced to a Market Maker and executed by preferenced and non-preferenced Market Makers.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[13] the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed rule change merely clarifies an existing rule already in effect.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 for 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 [14] and Rule 19b–4(f)(6) thereunder.[15]

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–ISEMercury–2016–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISEMercury–2016–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*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

[8] *See* Securities Exchange Act Release No. 77412 (March 21, 2016), 81 FR 16238 (March 25, 2016) (SR–ISE Mercury–2016–06).

[9] An Electronic Access Member (''EAM'') may designate a ''Preferred Market Maker'' on orders it enters into the System (''Preferenced Orders''). Supplementary Material .03 to Rule 713 describes the Exchange's rules concerning Preferenced Orders.

[10] ''Eligible volume'' refers to volume that would otherwise count towards to applicable volume tier. In the case of ADV thresholds based on Total Affiliated Priority Customer ADV, as currently implemented on ISE Mercury, all Priority Customer volume would be ''eligible.'' *See* note 6 supra.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(8).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISEMercury–2016–09, and should be submitted on or before May 23, 2016.[16]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10155 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32097; 812–14645]

Terra Capital Partners, LLC, et al.; Notice of Application

April 26, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 57(a)(4) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF THE APPLICATION: Terra Capital Partners, LLC (the ''Sponsor''), Terra Income Fund 6, Inc. (the ''Company''), Terra Income Advisors, LLC (the ''Advisor''), on behalf of itself and its successors,[1] and Terra Capital Markets, LLC (the ''Dealer Manager'' and collectively with the Sponsor, the Company, and the Advisor, the ''Applicants''), on behalf of itself and its successors, request an order to permit the Applicants to complete certain transactions in connection with an amendment to the dealer-manager agreement entered into by and among the Company, the Advisor, and the Dealer Manager.

FILING DATE: The application was filed on April 25, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 17, 2016, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants, Bruce D. Batkin, Terra Income Fund 6, Inc., c/o Terra Capital Partners, LLC, 805 Third Avenue, 8th Floor, New York, New York 10022.

FOR FURTHER INFORMATION CONTACT: Kieran G. Brown, Senior Counsel, at (202) 551–6773, or James M. Curtis, Branch Chief, at (202) 551–6712 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. The Sponsor is a Delaware limited liability company and served as the organizer and sponsor of the Company. The Sponsor is also the parent company of the Advisor and the Dealer Manager. Since its formation in February 2001, the Sponsor has organized or acted as investment manager for multiple private real estate investment funds (''REITs'').

2. The Company, a Maryland corporation, is an externally managed, non-diversified, closed-end management investment company that has elected to be regulated as a business development company (''BDC'') under the Act.[2] The Company's investment Objectives and Strategies [3] are to pay attractive and stable cash distributions and to preserve, protect and return capital contributions to the holders (''Common Shareholders'') of the Company's common stock (''Common Shares''). On March 2, 2015, the Company filed a public registration statement on Form N–2 (the ''Registration Statement'') with the Commission to offer its Common Shares in a continuous public offering (the ''Offering''). The Registration Statement was declared effective on April 20, 2015. Since commencing the Offering and through April 14, 2016, the Company has sold 2,444,185.856 Common Shares, including Common Shares purchased by the Sponsor in both an initial private placement and from the Offering. The Company currently has a five-member board of directors (the ''Board'') of whom three are not ''interested persons'' of the Company within the meaning of section 2(a)(19) of the Act (the ''Non-interested Directors'').

3. The Advisor is a Delaware limited liability company that is registered as an investment adviser under the Investment Advisers Act of 1940. The Advisor serves as the investment adviser to the Company.

4. The Dealer Manager is a Delaware limited liability company that serves as the dealer manager of the Company pursuant to a dealer manager agreement dated April 20, 2015 by and among the Company, the Advisor and the Dealer Manager (the ''Dealer Manager Agreement''). The Dealer Manager is duly registered as a broker-dealer pursuant to the provisions of the 1934 Act, a member in good standing with the Financial Industry Regulatory Authority, Inc. (''FINRA''), and a broker dealer duly registered as such in those states where the Dealer Manager is required to be registered in order to carry out the Offering.

5. Currently, the Common Shares are sold at a public offering price of $12.50

[16] 17 CFR 200.30–3(a)(12).

[1] The term ''successor,'' as applied to each entity, means an entity that results from a reorganization into another jurisdiction or change in the type of business organization.

[2] The Company was incorporated in Maryland in 2013 and commenced operations on June 24, 2015, upon raising gross proceeds in excess of $2.0 million in its initial public offering. Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[3] The ''Objectives and Strategies'' means the investment objectives and strategies, as described in the Registration Statement, other filings the Company has made with the Commission under the Securities Act of 1933, as amended or under the Securities Exchange Act of 1934, as amended (the ''1934 Act''), and the Company's reports to Common Shareholders.

per Common Share. This public offering price includes $1.25 in underwriting compensation (the ''Underwriting Compensation'') payable to the Dealer Manager. The Underwriting Compensation as set forth in the current prospectus contained in the Registration Statement (the ''Prospectus'') consists of three components: A 6% selling commission, a 3% dealer manager fee, and a 1% broker-dealer fee (collectively, the ''Upfront Sales Load''), all of which are paid to the Dealer Manager and a portion of which is re-allowed to the selling broker-dealers as set forth in the Prospectus. The Underwriting Compensation terms are currently governed by the Dealer Manager Agreement.

6. The Board, including the Non-Interested Directors, has determined that it is in the best interests of the Common Shareholders to amend the Dealer Manager Agreement (the ''Dealer Manager Agreement Amendment'') solely to change the Underwriting Compensation terms to reduce the Upfront Sales Load and implement an asset-based, ongoing distribution fee (a ''Distribution Fee''). The proposed change would reduce the selling commissions and dealer manager fees from 6.0% and 3.0% to 3.0% and 1.5%, respectively, of gross offering proceeds or an aggregate reduction in Upfront Sales Load of 4.5%. The proposed change also implements the Distribution Fee of 1.125% of gross offering proceeds, payable annually for four years, or 4.5%. The maximum Distribution Fee of 4.5% is therefore equal to the reduction in the Upfront Sales Load. All Common Shares will continue to have an offering price of $12.50 per Common Share after the proposed change.

7. To ensure that, following the change in Underwriting Compensation, the net proceeds to the Company from the sale of all Common Shares will be equivalent, the Dealer Manager proposes to reimburse to the Company an amount equal to the Distribution Fee to be paid with respect to the Common Shares outstanding, or 4.5% of the gross proceeds from the Offering, before the implementation of the proposed Dealer Manager Agreement Amendment (the ''Distribution Fee Reimbursement''). Once this amount is returned to the Company, (1) all Common Shares will become subject to the same 5.5% Upfront Sales Load; (2) all holders of Common Shares will become subject to the same aggregate Distribution Fee of 4.5%; (3) the net proceeds to the Company from the sale of all Common Shares (whether issued before or after the implementation of the Dealer Manager Agreement Amendment) will be the same, $11.25 per Common Share; and (4) all Common Shares will be subject to the same 10% in Underwriting Compensation, consistent with the limitations imposed by Conduct Rule 2310 of FINRA (''Conduct Rule 2310'').

8. Applicants believe that, if the Dealer Manager Agreement Amendment is entered into, a greater amount of the existing and future Common Shareholders' capital will be available for investment at an earlier stage in the Company's investment cycle. This would permit the Company and all Common Shareholders to benefit from the income generated from such investments while the Distribution Fee Payment is deferred, enable the Company to achieve its investment objectives and acquire a diversified portfolio, and lead to greater demand for the Company's Common Shares, which would further benefit the Common Shareholders because of the lower operating expense ratio and Company portfolio diversification resulting from such increased sales of Common Shares.

9. The Company believes that the Dealer Manager Agreement Amendment will enable the Common Shares to remain competitive with similar investments sold by broker-dealers. Because the per share estimated value of Common Shares that appears on customer account statements for Common Shares with a low Upfront Sales Load combined with a Distribution Fee is greater than the per share estimated value of Common Shares with a high Upfront Sales Load and no Distribution Fee, the Company believes that broker-dealers generally would prefer selling Common Shares with a with a low Upfront Sales Load and a Distribution Fee.[4] To accommodate the needs of these broker-dealers, other investment products (*e.g.,* non-traded REITs) offer common shares with a low Upfront Sales Load and a Distribution Fee, and the inability of the Company to offer Common Shares with a similar fee structure places the Company at a competitive disadvantage.

10. The Board, including the Non-Interested Directors, after reviewing and evaluating the proposed transactions and the Dealer Manager Agreement Amendment, determined that: (i) The Dealer Manager Agreement Amendment is in the best interests of the Company and its Common Shareholders; (ii) the services to be rendered by the Dealer Manager are required for the operation of the Company; (iii) the Dealer Manager can provide the services such that the nature and quality of the services are at least equal to those provided by others; and (iv) the fees charged are fair and reasonable in light of the usual and customary charges made by others for services of the same nature and quality.

11. The Company has filed a Post-Effective Amendment to its registration statement disclosing the changes to the Underwriting Compensation terms and will seek a declaration of effectiveness of such Post-Effective Amendment by the Commission prior to commencing sales of the Common Shares subject to the revised Underwriting Compensation as implemented by the Dealer Manager Agreement Amendment. All current Common Shares outstanding immediately prior to the implementation of the Dealer Manager Agreement Amendment and Common Shares to be issued upon effectiveness of the Post-Effective Amendment (exclusive of Common Shares to be issued pursuant to the Company's distribution reinvestment plan, as further described in the Prospectus) will be subject to the same Distribution Fee.

Applicants' Legal Analysis

1. Section 57(a) of the Act prohibits certain transactions between a BDC and persons related to the BDC absent an order from the Commission. Specifically, section 57(a)(4) makes it unlawful for any person who is related to a BDC in a manner described in section 57(b), acting as principal, knowingly to effect any transaction in which the BDC or a company controlled by such BDC is a joint or a joint and several participant with that person in contravention of rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by the BDC or controlled company on a basis less advantageous than that of the other participant. Section 57(b) specifies the persons to whom the prohibitions of section 57(a)(4) apply. Under section 57(b)(2), these persons include any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with a BDC (except the BDC itself and

[4] NASD Rule 2340 requires, among other things, broker-dealers to include on customer account statements a ''per share estimated value'' for shares of non-traded, continuously offered BDCs and certain similar investments. Amendments to NASD Rule 2340 effective April 11, 2016 require, among other things, broker-dealers to include on the customer account statements a ''per share estimated value,'' generally the current public offering price of the Common Shares minus sales charges and estimated organization and offering expenses. Prior to the amendment of Rule 2340, the general industry practice was to use the public offering price as the per share estimated value on customer account statements.

any person who, if it were not directly or indirectly controlled by the BDC, would not be directly or indirectly under the control of a person who controls the BDC), or any person who is, within the meaning of section 2(a)(3)(C) of the Act, an affiliated person of such person. Sections 2(a)(3)(C) defines an ''affiliated person'' of another person as any person directly or indirectly controlling, controlled by, or under common control with, such other person.

2. Rule 17d–1 under the Act generally prohibits participation by a registered investment company and an affiliated person (as defined in section 2(a)(3) of the Act) or principal underwriter for that investment company, or an affiliated person of such affiliated person or principal underwriter, in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Although the Commission has not adopted any rules expressly under section 57(a)(4), section 57(i) provides that the rules (but not section 17(d) itself) under section 17(d) applicable to registered closed-end investment companies (*e.g.,* rule 17d–1) are, in the interim, deemed to apply to transactions subject to section 57(a).

3. As the investment adviser and principal underwriter to the Company, the Advisor and the Dealer Manager, respectively, are subject to the prohibitions of section 57(a)(4) as a result of section 57(b)(2) of the Act. Moreover, the Sponsor may be deemed to control both the Advisor and the Dealer Manager and the Advisor may be deemed to control the Company within the meaning of section 2(a)(9) of the Act.[1] Accordingly, the Company, the Advisor, the Dealer Manager and the Sponsor may be deemed to be affiliated persons of each other under section 2(a)(3)(C) of the Act because they are under common control of the Sponsor, and thus the Advisor, the Dealer Manager and the Sponsor would be persons described in section 57(b)(2) subject to the prohibitions of section 57(a)(4). The Distribution Fee Reimbursement and the Dealer-Manager Agreement Amendment (the ''Proposed Transactions'') might be deemed a ''joint enterprise or other joint arrangement,'' within the meaning of section 57(a)(4) of the Act and rule 17d–1 thereunder. Therefore, the Sponsor, the Advisor, the Dealer Manager, and the Company may be prohibited from engaging in the Proposed Transactions as a result of the prohibitions of section 57(a)(4) and rule 17d–1, without a grant of the Order of the Commission.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants believe that the representations and conditions set forth in the application will ensure that the Proposed Transactions are consistent with the protection of the Company's Shareholders, including the Current Common Shareholders (as herein defined), and with the purposes intended by the policies and provisions of the Act. Applicants state that the Company's participation in the Proposed Transactions will be consistent with the provisions, policies, and purposes of the Act and on a basis that is not different from or less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Company will ensure that total Underwriting Compensation payable in the Offering will not exceed 10% of the gross proceeds of the Offering, consistent with Conduct Rule 2310.

2. For the period of time in which the Distribution Fee is payable, the Dealer Manager will waive any annual Distribution Fee payment to which it is otherwise entitled in an amount sufficient to ensure that the total return experienced by the holders of the Company's Common Shares immediately prior to the implementation of the Dealer Manager Agreement Amendment (the ''Current Common Shareholders'') is not less than the total return the Current Common Shareholders would have experienced if the Proposed Transactions had not occurred and the Dealer Manager Agreement had not been amended.

For the Commission, by the Division of Investment Management, under delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10109 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Order of Suspension of Trading; In the Matter of Pineapple Express, Inc.

April 28, 2016.

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Pineapple Express, Inc. (CIK No. 1654672) because of recent, unusual and unexplained market activity in the company's stock that raises concerns about the adequacy of publicly-available information regarding the company. Pineapple Express, Inc. is a Wyoming corporation with its principal place of business listed as Los Angeles, California, with stock quoted on OTC Link (previously ''Pink Sheets'') operated by OTC Markets Group, Inc. under the ticker symbol PNPL.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on April 28, 2016, through 11:59 p.m. EDT, on May 11, 2016.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10295 Filed 4–28–16; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77714; File No. SR–NASDAQ–2016–028]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of the Shares of the iSectors Post-MPT Growth ETF of ETFis Series Trust I

April 26, 2016.

I. Introduction

On February 23, 2016, The NASDAQ Stock Market LLC (''Exchange'' or ''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''

or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the iSectors Post-MPT Growth ETF (''Fund''), a series of ETFis Series Trust I (''Trust''), under Nasdaq Rule 5735. The proposed rule change was published for comment in the **Federal Register** on March 11, 2016.[3] On April 14, 2016, (a) the Exchange filed Amendment No. 1 to the proposed rule change,[4] and (b) 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] The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment No. 1 thereto.

II. Exchange's Description of the Proposal

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund will be an actively managed exchange-traded fund (''ETF''). The Shares will be offered by the Trust,[7] which is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission.[8] The Fund will be a series of the Trust.

Virtus ETF Advisers LLC will be the investment adviser (''Adviser'') to the Fund. iSectors, LLC will be the investment sub-adviser (''Sub-Adviser'') to the Fund. ETF Distributors LLC will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange states that, while the Adviser and Sub-Adviser are not registered as broker-dealers,[9] the Adviser (but not the Sub-Adviser) is affiliated with a broker-dealer. The Exchange represents that the Adviser has implemented a fire wall with respect to that broker-dealer regarding access to information concerning the composition of, and changes to, the portfolio, and personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the portfolio.[10]

The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including the Fund's portfolio holdings and investment restrictions.[11]

A. Exchange's Description of the Fund's Principal Investments

The Fund's investment objective will be to provide growth of capital, with a secondary emphasis on capital preservation, independent of individual market conditions. The Fund will seek to achieve its investment objective by utilizing a long-only, tactically-managed exposure to sectors of the U.S. equity market and U.S. fixed income markets. To obtain this exposure, the Sub-Adviser will invest, under normal market conditions,[12] the Fund's assets in: (1) ETFs,[13] exchange-traded notes (''ETNs''),[14] and exchange-traded trusts that hold commodities (''ETTs'') (ETFs, ETNs, and ETTs, collectively, ''ETPs''); [15] (2) individually selected U.S. exchange-traded common stocks (when the Sub-Adviser determines that investing in them would be more efficient or otherwise advantageous to do so); (3) money market funds; (4) U.S. treasuries; [16] or (5) money market

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77301 (Mar. 7, 2016), 81 FR 978 (''Notice'').

[4] In Amendment No. 1, the Exchange clarified that: (a) all statements and representations made in the proposal regarding the description of the portfolio, limitations on portfolio holdings or reference assets, or the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange; (b) the issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements; (c) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements; (d) if the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series; (e) the Fund will not invest in inverse or inverse leveraged ETPs (as defined herein); and (f) no more than 25% of the Fund's holdings will be invested in leveraged ETPs. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise novel regulatory issues, Amendment No. 1 is not subject to notice and comment. Amendment No. 1 to the proposed rule change is available at: *http://www.sec.gov/comments/sr-nasdaq-2016–028/nasdaq2016028-1.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 77623 (Apr. 14, 2016), 81 FR 23333 (Apr. 20, 2016).

[7] According to the Exchange, the Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the Investment Company Act of 1940 (''1940 Act''). The Exchange also states that, in compliance with Nasdaq Rule 5735(b)(5), which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933. *See* Notice, *supra* note 3, 81 FR at 12990.

[8] *See* Notice, *supra* note 3, 81 FR at 12990. *See* Registration Statement on Form N–1A for the Trust filed on December 2, 2015 (File Nos. 333–187668 and 811–22819).

[9] *See* Notice, *supra* note 3, 81 FR at 12990–12991.

[10] The Exchange further represents that, in the event (a) the Adviser or the Sub-Adviser registers as a broker dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, and changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the portfolio. *Id.*

[11] The Commission notes that additional information regarding the Fund, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (''NAV''), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. *See* Notice and Registration Statement, *supra* notes 3 and 8, respectively.

[12] The term ''under normal market conditions'' as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the equity and fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance. *See* Notice, *supra* note 3, 81 FR at 12991.

[13] According to the Exchange, ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission. The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). The shares of ETFs in which a Fund may invest will be limited to securities that trade in markets that are members of the Intermarket Surveillance Group (''ISG''), which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange. *See infra* note 15.

[14] The ETNs are limited to those described in Nasdaq Rule 5710.

[15] The Fund may invest in the following ETPs: Trust Certificates, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, and Managed Trust Securities (each as described in Nasdaq Rule 5711); Paired Class Shares (as described in Nasdaq Rule 5713); Trust Issued Receipts (as described in Nasdaq Rule 5720); and Exchange-Traded Managed Fund Shares (as described in Nasdaq Rule 5745). *See* Notice, *supra* note 3, at 12991. The Fund may invest in leveraged ETPs (*e.g.,* 2X or 3X), but will not invest in inverse or inverse leveraged ETPs (*e.g.,* –1X or –2X). In addition, no more than 25% of the Fund's holdings will be invested in leveraged ETPs. *See* Amendment No. 1, *supra* note 4.

[16] These securities will include securities that are issued or guaranteed by the U.S. Treasury, by

instruments. To the extent that the Fund invests in ETPs or money market funds to gain domestic exposure, the Fund is considered, in part, a ''fund of funds.'' [17]

B. Exchange's Description of Other Investments for the Fund

In order to seek its investment objective, the Fund will not employ other strategies outside of the above-described ''Principal Investments.'' [18]

C. Exchange's Description of the Fund's Investment Restrictions

According to the Exchange, under normal market conditions, the Fund anticipates investing its total assets in shares of ETPs, individually selected U.S. exchange-traded common stocks, money market funds, U.S. treasuries, or money market instruments.[19] The Fund will not purchase securities of open-end investment companies except in compliance with the 1940 Act. The Fund will not use derivative instruments, including options, swaps, forwards, and futures contracts.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (calculated at the time of investment). The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities or other illiquid assets. Illiquid securities and other illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Exchange states that the Fund intends to qualify for and to elect to be treated as a separate regulated investment company under Subchapter M of the Internal Revenue Code. In addition, under the 1940 Act, the Fund's investment in investment companies will be limited to, subject to certain exceptions: (i) 3% Of the total outstanding voting stock of any one investment company; (ii) 5% of the Fund's total assets with respect to any one investment company; and (iii) 10% of the Fund's total assets with respect to investment companies in the aggregate.[20]

The Fund's investments will be consistent with its investment objective. The Fund does not presently intend to engage in any form of borrowing for investment purposes, and it will not be operated as a ''leveraged ETF,'' *i.e.,* it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.[21]

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[22] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with Section 6(b)(5) of the Exchange Act,[23] which requires, among other things, that the Exchange's rules be designed 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.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,[24] which sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares and any underlying ETPs will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares.[25] On each business day, before commencement of trading in Shares in the Regular Market Session [26] on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (''Disclosed Portfolio,'' as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[27] In addition, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service [28] will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.[29] The Fund's NAV will be determined as of the close of trading on the New York Stock Exchange (ordinarily 4:00 p.m. E.T.) on each day that the New York Stock Exchange is

various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the ''full faith and credit'' of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government. *See* Notice, *supra* note 3, 81 FR at 12991.

[17] *See id.*

[18] *See id.*

[19] According to the Exchange, for temporary defensive purposes, during the initial invest-up period, and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies. For example, it may hold a higher than normal proportion of its assets in cash. During these periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

[20] *See* Notice, *supra* note 3, 81 FR at 12991.

[21] *Id.* at 12991–12992.

[22] 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).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[25] *See* Notice, *supra* note 3, 81 FR at 12993.

[26] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m. E.T.; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m. E.T.).

[27] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on that business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day. *See* Notice, *supra* note 3, 81 FR at 12993. The daily disclosure will include for each portfolio security and other asset of the Fund the following information on the Fund's Web site (if applicable): Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, commodity, index, or other asset or instrument underlying the holding, if any; maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holdings in the Fund's portfolio. The Web site information will be publicly available at no charge. *See id.*

[28] Currently, the Nasdaq Global Index Data Service (''GIDS'') is the Nasdaq global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. The Exchange represents that GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs. *See id.*

[29] *See id.*

open.[30] The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.[31] Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.[32] Price information regarding the ETPs, equity securities, U.S. treasuries, money market instruments, and money market funds held by the Fund will be available through the U.S. exchanges trading these assets, in the case of exchange-traded securities, as well as automated quotation systems, or published or other public sources. Intra-day price information for all assets held by the Fund will also be available through subscription services, such as Bloomberg, Markit, and Thomson Reuters, which can be accessed by authorized participants and other investors.

The Commission also believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange states that it will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[33] Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). In addition, trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.[34] Trading in the Shares also will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth additional circumstances under which Shares of the Fund may be halted.[35] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.[36] In addition, the Exchange states that, while the Adviser and Sub-Adviser are not registered as broker-dealers, the Adviser (but not the Sub-Adviser) is affiliated with a broker-dealer and has implemented a fire wall with respect to that broker-dealer regarding access to information concerning the composition of, and changes to, the portfolio.[37] Further, the Commission notes that the Reporting Authority [38] that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[39] The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[40]

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has represented that:

(1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.

(2) Nasdaq's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to detect and help deter violations of Exchange rules and applicable federal securities laws.

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities and instruments, including the common stock and shares held by the Fund with other markets and other entities that are members of the ISG,[41] and FINRA may obtain trading information regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund from those markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund from markets and other entities that are members of ISG,[42] or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed-income securities held by the Fund

[30] According to the Exchange, the Fund's investments will be valued at market value (*i.e.,* the price at which a security is trading and could presumably be purchased or sold) or, in the absence of market value with respect to any investment, at fair value in accordance with valuation procedures adopted by the Trust's Board (''Board'') and in accordance with the 1940 Act. Common stocks and equity securities (including shares of ETPs) will be valued at the last sales price on that exchange. Portfolio securities traded on more than one securities exchange will be valued at the last sale price or, if so disseminated by an exchange, the official closing price, as applicable, at the close of the exchange representing the principal exchange or market for these securities on the business day as of which the value is being determined. U.S. treasuries are valued using quoted market prices, and money market funds are valued at the net asset value reported by the funds. Money market instruments will typically be valued using information provided by a third-party pricing service. For all security types in which the Fund may invest, the Fund's primary pricing source is Interactive Data Corp.; its secondary source is Reuters; and its tertiary source is Bloomberg. Certain securities may not be able to be priced by pre-established pricing methods. These securities may be valued by the Board or its delegate at fair value. The use of fair value pricing by the Fund will be governed by valuation procedures adopted by the Board and in accordance with the provisions of the 1940 Act. All valuations will be subject to review by the Board or its delegate. *See id.* at 12992.

[31] *See id.* at 12993.

[32] *See id.*

[33] *See id.* at 12994.

[34] The Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. These may include: (1) The extent to which trading is not occurring in the securities and other assets constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.* at 12990; *see also supra* note 10 and accompanying text. The Exchange further represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser, the Sub-Adviser, and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above. *See* Notice, *supra* note 3, 81 FR at 12990–12991.

[38] Nasdaq Rule 5730(c)(4) defines ''Reporting Authority.''

[39] *See* Nasdaq Rule 5735(d)(2)(B)(ii).

[40] According to the Exchange, FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, and the Exchange is responsible for FINRA's performance under this regulatory services agreement. *See* Notice, *supra* note 3, 81 FR at 12994.

[41] For a list of the current members of ISG, *see www.isgportal.org.*

[42] *Id.*

reported to FINRA's Trade Reporting and Compliance Engine.

(4) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(5) Prior to commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value and Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(6) For initial and continued listing, the Fund must be in compliance with Rule 10A–3 under the Act.[43]

(7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets.

(8) The Fund may invest in leveraged ETPs (*e.g.,* 2X or 3X), but will not invest in inverse or inverse leveraged ETPs (*e.g.,* –1X or –2X). In addition, no more than 25% of the Fund's holdings will be invested in leveraged ETPs.

(9) The Fund will not use derivative instruments, including options, swaps, forwards, and futures contracts.

(10) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the exchange.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.[44] If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

This approval order is based on all of the Exchange's representations, including those set forth above, in the Notice, and in Amendment No. 1 to the proposed rule change. The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735, including those set forth in this proposed rule change, as modified by Amendment No. 1 thereto, to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with Section 6(b)(5) of the Act[45] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[46] that the proposed rule change (SR–NASDAQ–2016–028), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10153 Filed 4–29–16; 8:45 am]

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[43] *See* 17 CFR 240.10A–3.

[44] The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will ''surveil'' for compliance with the continued listing requirements. *See, e.g.,* Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428 (April 7, 2016) (SR–BATS–2016–04) (approving a proposed rule change to list and trade shares of the SPDR DoubleLine Short Duration Total Return Tactical ETF), *available at: http://www.sec.gov/rules/sro/bats/2016/34-77499.pdf.* In the context of this representation, it is the Commission's view that ''monitor'' and ''surveil'' both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view ''monitor'' as a more or less stringent obligation than ''surveil'' with respect to the continued listing requirements.

[45] 15 U.S.C. 78f(b)(5).

[46] 15 U.S.C. 78s(b)(2).

[47] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77715; File No. SR–NASDAQ–2016–056]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of the Shares of the PowerShares Variable Rate Investment Grade Portfolio, a Series of the PowerShares Actively Managed Exchange-Traded Fund Trust

April 26, 2016.

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 April 13 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. 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

Nasdaq proposes to list and trade the common shares of beneficial interest of the PowerShares Variable Rate Investment Grade Portfolio (the ''Fund''), a series of the PowerShares Actively Managed Exchange-Traded Fund Trust (the ''Trust''), under Nasdaq Rule 5735 (''Rule 5735''). The common shares of beneficial interest of the Fund are referred to herein as the ''Shares.''

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at Nasdaq'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, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq 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 list and trade the Shares of the Fund under Rule 5735, which rule governs the listing and trading of Managed Fund Shares [3] on the Exchange.[4] The Shares will be offered by the Fund, which will be an actively managed exchange-traded fund (''ETF''). The Fund is a series of the Trust. The Trust was established as a Delaware statutory trust on November 6, 2007. The Trust is registered with the Commission as an open-end management investment company and has filed a post-effective amendment to its registration statement on Form N–1A (the ''Registration Statement'') with the Commission to register the Fund and its Shares under the 1940 Act and the Securities Act of 1933.[5]

Invesco PowerShares Capital Management LLC will serve as the investment adviser (the ''Adviser'') to the Fund. Invesco Advisers, Inc. will serve as the sub-adviser to the Fund (''Sub-Adviser''). Invesco Distributors, Inc. (the ''Distributor'') will serve as the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will act as the administrator, accounting agent, custodian (the ''Custodian'') and transfer agent for the Fund.

Paragraph (g) of Rule 5735 provides that, if the investment adviser to an investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company's portfolio.[6] In addition, paragraph (g) of Rule 5735 further requires that personnel who make decisions on such investment company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the investment company's portfolio.

Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i), which applies to index-based funds and requires ''fire-walls'' between affiliated broker-dealers and investment advisers regarding the index-based fund's underlying benchmark index. Rule 5735(g), however, applies to the establishment of a ''fire wall'' between affiliated investment advisers and the broker-dealers with respect to the investment company's portfolio and not with respect to an underlying benchmark index, as is the case with index-based funds. The Adviser and the Sub-Adviser are not broker-dealers, but they are affiliated with the Distributor, a broker-dealer. The Adviser and the Sub-Adviser have therefore implemented, and will maintain, a fire wall between themselves and the Distributor with respect to access to information concerning the composition and/or changes to the Fund's portfolio. In the event (a) the Adviser or Sub-Adviser becomes newly affiliated with a different broker-dealer (or becomes a registered broker-dealer), or (b) any new adviser or sub-adviser to the Fund is a registered broker-dealer or becomes affiliated with a broker-dealer, each will implement and maintain a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, if applicable, regarding access to information concerning the composition and/or changes to the Fund's portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

Principal Investments

The Fund will be an actively managed ETF, and its investment objectives are to seek to generate current income while maintaining low portfolio duration as a primary objective and capital appreciation as a secondary objective.

The Fund will seek to achieve its investment objectives by investing, under normal market conditions,[7] at

[3] A ''Managed Fund Share'' is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (the ''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[4] The Commission approved Nasdaq Rule 5735 (formerly Nasdaq Rule 4420(o)) in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR–NASDAQ–2008–039). There are already multiple actively managed funds listed on the Exchange; *see, e.g.,* Securities Exchange Act Release Nos. 69464 (April 26, 2013), 78 FR 25774 (May 2, 2013) (SR–NASDAQ–2013–036) (order approving listing and trading of First Trust Senior Loan Fund); and 66489 (February 29, 2012), 77 FR 13379 (March 6, 2012) (SR–NASDAQ–2012–004) (order approving listing and trading of WisdomTree Emerging Markets Corporate Bond Fund). Additionally, the Commission has previously approved the listing and trading of a number of actively-managed funds on NYSE Arca, Inc. pursuant to Rule 8.600 of that exchange. *See, e.g.,* Securities Exchange Act Release No. 68870 (February 8, 2013), 78 FR 11245 (February 15, 2013) (SR–NYSEArca–2012–139) (order approving listing and trading of First Trust Preferred Securities and Income ETF). Moreover, the Commission previously approved the listing and trading of other actively managed funds within the PowerShares family of ETFs. *See, e.g.,* Securities Exchange Act Release Nos. 68158 (November 5, 2012), 77 FR 67412 (November 9, 2012) (SR–NYSEArca–2012–101) (order approving listing and trading of PowerShares S&P 500 Downside Hedged Portfolio); 69915 (July 2, 2013), 78 FR 41145 (July 9, 2013) (SR–NYSEArca–2013–56) (order approving listing of PowerShares China A-Share Portfolio); and 72241 (May 23, 2014), 79 FR 31156 (May 30, 2014) (SR–NASDAQ–2014–027) (order approving listing and trading of PowerShares Multi-Strategy Alternative Portfolio). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

[5] *See* Registration Statement for the Trust, filed on April 13, 2015 (File Nos. 333–147622 and 811–22148). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the1940 Act. *See* Investment Company Act Release No. 28171 (February 27, 2008) (File No. 812–13386) (''Exemptive Order'').

[6] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and the Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with the Advisers Act and Rule 204A–1 thereunder. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[7] The term ''under normal market conditions'' as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. For temporary defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the

least 80% of its net assets (plus any borrowings for investment purposes) in a portfolio of investment-grade, variable rate [8] debt securities that are denominated in U.S. dollars and are issued by U.S. private sector entities or U.S. government agencies and instrumentalities. The Adviser or Sub-Adviser (as applicable) will select the following types of securities for the Fund: (i) Floating rate non-agency commercial mortgage-backed securities [9] (''MBS''), variable rate non-agency residential MBS, variable rate agency [10] MBS, and floating rate non-agency asset-backed [11] securities (including floating rate non-agency commercial real estate collateralized loan obligations (''CLOs'')) (''ABS''); (ii) floating rate corporate debt securities, which will be comprised of corporate notes, bonds, debentures, or loans, and may include 144A securities; [12] (iii) floating rate government sponsored enterprise (''GSEs'') credit risk transfers; [13] (iv) variable rate preferred stock; [14] (v) floating rate U.S government securities, including floating rate agency debt securities; [15] and (vi) ETFs that invest primarily in any or all of the foregoing securities, to the extent permitted by the 1940 Act [16] (any or all of the foregoing securities, excluding variable rate preferred stock and ETFs, are collectively ''Variable Rate Debt Instruments''; Variable Rate Debt Instruments, variable rate preferred stock and ETFs are collectively ''Variable Rate Investments'').

At least 80% of the Fund's net assets will be invested in Variable Rate Debt Instruments or variable rate preferred stock that are, at the time of purchase, investment grade, or in ETFs that invest primarily in any or all of the foregoing securities. Under normal market conditions, Variable Rate Debt Instruments or variable rate preferred stock will be investment grade if, at the time of purchase they have a rating in one of the highest four rating categories of at least one nationally recognized statistical ratings organization (''NRSRO'') (*e.g.,* BBB- or higher by Standard & Poor's Ratings Services (''S&P''), and/or Fitch Ratings (''Fitch''), or Baa3 or higher by Moody's Investors Service, Inc. (''Moody's'')).[17] Unrated securities may be considered investment grade if at the time of purchase, and under normal market conditions, the Adviser or Sub-Adviser (as applicable) determines that such securities are of comparable quality based on a fundamental credit analysis of the unrated security and comparable NRSRO-rated securities. The Fund will not invest more than 20% of its net assets in the aggregate in Variable Rate Debt Instruments that are ABS or non-agency MBS.[18]

Under normal market conditions, the Fund will satisfy the following requirements on a continuous basis measured at the time of purchase: (i) At least 75% of the investments in the portfolio will be in Variable Rate Debt Instruments, with a minimum original principal amount outstanding of $100 million or more, variable rate preferred stock, or in ETFs that invest primarily in any or all of the foregoing securities; [19] (ii) no Variable Rate Investment (excluding U.S. government securities) will represent more than 30% of the weight of the portfolio, and the five most heavily weighted portfolio securities will not in the aggregate account for more than 65% of the weight of the portfolio; (iii) the portfolio (excluding securities exempted by Section 3(a)(12) of the Exchange Act)

Adviser or Sub-Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

[8] For the avoidance of doubt, the term ''variable-rate'' shall also include similar terms, such as ''floating rate'' and ''adjustable rate.''

[9] Mortgage-backed securities, which are securities that directly or indirectly represent a participation in, or are secured by and payable from, mortgage loans on real property, will consist of: (1) Residential mortgage-backed securities (''RMBS''); (2) commercial mortgage-backed securities (''CMBS''); (3) stripped mortgage-backed securities (''SMBS''), which are mortgage-backed securities where mortgage payments are divided between paying the loan's principal and paying the loan's interest; and (4) collateralized mortgage obligations (''CMOs'') and real estate mortgage investment conduits (''REMICs''), which are mortgage-backed securities that are divided into multiple classes, with each class being entitled to a different share of the principal and interest payments received from the pool of underlying assets.

[10] Agency securities for these purposes generally includes securities issued by the following entities: Government National Mortgage Association (Ginnie Mae), Federal National Mortgage Association (Fannie Mae), Federal Home Loan Banks (FHLBanks), Federal Home Loan Mortgage Corporation (Freddie Mac), Farm Credit System (FCS) Farm Credit Banks (FCBanks), Student Loan Marketing Association (Sallie Mae), Resolution Funding Corporation (REFCORP), Financing Corporation (FICO), and the FCS Financial Assistance Corporation (FAC). Agency securities can include, but are not limited to, mortgage-backed securities.

[11] Asset-backed securities are securities that are backed by a pool of assets. The Fund currently intends to invest in asset-backed securities that are consumer and corporate asset-backed securities.

[12] The Fund may invest in corporate securities, which represent debt obligations of corporate borrowers. Corporate securities may or may not be secured by collateral. The Fund will invest in floating rate corporate securities that have interest rates that reset periodically. The interest rates are based on a percentage above the London Interbank Offered Rate (LIBOR), a U.S. bank's prime or base rate, the overnight federal funds rate, or another rate. Corporate securities in which the Fund invests may be senior or subordinate obligations of the borrower. The Fund will not invest in senior or junior loans of a commercial nature. Senior secured and senior unsecured corporate securities generally rank at the top of a borrower's capital structure in terms of priority of payment, ahead of any subordinated unsecured debt securities or the borrower's common equity. The Fund will generally invest in floating rate corporate securities that the Adviser or Sub-Adviser (as applicable) deems to be liquid with readily available prices; notwithstanding the foregoing, the Fund may invest in corporate securities that are deemed illiquid so long as the Fund complies with the 15% limitation on investments of its net assets in illiquid assets described below under ''Investment Restrictions.''

[13] Credit risk transfers are unsecured obligations of GSEs such as Fannie Mae and Freddie Mac that are structured to provide credit protection to the issuer with respect to defaults and other credit events within pools of residential mortgage loans that collateralize MBS issued and guaranteed by the GSEs. This credit protection is achieved by allowing the GSEs to reduce the outstanding class principal balance of the securities as designated credit events on the loans arise. The GSEs make monthly payments of accrued interest and periodic payments of principal to the holders of the securities.

[14] The variable rate preferred stock in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or exchanges that are parties to a comprehensive surveillance sharing agreement with the Exchange.

[15] U.S. government securities include U.S. Treasury obligations and securities issued or guaranteed by various agencies of the U.S. government, or by various instrumentalities which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the ''full faith and credit'' of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

[16] An ETF is an investment company registered under the 1940 Act that holds a portfolio of securities. Many ETFs are designed to track the performance of a securities index, including industry, sector, country and region indexes. ETFs in which the Fund invests will be listed and traded in the U.S. on registered exchanges. The ETFs in which the Fund will invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). The shares of ETFs in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or exchanges that are parties to a comprehensive surveillance sharing agreement with the Exchange. The ETFs in which the Fund will not invest include: (i) ''leveraged ETFs'' (*i.e.,* ETFs operated in a manner designed to seek a multiple of the performance of an underlying reference index), and (ii) Index Fund Shares that seek to provide investment results that correspond to the inverse (opposite) of the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple.

[17] For the avoidance of doubt, if a security is rated by multiple NRSROs and receives different ratings, the Fund will treat the security as being rated in the highest rating category received from any one NRSRO.

[18] *See* note 25.

[19] Notwithstanding this limitation, the Fund's investment in ETFs that invest primarily in Variable Rate Debt Instruments, with a minimum original principal amount outstanding of $100 million or more, or variable rate preferred stock shall not be so limited.

will include a minimum of 13 non-affiliated issuers; and (iv) portfolio securities that in aggregate account for at least 90% of the weight of the portfolio, other than securities issued by certain issuers of non-agency MBS and non-agency ABS, will be either (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of outstanding common equity held by non-affiliates of $700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion; or (d) exempted securities as defined in Section 3(a)(12) of the Exchange Act.

In selecting Variable Rate Investments, for the Fund,[20] the Adviser or Sub-Adviser (as applicable) will take a strategic approach to sector allocation by using overall sector investment return and risk outlook data. Specifically, the Fund will seek capital appreciation while mitigating excess risk from any one sector by using a strategic distribution of risk across multiple sectors. In addition, the Fund will allocate its investments within each sector in an attempt to improve expected returns based on inflation and growth outlook, as well as relative value across sub-sectors and individual securities.

Under normal market conditions, the Fund will have investment exposure to a wide variety of Variable Rate Investments. During periods of market volatility, however, the Fund may allocate a significant portion of its net assets to floating rate U.S. Treasury debt securities and agency MBS. The Adviser expects that the Fund's portfolio will have average duration [21] of one year or less.

Other Investments of the Fund

According to the Registration Statement, under normal market conditions, the Fund will invest primarily in the Variable Rate Investments described above to meet its investment objectives. In addition, the Fund may invest up to 20% of its net assets in Variable Rate Debt Instruments or variable rate preferred stock that are rated below investment grade, and in fixed-rate debt instruments that are rated either investment grade or below investment grade. The Fund may invest in the following fixed-rate debt instruments: (i) Fixed-rate MBS and ABS (which includes fixed-rate commercial real estate CLOs); (ii) fixed-rate U.S. government and agency securities; (iii) fixed-rate corporate debt securities, which will be comprised of corporate notes, bonds, debentures, or loans, and may include 144A corporate securities; [22] (iv) fixed-rate exchange traded preferred stock; [23] and (v) ETFs that invest primarily in any or all of the foregoing securities [24] (any or all of the foregoing securities (excluding fixed-rate exchange traded preferred stock, and ETFs that invest primarily in any or all of the foregoing) are collectively, ''Fixed Rate Debt Instruments''; Fixed Rate Debt Instruments, fixed-rate exchange traded preferred stock and ETFs that invest primarily in any or all of the foregoing securities are collectively ''Fixed Rate Investments''). The Fund will not invest more than 20% of its net assets in Fixed Rate Debt Instruments that are ABS or non-agency MBS.[25] Below investment grade securities are commonly referred to as ''junk'' or ''high yield'' securities and are considered speculative with respect to the issuer's capacity to pay interest and repay principal.

The Fund may also take a temporary defensive position and hold a portion of its assets in cash and cash equivalents and money market instruments [26] if there are inadequate investment opportunities available due to adverse market, economic, political or other conditions, or atypical circumstances such as unusually large cash inflows or redemptions. The Fund may invest in non-exchange listed securities of other investment companies (including money market funds) beyond the limits permitted under the 1940 Act, subject to certain terms and conditions set forth in a Commission exemptive order issued to the Trust pursuant to Section 12(d)(1)(J) of the 1940 Act.[27]

Investment Restrictions of the Fund

The Fund may not concentrate its investments (*i.e.,* invest more than 25% of the value of its net assets) in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities.[28]

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A corporate debt securities deemed illiquid by the Adviser.[29] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change

[20] The liquidity of a security, especially in the case of asset-backed and mortgage-backed securities, will be a substantial factor in the Fund's security selection process. Consistent with the discussion below under ''Investment Restrictions,'' the Fund will not purchase any Variable Rate Investments (including asset-backed securities and mortgage-backed securities) that, in the Adviser's opinion, are illiquid if, as a result, more than 15% of the value of the Fund's net assets will be invested in illiquid assets.

[21] Duration refers to the average life of a Variable Rate Debt Instrument and serves as a measure of a Variable Rate Debt Instrument's interest rate risk. In general, each year of duration represents an expected 1% change in the value of a security for every parallel 1% change in interest rates. To illustrate, if a portfolio of mortgage-backed securities has an average duration of three years, its value can be expected to fall approximately 3% if interest rates rise by 1%. Conversely, the portfolio's value can be expected to rise approximately 3% if interest rates fall by 1%. As a result, prices of instruments with shorter durations, such as the Variable Rate Debt Instruments in which the Fund invests, are expected to be less sensitive to interest rate changes than instruments with longer durations.

[22] The Fund may invest in fixed-rate corporate securities, which represent debt obligations of corporate borrowers. Corporate securities may or may not be secured by collateral. The Fund will generally invest in fixed-rate corporate securities that the Adviser or Sub-Adviser (as applicable) deems to be liquid with readily available prices; notwithstanding the foregoing, the Fund may invest in corporate securities that are deemed illiquid so long as the Fund complies with the 15% limitation on investments of its net assets in illiquid assets described below under ''Investment Restrictions.''

[23] The fixed rate preferred stock in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or that are parties to a comprehensive surveillance sharing agreement with the Exchange.

[24] The shares of ETFs in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or that are parties to a comprehensive surveillance sharing agreement with the Exchange.

[25] This 20% limitation will apply to all investments in ABS and MBS held by the Fund in the aggregate, whether fixed rate or variable rate.

[26] For the Fund's purposes, money market instruments will include: Short-term, high quality securities issued or guaranteed by non-U.S. governments, agencies, and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a–7 of the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions.

[27] *See* Investment Company Act Release No. 30238 (October 23, 2012) (File No. 812–13820).

[28] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[29] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities or other illiquid assets. Illiquid securities and other illiquid assets include those subject to contractual or other restrictions on resale and other instruments or assets that lack readily available markets as determined in accordance with Commission staff guidance.[30] The Fund will not invest in futures, options, forwards, swaps or other derivatives.

The Fund intends to qualify for and to elect to be treated as a regulated investment company under Subchapter M of the Internal Revenue Code.[31]

The Fund's investments will be consistent with the Fund's investment objectives. Additionally, the Fund may engage in frequent and active trading of portfolio securities to achieve its investment objective. The Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as a ''leveraged ETF,'' *i.e.,* it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.

Net Asset Value

The Fund's administrator will calculate the Fund's net asset value (''NAV'') per Share as of the close of regular trading (normally 4:00 p.m., Eastern time (''E.T.'')) on each day the New York Stock Exchange (''NYSE'') is open for business (a ''Business Day''). NAV per Share will be calculated for the Fund by taking the value of the Fund's total assets, including interest or dividends accrued but not yet collected, less all liabilities, and dividing such amount by the total number of Shares outstanding. The result, rounded to the nearest cent, will be the NAV per Share (although creations and redemptions will be processed using a price denominated to the fifth decimal point, meaning that rounding to the nearest cent may result in different prices in certain circumstances).

A market valuation generally means a valuation (i) obtained from an exchange, an independent pricing service (''Pricing Service''), or a major market maker (or dealer) or (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a Pricing Service, or a major market maker (or dealer).

Securities listed or traded on an exchange generally are valued at the last sales price or official closing price that day as of the close of the exchange where the security is primarily traded. However, certain securities, including some Variable Rate Debt Instruments (and Fixed Rate Debt Instruments, to the extent applicable), in which the Fund may invest will not be listed on any securities exchange or board of trade. Such securities will typically be bought and sold by institutional investors in individually negotiated private transactions that function in many respects like an over-the-counter secondary market, although typically no formal market makers will exist. Certain securities, particularly debt securities, will have few or no trades, or trade infrequently, and information regarding a specific security may not be widely available or may be incomplete. Accordingly, determinations of the fair value of debt securities may be based on infrequent and dated information. Because there is less reliable, objective data available, elements of judgment may play a greater role in valuation of debt securities than for other types of securities.

Typically, Variable Rate Debt Instruments, Fixed Rate Debt Instruments and other debt securities in which the Fund may invest (other than those specifically described below) will be valued using information provided by a Pricing Service. Debt securities having a remaining maturity of 60 days or less when purchased will be valued at cost adjusted for amortization of premiums and accretion of discounts, provided the Adviser has determined that the use of amortized cost is an appropriate reflection of fair value given market and issuer-specific conditions existing at the time of the determination.

ABS and MBS will generally be valued by using a Pricing Service. If a Pricing Service does not cover a particular asset-backed or mortgage-backed security, or discontinues covering a particular asset-backed or mortgage-backed security, the security will be priced using broker quotes generally provided by brokers that make or participate in markets in the security. To derive values, Pricing Services and broker-dealers may use matrix pricing and valuation models, as well as recent market transactions for the same or similar assets. As it deems appropriate, the Adviser may determine that a Pricing Service price does not represent an accurate value of an ABS or MBS, based on broker quotes it receives, a recent trade in the security by the Fund, information from a portfolio manager, or other market information. In the event that the Adviser determines that the Pricing Service price is unreliable or inaccurate based on such other information, broker quotes may be used. Additionally, if the Adviser determines that the price of an asset-backed or mortgage-backed security obtained from a Pricing Service and available broker quotes is unreliable or inaccurate due to market conditions or other reasons, or if a Pricing Service price or broker quote is unavailable, the security will be valued using fair value pricing, as described below.

Shares of open-end registered investment companies (*i.e.,* money market mutual funds) will be valued at net asset value; shares of preferred stock and ETFs will be valued at the last sale price or official closing price on the exchange on which they primarily trade. Deposits, other obligations of U.S. and non-U.S. banks and financial institutions, and cash equivalents will be valued at their daily account value.

Certain securities, including certain Variable Rate Debt Instruments and Fixed Rate Debt Instruments, in which the Fund will invest will not be able to be priced by pre-established pricing methods. Such securities may be valued by the Trust's Board or its delegate at fair value. The use of fair value pricing by the Fund will be governed by the valuation policies and procedures and conducted in accordance with the provisions of the 1940 Act. Valuing the Fund's securities using fair value pricing will result in using prices for those securities that may differ from current market valuations or official closing prices on the applicable exchange. All valuations will be subject to review by the Board of Trustees of the Trust (''Board'') or its delegate.

In determining NAV, expenses will be accrued and applied daily and securities and other assets for which market quotations are readily available will be valued at market value. The NAV for the Fund will be calculated and disseminated daily. If a security's market price is not readily available, the security will be valued using pricing provided from independent pricing services or by another method that the Adviser, in its judgment, believes will

[30] Long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), FN 34. *See also* Investment Company Act Release Nos. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); and 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release Nos. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); and 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[31] 26 U.S.C. 851.

better reflect the security's fair value, in each case in accordance with the Trust's valuation policies and procedures (which may be revised from time to time) as adopted by the Trust's Board and in accordance with the 1940 Act.

Creation and Redemption of Shares

The Trust will issue Shares of the Fund at NAV only with authorized participants (''APs'') and only in aggregations of 50,000 shares (each aggregation is called a ''Creation Unit'') or multiples thereof, on a continuous basis through the Distributor, without a sales load, at the NAV next determined after receipt, on any Business Day, of an order in proper form.

The consideration an AP must provide for purchase of Creation Units of the Fund may consist of (i) cash in lieu of all or a portion of the Deposit Securities, as defined below, in an amount calculated based on the NAV per Share, multiplied by the number of Shares representing a Creation Unit (''Deposit Cash''), plus certain transaction fees; or (ii) an ''in-kind'' deposit of a designated portfolio of securities determined by the Adviser that generally will conform to the holdings of the Fund consistent with its investment objective (the ''Deposit Securities'') per each Creation Unit and generally an amount of cash (the ''Cash Component'') computed as described below. Together, the Deposit Securities and the Cash Component (including the cash in lieu amount) will constitute the ''Fund Deposit,'' which will represent the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The Cash Component is sometimes also referred to as the Balancing Amount. The Cash Component will serve the function of compensating for any differences between the NAV per Creation Unit and the Deposit Amount (as defined below). For example, for a creation the Cash Component will be an amount equal to the difference between the NAV of Fund Shares (per Creation Unit) and the ''Deposit Amount''—an amount equal to the market value of the Deposit Securities and/or cash in lieu of all or a portion of the Deposit Securities. If the Cash Component is a positive number (*i.e.,* the NAV per Creation Unit exceeds the Deposit Amount), the AP will deliver the Cash Component. If the Cash Component is a negative number (*i.e.,* the NAV per Creation Unit is less than the Deposit Amount), the AP will receive the Cash Component. Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Custodian and only on a Business Day. The Fund will not redeem Shares in amounts less than a Creation Unit. APs must accumulate enough Shares in the secondary market to constitute a Creation Unit in order to have such Shares redeemed by the Trust. The redemption proceeds for a Creation Unit generally consist of (i) cash, in lieu of all or a portion of the Fund Securities as defined below, in an amount calculated based on the NAV per Share, multiplied by the number of Shares representing a Creation Unit, less any redemption transaction fees; or (ii) a designated portfolio of securities determined by the Adviser that generally will conform to the holdings of the Fund consistent with its investment objective per each Creation Unit (''Fund Securities'')—as announced on the Business Day of the request for redemption received in proper form—plus or minus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities, less any redemption transaction fees. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating Cash Component payment equal to the difference is required to be made by or through an AP by the redeeming shareholder.

Creation Units of the Fund generally will be sold partially in cash and partially in-kind plus a fixed and/or variable transaction fee.

To the extent that the Fund permits Creation Units to be issued principally or partially in-kind, the Custodian, through the National Securities Clearing Corporation (''NSCC''), will make available on each Business Day, prior to the opening of business of the NYSE (currently, 9:30 a.m., E.T.), the list of the names and the quantity of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous Business Day), plus any estimated Cash Component, for the Fund. Such Fund Deposit will be applicable, subject to any adjustments as described below, to effect creations of Creation Units of the Fund until such time as the next-announced composition of the Deposit Securities is made available. Information on the specific names and holdings in a Fund Deposit also will be available at *www.pstrader.net.*

To the extent that the Fund permits Creation Units to be redeemed in-kind, the Custodian, through the NSCC, will make available on each Business Day, prior to the opening of business of NYSE (currently, 9:30 a.m., E.T.), the identity of the Fund Securities that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day. Fund Securities received on redemption may not be identical to Deposit Securities that are applicable to creations of Creation Units.

When applicable, during times that the Fund permits in-kind creations, the identity and quantity of the Deposit Securities required for a Fund Deposit for the Shares may change as rebalancing adjustments and corporate action events occur and are reflected within the Fund from time to time by the Adviser, consistent with the investment objective of the Fund.

To be eligible to place orders with respect to creations and redemptions of Creation Units, an entity must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the continuous net settlement system of the NSCC or (ii) a Depository Trust Company (''DTC'') Participant (a ''DTC Participant''). In addition, each Participating Party or DTC Participant (each, an AP) must execute an agreement that has been agreed to by the Distributor and the Custodian with respect to purchases and redemptions of Creation Units.

All orders to create Creation Units must be received by the transfer agent no later than the closing time of the regular trading session on the NYSE (ordinarily, 4:00 p.m., E.T.) in each case on the date such order is placed in order for creations of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

In order to redeem Creation Units of the Fund, an AP must submit an order to redeem for one or more Creation Units. All such orders must be received by the Fund's transfer agent in proper form no later than the close of regular trading on the NYSE (ordinarily, 4:00 p.m. E.T.) in order to receive that day's closing NAV per Share.

Availability of Information

The Fund's Web site (*www.invescopowershares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include the ticker symbol for the Shares, CUSIP and exchange information, along with additional quantitative information updated on a daily basis, including, for the Fund: (1) Daily trading volume, the prior Business

Day's reported NAV, closing price and mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[32] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for the most recently completed calendar year and each of the four most recently completed calendar quarters since that year (or the life of the Fund if shorter). On each Business Day, before commencement of trading in Shares in the Regular Market Session [33] on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the ''Disclosed Portfolio'' as such term is defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[34] In addition to disclosing the identities and quantities of the portfolio of securities and other assets in the Disclosed Portfolio, the Fund also will disclose on a daily basis on its Web site the following information, as applicable to the type of holding: ticker symbol, if any, CUSIP number or other identifier, if any; a description of the holding (including the type of holding), quantity held (as measured by, for example, par value, number of shares or units); maturity date, if any; coupon rate, if any; market value of the holding; and percentage weighting of the holding in the Fund's portfolio. The Web site and information will be publicly available at no charge.

In addition, to the extent the Fund permits full or partial creations in-kind, a basket composition file, which will include the security names and share quantities to deliver (along with requisite cash in lieu) in exchange for Shares, together with estimates and actual Cash Components, will be publicly disseminated daily prior to the opening of the Exchange via the NSCC and at *www.pstrader.net.* The basket will represent the securities component of the Shares of the Fund, and when added to the Cash Components will equal a Creation Unit.

In addition, for the Fund, an estimated value, defined in Rule 5735(c)(3) as the ''Intraday Indicative Value,'' that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service [35] will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Intraday executable price quotations on exchange listed securities, certain Variable Rate Debt Instruments, Fixed Rate Debt Instruments and other assets not traded on an exchange will be available from major broker-dealer firms or market data vendors, as well as from automated quotation systems, published or other public sources, or online information services. Additionally, the Trade Reporting and Compliance Engine (''TRACE'') of the Financial Industry Regulatory Authority (''FINRA'') will be a source of price information for corporate bonds, privately-issued securities, MBS and ABS to the extent transactions in such securities are reported to TRACE.[36] Intra-day, executable price quotations on the securities and other assets held by the Fund, as well as closing price information, will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day and closing price information related to U.S. government securities, money market mutual funds, and other short-term investments held by the Fund also will be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by APs and other investors.

Investors also will be able to obtain the Fund's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and its Trust's Form N–CSR and Form N–SAR, each of which is filed twice a year, except the SAI, which is filed at least annually. The Fund's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. Quotation and last sale information for any exchange-traded instruments (including preferred stocks and ETFs) also will be available via the quote and trade service of their respective primary exchanges, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans.

Additional information regarding the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, will be included in the Registration Statement.

Initial and Continued Listing of the Fund's Shares

The Shares will conform to the initial and continued listing criteria applicable to Managed Fund Shares, as set forth under Rule 5735. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [37] under the Exchange Act. A minimum of 100,000 Shares will be outstanding at

[32] The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[33] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m. E.T.; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m. E.T.).

[34] Under accounting procedures to be followed by the Fund, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any Business Day may be booked and reflected in NAV on such Business Day. Accordingly, the Fund will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

[35] Currently, the NASDAQ OMX Global Index Data Service (''GIDS'') is the NASDAQ OMX global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

[36] Broker-dealers that are FINRA member firms have an obligation to report transactions in specified debt securities to TRACE to the extent required under applicable FINRA rules. Generally, such debt securities will have at issuance a maturity that exceeds one calendar year.

[37] *See* 17 CFR 240.10A–3.

the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts of the Fund's Shares

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in the Shares from 4:00 a.m. until 8:00 p.m. E.T. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is $0.01.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[38] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities (including ETFs and preferred stock) and instruments held by the Fund with other markets and other entities that are members of the ISG,[39] and FINRA may obtain trading information regarding trading in the Shares and other exchange-traded securities (including ETFs and preferred stock) and instruments held by the Fund from such markets and other entities. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain Variable Rate Debt Instruments, Fixed Rate Debt Instruments, and other debt securities held by the Fund reported to FINRA's TRACE.

In addition, the Exchange may obtain information regarding trading in the Shares and other exchange-traded securities (including ETFs and preferred stock) and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members purchasing Shares from the Fund for resale to investors deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. Members purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Exchange Act.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Exchange Act. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV calculation time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's Web site.

All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

[38] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[39] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Exchange Act in general, and Section 6(b)(5) [40] of the Exchange Act 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5735. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA, on behalf of the Exchange, which are designed to deter and detect violations of Exchange rules and applicable federal securities laws and are adequate to properly monitor trading in the Shares in all trading sessions. The Adviser and the Sub-Adviser are affiliated with a broker-dealer and have implemented, and will maintain, a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, paragraph (g) of Nasdaq Rule 5735 further requires that personnel who make decisions on an open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio.

FINRA may obtain information via ISG from other exchanges that are members of ISG. In addition, the Exchange may obtain information regarding trading in the Shares and other exchange-traded securities (including ETFs and preferred stock) and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Fund will limit its investments in illiquid securities or other illiquid assets to an aggregate amount of 15% of its net assets (calculated at the time of investment). The Fund also may invest directly in ETFs. The ETFs in which the Fund will not invest include: (i) ''leveraged ETFs'' (*i.e.,* ETFs operated in a manner designed to seek a multiple of the performance of an underlying reference index), and (ii) Index Fund Shares that seek to provide investment results that correspond to the inverse (opposite) of the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple.

Additionally, the Fund may engage in frequent and active trading of portfolio securities to achieve its investment objective. The Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as a ''leveraged ETF,'' *i.e.,* it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index. The Fund will not invest in futures, options, forwards, swaps or other derivatives.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily every day that the Fund is traded, and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service, will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Regular Market Session. On each Business Day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio of the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. Quotation and last sale information for any exchange-traded instruments (including preferred stocks and ETFs) also will be available via the quote and trade service of their respective primary exchanges, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans. Intraday executable price quotations on exchange listed securities, certain Variable Rate Debt Instruments, Fixed Rate Debt Instruments and other assets not traded on an exchange will be available from major broker-dealer firms or market data vendors, as well as from automated quotation systems, published or other public sources, or online information services. Additionally, FINRA's TRACE will be a source of price information for corporate bonds, privately-issued securities, MBS and ABS to the extent transactions in such securities are reported to TRACE. For exchange-traded assets, intraday pricing information will be available directly from the applicable listing exchange.

The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

For the above reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Exchange Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

[40] 15 U.S.C. 78(f)(b)(5).

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will: (a) By order approve or disapprove such proposed rule change; or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–056 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–056. 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 Web site (*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 Web site 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 Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–056 and should be submitted on or before May 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10154 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

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 302 SEC File No. 270–453, OMB Control No. 3235–0510

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 302 (17 CFR 242.302) of Regulation ATS (17 CFR 242.300 *et seq.*) under the Securities and Exchange Act of 1934 (''Act'') (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.

Regulation ATS sets forth a regulatory regime for ''alternative trading systems'' (''ATSs''), which are entities that carry out exchange functions but which are not required to register as national securities exchanges under the Act. In lieu of exchange registration, an ATS can instead opt to register with the Commission as a broker-dealer and, as a condition to not having to register as an exchange, must instead comply with Regulation ATS. Rule 302 of Regulation ATS (17 CFR 242.302) describes the recordkeeping requirements for ATSs. Under Rule 302, ATSs are required to make a record of subscribers to the ATS, daily summaries of trading in the ATS, and time-sequenced records of order information in the ATS.

The information required to be collected under Rule 302 should increase the abilities of the Commission, state securities regulatory authorities, and the self-regulatory organizations to ensure that ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. If the information is not collected or collected less frequently, the regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

Respondents consist of ATSs that choose to register as broker-dealers and comply with the requirements of Regulation ATS. There are currently 84 respondents. These respondents will spend approximately 3,780 hours per year (84 respondents at 45 burden hours/respondent) to comply with the recordkeeping requirements of Rule 302. At an average cost per burden hour of $65, the resultant total related internal cost of compliance for these respondents is $245,700 per year (3,780 burden hours multiplied by $65/hour).

Written comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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.

[41] 17 CFR 200.30–3(a)(12).

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.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 26, 2016.

Robert E. Errett,

Deputy Secretary.

[FR Doc. 2016–10110 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77711; File No. SR–CHX–2016–01]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Approving a Proposed Rule Change To Adopt and Amend Rules To Permit the Exchange To Initiate CHX SNAP Cycles

April 26, 2016.

I. Introduction

On February 26, 2016, the Chicago Stock Exchange, Inc. (''CHX'' 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 to amend the functionality of the Exchange's Sub-second Non-displayed Auction Process (''SNAP'') to permit the Exchange to initiate the SNAP when certain criteria are met. The proposed rule change was published for comment in the **Federal Register** on March 15, 2016.[3] The Commission did not receive any comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Overview of the Proposal

The SNAP is designed to facilitate the bulk trading of a security within the Exchange's matching system (''Matching System''). The SNAP is a fully-hidden, on-demand auction for a security that, under the Exchange's current rules, may be initiated only by the Exchange's Participants [4] and may occur only during the Exchange's regular trading session. During the stages of a SNAP (''CHX SNAP Cycle''), the Exchange temporarily suspends automated trading on the Exchange for the security subject to the SNAP. At the conclusion of a CHX SNAP Cycle, the Exchange transitions back to automated trading for the subject security. The SNAP Cycle has the following five stages, which are set forth in CHX Article 18, Rule 1: [5] (1) Initiating the SNAP; (2) SNAP Order Acceptance Period; (3) Pricing and Satisfaction Period; (4) Order Matching Period; and (5) Transition to Open Trading State.[6]

Under the Exchange's current rules, only a Participant may initiate the SNAP Cycle by submitting a valid limit order marked Start SNAP.[7] To initiate a SNAP Cycle, a Start SNAP order must meet certain size,[8] price,[9] and timing requirements.[10] Orders marked with a SNAP Auction Only modifier (SNAP AOO—Day, SNAP AOO—One and Done, SNAP AOO- Pegged) that are received during Open Trading State are queued in the SNAP Auction Only Order (''AOO'') Queue and are eligible for execution only during a SNAP Cycle.[11]

In the instant proposed rule change, the Exchange proposes to permit *the Exchange* to initiate a SNAP Cycle, under certain circumstances, in the absence of a Start SNAP order. The Exchange would conduct *pro forma* SNAP reviews of the contents of the CHX book, SNAP AOO Queue, and Protected Quotations of external markets for each SNAP-eligible security, consecutively and continuously in a preset order,[12] and would initiate a SNAP Cycle for a security if a review projects that the aggregate number of executions would satisfy certain minimum size and notional value requirements, as applicable. In conducting the *pro forma* SNAP review, the Exchange would take a market snapshot of the Protected Quotations of external markets in the subject security and calculate a *pro forma* SNAP Price to determine: (1) Whether the projected execution size (''PES'') at the *pro forma* SNAP Price is equal to or greater than the corresponding minimum PES; and (2) whether the PES within the Matching System at the *pro forma* SNAP Price would be equal to or greater than 80% of the corresponding minimum PES. The minimum PES for an Exchange-initiated SNAP is either: (1) 2,500 Shares with a minimum aggregate notional value of $250,000 based on the midpoint of the NBBO ascertained from the market snapshot; or (2) 20,000 shares with no minimum aggregate notional value requirement; provided, however, that the PES for Berkshire Hathaway, Inc. (BRK–A) would be a flat 100 shares.

There would be restrictions on when the Exchange may initiate a SNAP Cycle. Proposed Rule 1A(c) prohibits the Exchange from initiating a SNAP Cycle:

(1) Within five minutes of the first two-sided quote in the subject security having been received by the Exchange from the primary market disseminated after either the beginning of the regular trading session or a trading halt, pause or suspension that required the Exchange to suspend trading in the subject security;

(2) within five minutes of the end of the regular trading session;

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77331 (March 9, 2016), 81 FR 13857 (''Notice'').

[4] Article 1, Rule 1 of CHX's Rules defines the term ''Participant.''

[5] *See generally* Securities Exchange Act Release No. 76087 (October 6, 2015), 80 FR 61540 (SR–CHX–2015–03) (''Approval Order'') (order approving the adoption of the SNAP rules on the Exchange). The approved rule changes governing the SNAP are not yet operative and will become operative upon two weeks' notice by the Exchange to its Participants. *See* Notice, *supra* note 3, 81 FR at 13857, n.3.

[6] Open Trading State means the period of time during the regular trading session when orders are eligible for automatic execution on the Exchange. *See* CHX Article 1, Rule 1(qq).

[7] *See* CHX Article 1, Rule 2(h)(1) and CHX Article 18, Rule 1(b)(1).

[8] To initiate a SNAP Cycle, a Start SNAP order must be for (a) at least 2,500 shares and have a minimum aggregate notional value of $250,000 or (b) at least 20,000 shares with no minimum aggregate notional value requirement; provided, however, that certain issues specified in the rule may have special minimum size requirements. *See* CHX Article 1, Rule 2(h)(1)(A)(i).

[9] To initiate a SNAP Cycle, the limit price of a buy (sell) Start SNAP Order must be priced at or through the National Best Offer (National Best Bid) at the time the order was received by the Matching System. If the National Best Bid and Offer (''NBBO'') is crossed or a two-sided NBBO does not exist at the time the limit order marked Start SNAP is received by the Matching System, the limit order marked Start SNAP would not initiate a SNAP Cycle. A limit order marked Start SNAP and Sell Short, as defined under CHX Article 1, Rule 2(b)(3)(E), for a covered security subject to short sale price test restriction, may not initiate a SNAP Cycle and would be cancelled. *See* CHX Article 1, Rule 2(h)(1)(A)(ii).

[10] A Start SNAP order will initiate a SNAP Cycle only if it is received during the Exchange's regular trading session; provided, however, that it will not initiate a SNAP Cycle if it is received (a) within five minutes of the first two-sided quote in the subject security having been received by the Exchange from the primary market disseminated after either the beginning of the Exchange's regular trading session or a trading halt or pause that required the Exchange to suspend trading in the subject security; (b) within five minutes of the end of the regular trading session; (c) during a SNAP Cycle or (d) within one minute after the completion of the previous SNAP Cycle. *See* CHX Article 1, Rule 2(h)(1)(A)(iii).

[11] *See* CHX Article 20, Rule 8(b)(2)(A) and CHX Article 18, Rule 1(b)(2)(A)(i).

[12] The Exchange represents that it will not modify this procedure absent an approved filing pursuant to Rule 19b–4 under the Act. *See* Notice, *supra* note 3, 81 FR at 13858, n.21.

(3) during a SNAP Cycle;

(4) within one minute after the completion of the previous SNAP Cycle;

(5) if the CHX Routing Services are not available at the time of the market snapshot taken pursuant to be proposed Rule 1A(b);

(6) if the NBBO ascertained from the market snapshot taken pursuant to proposed Rule 1A(b) is crossed or a two-sided NBBO does not exist.

III. Discussion and Commission Findings

After careful review and consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed 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 that the rules of a national securities exchange not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

When it approved the SNAP, the Commission stated that it believed that the SNAP: (1) Was reasonably designed to facilitate the auction trading of securities on CHX in a fair and orderly manner, and could improve market quality for market participants seeking to execute bulk trading interests and for other market participants submitting orders in response to that interest; [15] and (2) may promote liquidity while minimizing potential information leakage that could disadvantage market participants whose orders are participating in the SNAP Cycle.[16] The Commission believes that the Exchange-initiated SNAP functionality may result in more bulk executions in SNAP-eligible securities by allowing—under certain circumstances—SNAP AOOs queued in the Matching System to match in the absence of a valid Start SNAP order. Additionally, the Commission believes that the proposed restrictions on when the Exchange may initiate a SNAP Cycle are reasonably designed to provide for a fair and orderly market.

Further, the Commission believes that the proposed rule change would further minimize information leakage from SNAP Cycles in that market participants would not know which initiating mechanism triggered a particular SNAP Cycle.

For the above reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act.

IV. Conclusion

It is therefore ordered that, pursuant to Section 19(b)(2) of the Act,[17] the proposed rule change (SR–CHX–2016–01) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10152 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77707; File No. SR–Phlx–2016–53]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Public Disclosure of Exchange Usage of Market Data

April 26, 2016.

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 April 21, 2016, NASDAQ PHLX LLC (''Phlx'' or ''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 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 update Exchange Rule 3304 and to amend the public disclosure of the sources of data that the Exchange utilizes when performing (1) order handling and execution; (2) order routing; and (3) related compliance processes.

The text of the proposed rule change is below. Proposed new language is italicized and deleted language is bracketed.

* * * * *

Rule 3304. Data Feeds Utilized

The PSX System utilizes the below proprietary and network processor feeds for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. The Secondary Source of data is, where applicable, utilized only in emergency market conditions and only until those emergency conditions are resolved.

Market center	Primary source	Secondary source
A—NYSE MKT (AMEX)	NYSE MKT OpenBook Ultra	CQS/UQDF.
B—NASDAQ OMX BX	BX ITCH 5.0	CQS/UQDF.
C—NSX	CQS/UQDF	n/a.
D—FINRA ADF	CQS/UQDF	n/a.
J—DirectEdge A	BATS PITCH	CQS/UQDF.
K—DirectEdge X	BATS PITCH	CQS/UQDF.
M—[CSX]*CHX*	[CQS/UQDF]*CHX Book Feed*	[n/a] *CQS/UQDF.*
N—NYSE	NYSE OpenBook Ultra	CQS/UQDF.
P—NYSE Arca	NYSE ARCA XDP	CQS/UQDF.

[13] In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

[15] *See* Approval Order, *supra* note 5, 80 FR at 61544.

[16] *See id.*

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Market center	Primary source	Secondary source
T/Q—NASDAQ	ITCH 5.0	CQS/UQDF.
X—NASDAQ OMX PSX	PSX ITCH 5.0	CQS/UQDF.
Y—BATS Y-Exchange	BATS PITCH	CQS/UQDF.
Z—BATS Exchange	BATS PITCH	CQS/UQDF.

* * * * *

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update and amend the table in Exchange Rule 3304 that sets forth on a market-by-market basis the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance checks related to each of those functions.

Specifically, the table will be amended to update the symbol for the Chicago Stock Exchange, Inc. from ''CSX'' to ''CHX'', as well as to update the primary and secondary sources in the table for CHX. The primary source will be CHX Book Feed and the former primary source, CQS/UQDF, will become the secondary source. The change to the primary source reflects the Exchange's effort to increase the amount of data it gathers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general and with Sections 6(b)(5) of the Act,[4] 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 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.

The Exchange believes that its proposal to amend the table in Exchange Rule 3304 to update the symbol for the Chicago Stock Exchange, Inc. and to amend the primary and secondary sources of data for CHX that the Exchange utilizes when performing (1) order handling and execution; (2) order routing; and (3) related compliance processes will ensure that Exchange Rule 3304 correctly identifies and publicly states on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance checks related to each of those functions. The Exchange also believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional specificity, clarity and transparency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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, as amended. To the contrary, the Exchange believes the proposal will enhance competition because including all of the correct information for the exchanges enhances transparency and enables investors to better assess the quality of the Exchange's execution and routing services.

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

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)(iii) of the Act[5] and subparagraph (f)(6) of Rule 19b–4 thereunder.[6]

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

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(a)(iii).

[6] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Number SR–Phlx–2016–53 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2016–53. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*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 Web site 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. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2016–53 and should be submitted on or before May 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10148 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–0213

Extension: Rule 17Ad-10

SEC File No. 270–265, OMB Control No. 3235–0273

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17Ad–10, (17 CFR 240.17Ad–10), 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 17Ad–10 generally requires registered transfer agents to: (1) Create and maintain current and accurate securityholder records; (2) promptly and accurately record all transfers, purchases, redemptions, and issuances, and notify their appropriate regulatory agency if they are unable to do so; (3) exercise diligent and continuous attention in resolving record inaccuracies; (4) disclose to the issuers for whom they perform transfer agent functions and to their appropriate regulatory agency information regarding record inaccuracies; (5) buy-in certain record inaccuracies that result in a physical over issuance of securities; and (6) communicate with other transfer agents related to the same issuer. These requirements assist in the creation and maintenance of accurate securityholder records, enhance the ability to research errors, and ensure the transfer agent is aware of the number of securities that are properly authorized by the issuer, thereby avoiding over issuance.

The rule also has specific recordkeeping requirements. It requires registered transfer agents to retain certificate detail that has been deleted for six years and keep current an accurate record of the number of shares or principal dollar amount of debt securities that the issuer has authorized to be outstanding. These mandatory requirements ensure accurate securityholder records and assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. This rule does not involve the collection of confidential information.

There are approximately 413 registered transfer agents. We estimate that the average number of hours necessary for each transfer agent to comply with Rule 17Ad–10 is approximately 80 hours per year, which generates an industry-wide annual burden of 33,040 hours (413 times 80 hours). This burden is of a recordkeeping nature but also includes a small amount of third party disclosure and SEC reporting burdens. At an average staff cost of $50 per hour, the industry-wide internal labor cost of compliance (a monetization of the burden hours) is approximately $1,652,000 per year (33,040 × $50). In addition, we estimate that each transfer agent will incur an annual external cost burden of $18,000 resulting from the collection of information. Therefore, the total annual external cost on the entire transfer agent industry is approximately $7,434,000 ($18,000 times 413). This cost primarily reflects ongoing computer operations and maintenance associated with generating, maintaining, and disclosing or providing certain information required by the rule.

The amount of time any particular transfer agent will devote to Rule 17Ad–10 compliance will vary according to the size and scope of the transfer agent's business activity. We note, however, that at least some of the records, processes, and communications required by Rule 17Ad–10 would likely be maintained, generated, and used for transfer agent business purposes even without the rule.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 26, 2016.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10108 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77710; File No. SR–CBOE–2016–038]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule To Amend the Fees Schedule

April 26, 2016.

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 April 12, 2016, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') 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 proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule.[3]

The Exchange first proposes to amend its Volume Incentive Program (''VIP''). By way of background, under VIP, the Exchange credits each Trading Permit Holder (''TPH'') the per contract amount set forth in the VIP table resulting from each public customer (''C'' origin code) order transmitted by that TPH (with certain exceptions) which is executed electronically on the Exchange, provided the TPH meets certain volume thresholds in a month.[4] The current qualification tiers are set to, in ascending order, 0%–0.75%, above 0.75%–1.50%, above 1.50%–3.00% and above 3%. The Exchange proposes to adjust the threshold percentages for Tiers 2 and 3. Specifically, the Exchange is proposing to amend Tier 2 to above 0.75%–1.80% and Tier 3 to be above 1.80%–3.00%. The purpose of this change is to incentivize the sending of both simple and complex orders to the Exchange and to adjust the incentive tiers accordingly as competition requires while maintaining an incremental incentive for TPH's [sic] to strive for the highest tier level.

The Exchange next proposes to amend its Affiliate Volume Plan (''AVP''). By way of background, under AVP if a TPH Affiliate[5] of a Market-Maker (including a Designated Primary Market-Maker (''DPM'') or Lead Market-Maker (''LMM'')) qualifies under VIP, that Market-Maker will also qualify for a discount on that Market-Maker's Liquidity Provider Sliding Scale (''Sliding Scale'') transaction fees (''Sliding Scale Credit''). More specifically, if a Market-Maker's Affiliate reaches Tier 2, Tier 3 or Tier 4 of VIP, that Market-Maker will receive a discount on their Sliding Scale Market-Maker transaction fees of 10%, 15% or 20%, respectively. The Exchange now proposes to increase the current discounts for Tiers 3 and 4 as follows:

Tier	VIP thresholds	Current AVP transaction fee discount (%)	Proposed AVP transaction fee discount (%)
1	0.00%–0.75%	0	0
2	Above 0.75%–1.50%	10	10
3	Above 1.50%–3.00%	15	20
4	Above 3.00%	20	30

The Exchange believes the increased credit rate will incentivize increased volume while also maintaining an incremental incentive for TPH's [sic] to strive for the highest tier level.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed change on April 1 2016 (SR–CBOE–2016–033). On April 12, 2016, the Exchange withdrew that filing and replaced it with SR–CBOE–2016–038.

[4] Currently, qualification for the different fee rates at different tiers in the VIP is based on a TPH's percentage of national customer volume in all products, excluding Underlying Symbol List A, DJX, MXEA, MXEF, MNX, NDX, XSP, XSPAM and mini-options. Excluded from the VIP credit are options in Underlying Symbol List A, DJX, MXEA, MXEF, MNX, NDX, XSP, XSPAM, mini-options, QCC trades, public customer to public customer electronic complex order executions, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 6.80 (*see* CBOE Fees Schedule, Volume Incentive Program).

[5] ''Affiliate'' is defined as having at least 75% common ownership between the two entities as reflected on each entity's Form BD, Schedule A.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the Exchange believes it's reasonable to increase the lower threshold in the third tier of VIP (and thus the corresponding upper threshold in the second tier) because the change is designed to adjust the incentive tiers accordingly as competition requires while maintaining an incremental incentive for TPH's [sic] to strive for the highest tier level to reach the highest credits available. This change is also equitable and not unfairly discriminatory because it will be applied to all TPHs uniformly. The Exchange believes the proposed change will incentivize the sending of more simple and complex orders to the Exchange. The greater liquidity and trading opportunities should benefit not just public customers (whose orders are the only ones that qualify for the VIP) but all market participants.

The Exchange believes that increasing the Tier 3 and Tier 4 Sliding Scale Credits from 15% to 20% and 20% to 30%, respectively, is reasonable because it is increasing available credits. Additionally, enhancing the incentives under the Sliding Scale Credit further incentivizes a Market-Maker Affiliate to achieve the highest tier on the VIP so that the Market-Maker can achieve those higher credits, which thereby can result in greater customer liquidity. The resulting increased volume benefits all market participants (including Market-Makers or their affiliates who do not achieve the higher tiers on the VIP; indeed, this increased volume may allow them to reach these tiers).

The Exchange believes that limiting the Sliding Scale Credit to Market-Makers is equitable and not unfairly discriminatory because Market-Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. For example, Market-Makers have a number of obligations, including quoting obligations that other market participants do not have.

The Exchange also believes that it's equitable and not unfairly discriminatory to limit the discounts under the Sliding Scale Credit to Market-Makers with Affiliates that reach certain tiers under VIP. The Exchange notes that in the options industry, many options orders are routed by consolidators, which are firms that have both order router and Market-Maker operations. The Exchange is aware not only of the importance of providing credits on the order routing side in order to encourage the submission of orders (which is [sic] currently does via VIP), but also of the operations costs on the Market-Maker side. The Exchange believes the Sliding Scale Credit allows the Exchange to provide further relief to the Market-Maker side via the discount, which incents these Market- Makers to tighten market widths due to the reduced costs the incentives provide. Additionally, the Exchange believes the discount attracts more volume and liquidity to the Exchange, which benefits all Exchange participants through increased opportunities to trade as well as enhancing price discovery. The Exchange also notes that incentivizing a Market-Maker Affiliate to achieve higher tiers on the VIP, so that the Market-Maker can achieve higher tiers under the Sliding Scale Credit, can result in greater customer liquidity, and the resulting increased volume also benefits all market participants (including Market-Makers that do not have Affiliates or whose Affiliates do not achieve the higher tiers on the VIP; indeed, this increased volume may allow them to reach these tiers). Lastly, other options exchanges also provide credits to Market-Makers if a Market-Maker's affiliate adds a certain amount of customer liquidity to that exchange.[9]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. In particular, the Exchange believes the proposed change to amend certain tier thresholds in VIP does not impose a burden on intramarket competition because it applies uniformly to all TPHs and incentivizes the sending of more simple and complex orders to the Exchange, which provides greater liquidity and trading opportunities. Additionally, the Exchange does not believe increasing credits under Tiers 3 and 4 of the Liquidity Provider Sliding Scale Credit imposes a burden on intramarket competition because, although it applies only to Market-Makers, Market-Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. Market-Makers also have a number of obligations, including quoting obligations that other market participants do not have. Additionally, the Exchange notes that although the Sliding Scale Credit is limited to Market-Makers with an Affiliate, incentivizing a Market-Maker Affiliate to achieve higher tiers on the VIP, so that the affiliated Market-Maker can achieve higher tiers under the Sliding Scale Credit, can result in greater liquidity (including customer liquidity), and the resulting increased volume benefits all market participants.

The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes are intended to promote competition and better improve the Exchange's competitive position and make CBOE a more attractive marketplace in order to encourage market participants to bring increased volume to the Exchange (while still covering costs as necessary). Further, the proposed changes only affect trading on CBOE. To the extent that the proposed changes make CBOE a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and paragraph (f) of Rule 19b–4[11] 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

[8] 15 U.S.C. 78f(b)(4).

[9] *See e.g.,* NYSE Arca, Inc. (''Arca'') Options Fees and Charges, specifically the table describing the Market Maker Monthly Posting Credit Super Tier, under which transaction volume from a Market Maker's affiliates count towards the Market Maker's ability to qualify for higher credit tiers.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f).

Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2016–038 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–CBOE–2016–038. 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 Web site (*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 Web site 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. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2016–038, and should be submitted on or before May 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–10151 Filed 4–29–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 9541]

Renewal of Cultural Property Advisory Committee Charter

SUMMARY: The Charter of the Department of State's Cultural Property Advisory Committee (CPAC) has been renewed for an additional two years. The Charter of the Cultural Property Advisory Committee is being renewed for a two-year period. The Committee was established by the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. 2601 *et seq.* It reviews requests from other countries seeking U.S. import restrictions on archaeological or ethnological material the pillage of which places a country's cultural heritage in jeopardy. The Committee makes findings and recommendations to the President's designee who, on behalf of the President, determines whether to impose the import restrictions. The membership of the Committee consists of private sector experts in archaeology, anthropology, or ethnology; experts in the international sale of cultural property; and representatives of museums and of the general public.

FOR FURTHER INFORMATION CONTACT: Cultural Heritage Center, U.S. Department of State, Bureau of Educational and Cultural Affairs, 2200 C Street NW., Washington, DC 20522. Telephone: (202) 632–6301; Fax: (202) 632–6300.

Dated: March 1, 2016.

Maria P. Kouroupas,

Executive Director, Cultural Property Advisory Committee, Department of State.

[FR Doc. 2016–10223 Filed 4–29–16; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9540]

Overseas Security Advisory Council (OSAC) Meeting Notice: Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on June 7 and 8, 2016. Pursuant to Sec. 10(d) of the Federal Advisory Committee Act (5 U.S.C. Appendix), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(7)(E), it has been determined that the meeting will be closed to the public. The meeting will focus on an examination of corporate security policies and procedures and will involve extensive discussion of trade secrets and proprietary commercial information that is privileged and confidential, and will discuss law enforcement investigative techniques and procedures. The agenda will include updated committee reports, a global threat overview, and other matters relating to private sector security policies and protective programs and the protection of U.S. business information overseas.

For more information, contact Marsha Thurman, Overseas Security Advisory Council, U.S. Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Dated: April 14, 2016.

Bill A. Miller,

Director of the Diplomatic, Security Service, U.S. Department of State.

[FR Doc. 2016–10224 Filed 4–29–16; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice: 9542]

Presidential Permits: Withdrawal of Request From Plains LPG Services, L.P. for Existing Pipeline Facilities on the Border of the United States and Canada Under the St. Clair River

AGENCY: Department of State.

ACTION: Notice of Withdrawal of Request for Re-Consideration Concerning the Scope of Authorizations by Plains LPG Services, L.P. for Existing Pipeline Facilities on the Border of the United States and Canada Under the St. Clair River.

SUMMARY: On May 23, 2014, the Department of State (Department) issued a Presidential Permit to Plains LPG Services, L.P. (Plains LPG) based on Plains LPG's acquisition of six existing pipelines under the St. Clair River. After the new permits were issued, Plains LPG provided new information that altered the Department's understanding of the historic authorization for two of the six St. Clair pipelines. In light of this additional information, the Department was revisiting Plains LPG's 2012 application and considering whether to issue a new permit for these two St. Clair pipelines that would authorize the

[12] 17 CFR 200.30–3(a)(12).

transport of crude and other liquid hydrocarbons, superseding the authorization in the 2014 Presidential Permit for the transport of only light liquid hydrocarbons. The Department published the *Notice of Re-Consideration Concerning the Scope of Authorizations in a Presidential Permit Issued to Plains LPG Services, L.P. in May 2014 for Existing Pipeline Facilities on the Border of the United States and Canada Under the St. Clair River* on January 25, 2016 (81 FR 4081) (Notice) and solicited public comment for a 30-day period. The Department subsequently re-opened public comment on March 15, 2016 (81 FR 13871) for an additional 30 days. Plains LPG subsequently notified the Department that it no longer seeks reconsideration of the scope of the authorizations referenced in the Notice. The Department is therefore no longer considering whether to issue a new permit for the two St. Clair pipelines.

DATES: This action is effective on May 2, 2016.

FOR FURTHER INFORMATION CONTACT: Office of Energy Diplomacy, Energy Resources Bureau (ENR/EDP/EWA) Department of State 2201 C St. NW., Ste,. 4428, Washington, DC 20520, Attn: Sydney Kaufman, Tel: 202–647–2041. Email: *kaufmans@state.gov*.

SUPPLEMENTARY INFORMATION: Additional information related to the Department's review Presidential Permit applications, including information concerning the St. Clair pipeline facilities, can be found at *http://www.state.gov/e/enr/applicant/applicants/index.htm*.

Chris Davy,

Deputy Director, Energy Resources Bureau, Energy Diplomacy, Bureau of Energy Resources, U.S. Department of State.

[FR Doc. 2016–10226 Filed 4–29–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice: 9543]

Notice of Renewal of the Advisory Committee on International Law Charter

The Department of State has renewed the charter of the Advisory Committee on International Law. ACIL is a critical forum for receiving informed public opinion and specialized advice on important legal matters. The Committee follows procedures prescribed by the Federal Advisory Committee Act (FACA). Its meetings are open to the public unless a determination is made in accordance with the FACA and 5 U.S.C. 552b(c) that a meeting or portion of a meeting should be closed to the public. Notice of each meeting will be published in the **Federal Register** at least 15 days prior to the event, unless extraordinary circumstances require shorter notice. For further information, please contact Julian Simcock, Executive Director, Advisory Committee on International Law, Department of State, at 202–776–8477 or *simcockjc@state.gov.*

Dated: April 26, 2016.

Julian Simcock,

Attorney Adviser, Office of the Legal Adviser, Department of State.

[FR Doc. 2016–10221 Filed 4–29–16; 8:45 am]

BILLING CODE 4710–08–P

SURFACE TRANSPORTATION BOARD

Notice and Request for Comments

ACTION: 60-day notice of intent to seek extension of approval: Information Collection Activities: Recordations (Rail and Water Carrier Liens), Water Carrier Tariffs, and Agricultural Contract Summaries.

AGENCY: Surface Transportation Board.

SUMMARY: As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek from the Office of Management and Budget (OMB) an extension of the information collections required under 49 U.S.C. 11301 and 49 CFR 1177 (rail or water carrier equipment liens (recordations)), under 49 U.S.C. 13702(b) and 49 CFR 1312 (water carrier tariffs), and under 49 U.S.C. 10709(d) and 49 CFR 1313 (rail agricultural contract summaries). The information collections are described in more detail below.

Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collections

Collection Number 1

Title: Agricultural Contract Summaries.

OMB Control Number: 2140–0024.

STB Form Number: None.

Type of Review: Extension with change.

Number of Respondents: Approximately 10 (seven Class I railroads and a limited number of other railroads).

Frequency: On occasion. (Over the last three years, respondents have filed an average of 161 agricultural contract summaries per year. The same number of filings is expected during each of the next 3 years.)

Total Burden Hours (annually including all respondents): 40.25 hours (161 submissions × .25 hours estimated per submission).

Total Annual ''Non-hour Burden'' Cost (such as start-up and mailing costs): There are no non-hourly burden costs for this collection. The collection is filed electronically.

Needs and Uses: Under 49 U.S.C. 10709(d), railroads are required to file a summary of the nonconfidential terms of any contract for the transportation of agricultural products.

Retention Period: Paper copies of this collection are destroyed six months after the expiration of the referenced contract.

Collection Number 2

Title: Recordations (Rail and Water Carrier Liens).

OMB Control Number: 2140–0025.

STB Form Number: None.

Type of Review: Extension with change.

Respondents: Parties holding liens on rail equipment or water carrier vessels, and carriers filing proof that a lien has been removed.

Number of Respondents: Approximately 50 respondents.

Frequency: On occasion. (Over the last three years, respondents have filed an average of 1,831 responses per year. The same number of filings is expected during each of the next 3 years.)

Total Burden Hours (annually including all respondents): 457.75 hours (1,831 submissions × .25 hours estimated per response).

Total ''Non-hour Burden'' Cost (such as start-up and mailing costs): There are no non-hourly burden costs for this collection. The collection may be filed electronically.

Needs and Uses: Under 49 U.S.C. 11301 and 49 CFR 1177, liens on rail equipment must be filed with the STB in order to perfect a security interest in

the equipment. Subsequent amendments, assignments of rights, or release of obligations under such instruments must also be filed with the agency. This information is maintained by the Board for public inspection. Recordation at the STB obviates the need for recording the liens in individual States.

Retention Period: Recordations of liens are destroyed 60 years after the last filing.

Collection Number 3

Title: Water Carrier Tariffs.
OMB Control Number: 2140–0026.
STB Form Number: None.
Type of Review: Extension with change.
Respondents: Water carriers that provide freight transportation in noncontiguous domestic trade.
Number of Respondents: Approximately 29.
Frequency: On occasion. (Over the last three years, respondents have filed an average of 228 responses per year. The same number of filings is expected during each of the next 3 years.)
Total Burden Hours (annually including all respondents): 171 hours (228 filings × .75 hour estimated time per filing).
Total ''Non-hour Burden'' Cost (such as start-up costs and mailing costs): There are no non-hourly burden costs for this collection. The collection may be filed electronically.
Needs and Uses: Under 49 U.S.C. 13702(b) and 49 CFR 1312, water carriers that provide freight transportation in noncontiguous domestic trade (*i.e.,* domestic, as opposed to international) shipments moving to or from Alaska, Hawaii, or the U.S. territories or possessions (Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands)) must file tariffs, providing a list of prices and fees that the water carrier charges to the shipping public.
Retention Period: After cancellation, tariffs are placed in a ''Cancelled Tariffs'' file. They are destroyed five years after the end of the year in which they were cancelled.

DATES: Comments on this information collection should be submitted by July 1, 2016.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or to *PRA@stb.dot.gov.* When submitting comments, please refer to the title of the collection about which you are commenting. For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0284 or at *higginsm@stb.dot.gov.* [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under § 3506(c)(2)(A) of the PRA, federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: April 27, 2016.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–10190 Filed 4–29–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

Notice and Request for Comments

AGENCY: Surface Transportation Board.

ACTION: 60-day notice of intent to seek extension of approval: Arbitration Option Notices.

SUMMARY: As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the process for filing Arbitration Option Notices. This information collection is described in detail below.

Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Arbitration Option Notices.
OMB Control Number: 2140–0020.
STB Form Number: None.
Type of Review: Extension with change.
Respondents: All regulated rail carriers.
Number of Respondents: 1.
Estimated Time per Response: .5 hours.
Frequency: Annually.
Total Burden Hours (annually including all respondents): .5 hours.
Total ''Non-hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.
Needs and Uses: Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995), the Board is responsible for the economic regulation of common carrier rail transportation. Under 49 CFR 1108.3, rail carriers may agree to participate in the Board's arbitration program by filing a notice with the Board to ''opt in.'' Once a rail carrier is participating in the Board's arbitration program, it may discontinue its participation only by filing a notice to ''opt out'' with the Board, which would become effective 90 days after its filing.

DATES: Comments on this information collection should be submitted by July 1, 2016.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or to *PRA@stb.dot.gov.* When submitting comments, please refer to ''Arbitration Option Notice.'' For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0284 or at *higginsm@stb.dot.gov.* [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under § 3506(c)(2)(A) of the PRA, federal agencies are required to provide, prior

to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: April 27, 2016.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–10192 Filed 4–29–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

Notice and Request for Comments

AGENCY: Surface Transportation Board.

ACTION: 60-day notice of intent to seek extension of approval: System Diagram Maps.

SUMMARY: As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the system diagram maps, described below.

Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: System Diagram Maps (or, in the case of Class III carriers, the alternative narrative description of rail system).

OMB Control Number: 2140–0003.

Form Number: None.

Type of Review: Extension without change.

Respondents: Common carrier freight railroads that are either new or reporting changes in the status of one or more of their rail lines.

Number of Respondents: 1.

Estimated Time per Response: 7.1 hours, based on average time reported in informal survey of respondents (less than 10).

Frequency of Response: On occasion.

Total Annual Burden Hours: 7.1 hours.

Total ''Non-hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR 1152.10–1152.13, all railroads subject to the Board's jurisdiction are required to keep current system diagram maps on file, or alternatively, in the case of a Class III carrier (a carrier with assets of not more than $38,060,384 in 2014 dollars), to submit the same information in narrative form. The information sought in this collection identifies all lines in a particular railroad's system, categorized to indicate the likelihood that service on a particular line will be abandoned and/or whether service on a line is currently provided under the financial assistance provisions of 49 U.S.C. 10904. Carriers are obligated to amend these maps as the need to change the category of any particular line arises.

DATES: Comments on this information collection should be submitted by July 1, 2016.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or to *PRA@stb.dot.gov.* When submitting comments, please refer to ''System Diagram Maps.'' For further information regarding this collection, please contact Pedro Ramirez at (202) 245–0333 or at *pedro.ramirez@stb.dot.gov.* [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under § 3506(c)(2)(A) of the PRA, federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: April 27, 2016.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–10191 Filed 4–29–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

Notice and Request for Comments

AGENCY: Surface Transportation Board.

ACTION: 60-Day notice of intent to seek extension of approval: Rail Depreciation Studies.

SUMMARY: As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the Rail Depreciation Studies. This information collection is described in detail below.

Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Rail Depreciation Studies.

OMB Control Number: 2140–0028.

Form Number: None.

Type of Review: Extension with change.

Respondents: Class I railroads.

Number of Respondents: 7.

Estimated Time per Response: Approximately 500 hours annually.

Frequency of Response: Bi-annual. (Under 49 CFR part 1201, sections 4–1 to 4–4, the Board requires all class 1 (large) carriers to submit depreciation studies no less than every three years for equipment property and every six years for road and track property. That means that for any given six year period the Class 1 railroads have to submit no less than three depreciation reports or the equivalent of 0.5 depreciation reports per year.)

Total Annual Hour Burden: 3,500 hours (500 hours × 7 Class I railroads).

Total Annual ''Non-Hour Burden'' Cost: Approximately $262,500 per year. Board staff estimates that each study will cost between $50,000 and $100,000, which equals a cost of approximately $25,000–$50,000 per year. Using an average cost ($37,500 per year × 7 Class I railroads), the non-hour burden cost is

estimated to be approximately $262,500 per year.

Needs and Uses: Under 49 CFR part 1201, sections 4–1 to 4–4, the Board is required to identify those classes of property for which rail carriers may include depreciation charges under operating expenses, and the Board must also prescribe a rate of depreciation that may be charged to those classes of property. Pursuant to the Board's authority under 49 U.S.C. 11145, Class I rail carriers are required to submit Depreciation Studies to the Board. Information in these studies is not available from any other source. The Board uses the information in these studies to prescribe depreciation rates. These depreciation rate prescriptions state the period for which the depreciation rates therein are applicable. Class I railroads apply the prescribed depreciation rates to their investment base to determine monthly and annual depreciation expense. This expense is included in the railroads' operating expenses, which are reported in their R–1 reports (OMB Control Number 2140–0009). Operating expenses are used to develop operating costs for application in various proceedings before the Board, such as in rate reasonableness cases and in the determination of railroad revenue adequacy.

DATES: Comments on this information collection should be submitted by July 1, 2016.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or to *PRA@stb.dot.gov.* When submitting comments, please refer to ''Rail Depreciation Studies.'' For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or at *pedro.ramirez@stb.dot.gov.* [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under § 3506(c)(2)(A) of the PRA, federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: April 27, 2016.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–10193 Filed 4–29–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic motor and machinery brakes for Southern Boulevard (SR 80) Bascule Bridge Replacement project that meet AASHTO Moveable Highway Bridge Design specifications (MHBDS) 5.5, 5.6, 6.7.13 in the State of Florida.

DATES: The effective date of the waiver is May 3, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Jomar Maldonado, FHWA Office of the Chief Counsel, (202) 366–1373, or via email at *Jomar.Maldonado@dot.gov.* Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic motor and machinery brake systems for Southern Boulevard (SR 80) Bascule Bridge Replacement project in the State of Florida.

In accordance with Division K, section 122 of the ''Consolidated and Further Continuing Appropriations Act, 2015'' (Pub. L. 113–235), FHWA published a notice of intent to issue a waiver on its Web site *(http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=118*) on January 14th. The FHWA received no comments in response to the publication. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of motor and machinery brake systems that meet specifications for AASHTO Moveable Highway Bridge Design for Southern Boulevard (SR 80) Bascule Bridge Replacement project in the State of Florida.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410).

Issued on: April 21, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–10214 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0027]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 21 individuals for exemption from the vision requirement

in the Federal Motor Carrier Safety Regulations. They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce.

DATES: Comments must be received on or before June 1, 2016. All comments will be investigated by FMCSA. The exemptions will be issued the day after the comment period closes.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2016–0027 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 21 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

II. Qualifications of Applicants

Felix Barajas Ramirez

Mr. Barajas Ramirez, 54, has had a retinal detachment in his left eye since 2009. The visual acuity in his right eye is 20/20, and in his left eye, hand motion. Following an examination in 2016, his ophthalmologist stated, ''In my medical opinion I see no ocular reason to exclude Mr. Barajas from driving or operating a commercial vehicle.'' Mr. Barajas Ramirez reported that he has driven tractor-trailer combinations for 13 years, accumulating 140,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Curtis W. Bottorf

Mr. Bottorf, 61, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/80. Following an examination in 2015, his optometrist stated, ''I certify that, in my medical opinion, Curt Bottorf has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Bottorf reported that he has driven straight trucks for 23 years, accumulating 345,000 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronnie E. Boyd

Mr. Boyd, 51, has had corneal ectasia in his right eye since 2013. The visual acuity in his right eye is 20/50, and in his left eye, 20/20. Following an examination in 2015, his ophthalmologist stated, ''Ronnie has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Boyd reported that he has driven straight trucks for 1 year, accumulating 7,000 miles and tractor-trailer combinations for 6 years, accumulating 480,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Laurence R. Casey

Mr. Casey, 56, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/400, and in his left eye, 20/40. Following an examination in 2016, his ophthalmologist stated, ''Mr. Casey has sufficient vision to operate a commercial vehicle.'' Mr. Casey reported that he has driven straight trucks for 34 years, accumulating 153,000 miles, and tractor-trailer combinations for 34 years, accumulating 2.04 million miles. He holds a Class AM CDL from Massachusetts. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jon C. Dillon

Mr. Dillon, 47, has macular scarring in his left eye due to a traumatic incident in 1991. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2016, his optometrist stated, ''It is my medical opinion that Mr. Dillion has sufficient vision to perform the driving tests required to operate a commercial vehicle under your guidelines.'' Mr. Dillon reported that he has driven straight trucks for 23 years, accumulating 11,500 miles and tractor-trailer combinations for 10 years, accumulating 30,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows

no crashes and no convictions for moving violations in a CMV.

Richard W. Ellis

Mr. Ellis, 48, has had a prosthetic right eye since 2000. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''In regards to his visual competence, Mr. Ellis is quite sufficiently equipped to operate commercial vehicles.'' Mr. Ellis reported that he has driven tractor-trailer combinations for 30 years, accumulating 2.4 million miles. He holds a Class A CDL from Iowa. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Shorty Ellis

Mr. Ellis, 52, has had a retinal scar in his right eye since childhood. The visual acuity in his right eye is 20/50, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''. . . Mr. Ellis has stable vision that hasn't changed and he is safe to operate a commercial motor vehicle as he has been successfully doing for years.'' Mr. Ellis reported that he has driven straight trucks for 35 years, accumulating 280,000 miles, tractor-trailer combinations for 5 years, accumulating 390,000 miles and buses for 2 years, accumulating 2,400 miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gregory T. Garris

Mr. Garris, 47, has had a cataract in his right eye since birth. The visual acuity in his right eye is hand motion, and in his left eye, 20/20. Following an examination in 2015, his ophthalmologist stated, ''Given his long-term record of safely driving with one good eye, I see no reason to deny him continued privilege of driving as a commercial driver.'' Mr. Garris reported that he has driven tractor-trailer combinations for 25 years, accumulating 1.63 million miles. He holds a Class A CDL from Oklahoma. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James R. Hammond

Mr. Hammond, 27, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/400 and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''The patient states that he has safely driven commercial vehicles for many years with no troubles. I think the patient should be able to drive safely with his excellent vision (left eye) and his excellent visual field with both eyes.'' Mr. Hammond reported that he has driven straight trucks for 2 years, accumulating 28,080 miles. He holds a Class D CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Russell P. Kosinko

Mr. Kosinko, 55, has a scar in his right eye due to a traumatic incident in 2011. The visual acuity in his right eye is 20/600, and in his left eye, 20/30. Following an examination in 2015, his optometrist stated, ''In my medical opinion Russell does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Kosinko reported that he has driven straight trucks for 20 years, accumulating 2 million miles, and tractor-trailer combinations for 20 years, accumulating 520,000 miles. He holds a Class AM CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Christopher B. Liston

Mr. Liston, 47, has had a chorioretinal scar in his right eye since birth. The visual acuity in his right eye is 20/70, and in his left eye, 20/20. Following an examination in 2016, his optometrist stated, ''It is my opinion that Mr. Liston has sufficient vision to perform driving tasks required to operate a commercial vehicle as it relates to his vision.'' Mr. Liston reported that he has driven straight trucks for 11 years, accumulating 126,720 miles, and tractor-trailer combinations for 11 years, accumulating 31,680 miles. He holds a Class AM CDL from Tennessee. His driving record for the last 3 years shows one crash, to which he did not contribute and for which he was not cited, and no convictions for moving violations in a CMV.

Larry D. Miller

Mr. Miller, 72, has had a prosthetic right eye since 1969. The visual acuity in his right eye is no light perception, and in his left eye, 20/25. Following an examination in 2015, his optometrist stated, ''In my professional medical opinion, Mr. Larry Miller has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Miller reported that he has driven straight trucks for 10 years, accumulating 250,000 miles, and tractor-trailer combinations for 43 years, accumulating 4.3 million miles. He holds a Class A CDL from Missouri. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Mickael P. Miller

Mr. Miller, 52, has had exotropia in both eyes since childhood, preventing him from using both eyes together. The visual acuity in his right eye is 20/20, and in his left eye, 20/20. Following an examination in 2016, his optometrist stated, ''In my opinion Mr. Miller has vision adequate to drive a commercial vehicle, especially in light of his long work history doing this very job with an apparently successful track record.'' Mr. Miller reported that he has driven straight trucks for 25 years, accumulating 50,000 miles. He holds a Class B CDL from Louisiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Benny D. Patterson

Mr. Patterson, 56, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2015, his ophthalmologist stated, ''I do feel that Mr. Patterson, in my medical opinion, has sufficient vision to perform the driving tasks required to operative [*sic*] a commercial motor vehicle with the monocular Vision Exemption Program.'' Mr. Patterson reported that he has driven straight trucks for 38 years, accumulating 760,000 miles and tractor-trailer combinations for 35 years, accumulating 875,000 miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James A. Peterson

Mr. Peterson, 67, had a retinal detachment in his left eye in 1965. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2015, his ophthalmologist stated, ''His color vision is completely normal, and in my medical opinion, he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Peterson reported that he has driven straight trucks for 3 years, accumulating 30,000 miles, and tractor-trailer combinations for 20 years, accumulating 1 million miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jose R. Pitre Rodriguez

Mr. Pitre Rodriguez, 57, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''Mr. Pitre has sufficient vision to perform the driving test required and to operate a commercial vehicle.'' Mr. Pitre Rodriguez reported that he has driven straight trucks for 23 years, accumulating 61,600 miles. He holds a Class A CDL from FL. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John Rueckert

Mr. Rueckert, 63, had a retinal detachment in his left eye in 2013. The visual acuity in his right eye is 20/20, and in his left eye, 20/100. Following an examination in 2015, his optometrist stated, ''In my opinion, John has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Rueckert reported that he has driven straight trucks for 45 years, accumulating 2.25 million miles and tractor-trailer combinations for 39 years, accumulating 5.85 million miles. He holds a Class A CDL from South Dakota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joseph W. Schmit

Mr. Schmit, 54, has a prosthetic left eye due to a traumatic incident in 1987. The visual acuity in his right eye is 20/20, and in his left eye, no light perception. Following an examination in 2016, his optometrist stated, ''It is my medical opinion that he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Schmit reported that he has driven straight trucks for 20 years, accumulating 250,000 miles and tractor-trailer combinations for 4 years, accumulating 22,000 miles. He holds a Class A CDL from Nebraska. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Douglas R. Strickland

Mr. Strickland, 25, has had refractive amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''He should be cleared to drive a commercial vehicle from a visual standpoint in my opinion.'' Mr. Strickland reported that he has driven straight trucks for 8 years, accumulating 12,800 miles. He holds a Class C CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Vladimir Szudor

Mr. Szudor, 44, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''Yes, Mr. Szudor has sufficient vision to perform the driving tasks to operate commercial vehicle.'' Mr. Szudor reported that he has driven buses for 8 years, accumulating 320,000 miles. He holds an operator's license from Florida. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Marvin S. Zimmerman

Mr. Zimmerman, 69, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is light perception, and in his left eye, 20/20. Following an examination in 2015, his optometrist stated, ''In my medical opinion Mr. Zimmerman has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Zimmerman reported that he has driven tractor-trailer combinations for 40 years, accumulating 5.2 million miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

III. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and put the docket number FMCSA–2016–0027 in the ''Keyword'' box, and click ''Search. When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and insert the docket number FMCSA–2016–0027 in the ''Keyword'' box and click ''Search.'' Next, click ''Open Docket Folder'' button and choose the document listed to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Issued on: April 26, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–10200 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Environmental Impact Statement (EIS) for the Hudson Tunnel Project in Hudson County, New Jersey and New York County, New York

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of intent (NOI) to prepare an Environmental Impact Statement (EIS).

SUMMARY: Through this Notice, FRA announces its intent to jointly prepare an environmental impact statement (EIS) with the New Jersey Transit Corporation (NJ TRANSIT) for the Hudson Tunnel Project (the Proposed Action or the Project) under the National Environmental Policy Act (NEPA). The Proposed Action is

intended to preserve the current functionality of the Northeast Corridor's (NEC) Hudson River rail crossing between New Jersey and New York and strengthen the resilience of the NEC. The Project would consist of construction of a new rail tunnel beneath the Hudson River, including railroad infrastructure in New Jersey and New York connecting the new rail tunnel to the existing NEC, and rehabilitation of the existing NEC tunnel beneath the Hudson River, referred to as the North River Tunnel. The EIS will evaluate the potential environmental impacts of a reasonable range of alternatives, including the No Action (No Build) Alternative. As appropriate, FRA and NJ TRANSIT will coordinate with the National Railroad Passenger Corporation (Amtrak), as owner of the North River Tunnel, and the Port Authority of New York and New Jersey (PANYNJ) on the EIS.

FRA invites the public and all interested parties to provide comments on the scope of the EIS, including the proposed purpose and need, the Proposed Action and alternatives to be considered in the EIS, potential environmental impacts of concern and methodologies to be used in the EIS, the approach for public and agency involvement, and any other particular concerns about the potential impacts of the Proposed Action.

DATES: Persons interested in providing written comments on the scope of the EIS must do so by May 31, 2016. Please submit written comments via the internet, email, or mail, using the contact information provided below.

Persons may also provide comments orally or in writing at the public scoping meetings. FRA and NJ TRANSIT will hold two scoping meetings on the following dates:

- May 17, 2016, at the Hotel Pennsylvania, Gold Ballroom, 3rd Floor, 401 Seventh Avenue at West 33rd Street, New York, New York 10001.
- May 19, 2016, at Union City High School, 2500 Kennedy Boulevard, Union City, New Jersey 07087.

Both days will include an afternoon session from 3 to 5 p.m. with a brief presentation about the Proposed Action at 4 p.m., and an evening session from 6 to 8 p.m. with a brief presentation about the Proposed Action at 7 p.m. The public can review Project information, talk informally with members of the study staff, and formally submit comments to the FRA (to a stenographer or in writing). The meeting facilities will be accessible to persons with disabilities. Spanish language translators will be present. If you need special translation or signing services or other special accommodations, please contact the Project team five days prior to the meeting at 973–261–8115, or email *team@hudsontunnelproject.com*.

FRA and NJ TRANSIT will give equal consideration to oral and written comments.

ADDRESSES: The public and other interested parties are encouraged to comment via the internet at the Project's Web site (*www.hudsontunnelproject.com*) or via email at *team@hudsontunnelproject.com*. You can also send written comments by mail to persons identified below.

FOR FURTHER INFORMATION CONTACT: Amishi Castelli, Ph.D., Environmental Protection Specialist, Office of Railroad Policy and Development, USDOT Federal Railroad Administration, One Bowling Green, Suite 429, New York, NY 10004, or *Amishi.Castelli@dot.gov;* or Mr. RJ Palladino, AICP, PP, Senior Program Manager, NJ TRANSIT Capital Planning, One Penn Plaza East—8th Floor, Newark, NJ 07105, or *RPalladino@njtransit.com*.

SUPPLEMENTARY INFORMATION: FRA and NJ TRANSIT will prepare the EIS in compliance with NEPA, the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR parts 1500–1508), and the FRA Procedures for Considering Environmental Impacts (FRA's Environmental Procedures) (64 FR 28545, May 26, 1999; 78 FR 2713, Jan. 14, 2013). Consistent with Section 11503 of the Fixing America's Surface Transportation Act of 2015 (FAST Act), FRA and NJ TRANSIT will prepare the EIS consistent with 23 U.S.C. 139. After release and circulation of a Draft EIS for public comment, FRA intends to issue a single document that consists of the Final EIS and Record of Decision under Public Law 112–141, 126 Stat. 405, Section 1319(b) unless it determines the statutory criteria or practicability considerations preclude issuing a combined document.

The EIS will also document compliance with other applicable Federal, state, and local environmental laws and regulations, including Section 106 of the National Historic Preservation Act (NHPA); the Conformity requirements of the Clean Air Act; the Clean Water Act; Section 4(f) of the Department of Transportation Act of 1966 (Section 4(f)); the Endangered Species Act; Executive Order 11988 and USDOT Order 5650.2 on Floodplain Management; Executive Order 11990 on Protection of Wetlands; the Magnuson-Stevens Act related to Essential Fish Habitat; the Coastal Zone Management Act; and Executive Order 12898 on Environmental Justice. The EIS will provide FRA, NJ TRANSIT, and other cooperating and participating agencies and the public with information about alternatives that meet the Proposed Action's purpose and need, including their environmental impacts and appropriate measures to avoid, minimize, and mitigate those impacts.

The Proposed Action may affect historic properties and will be subject to the requirements of Section 106 of the NHPA (54 U.S.C. 306108). Consistent with regulations issued by the Advisory Council on Historic Preservation (36 CFR part 800), FRA intends to coordinate compliance with Section 106 of the NHPA with the preparation of the EIS. The public and interested parties may also provide input relevant to FRA's review under Section 106 including identifying potentially eligible resources and the potential effect of the Proposed Action on those resources. In addition, the public or other interested parties may also request to participate in the Section 106 process as a consulting party under 36 CFR part 800.

Project Background

The existing NEC rail tunnel beneath the Hudson River is known as the North River Tunnel. This tunnel is used by Amtrak for intercity passenger rail service and by NJ TRANSIT for commuter rail service. The approach to the tunnel begins east of NJ TRANSIT's Frank R. Lautenberg Station in Secaucus, New Jersey (which is 5 miles east of Amtrak and NJ TRANSIT's Newark Penn Station). East of the Secaucus station, the NEC has two tracks that approach the tunnel on a raised embankment through the towns of Secaucus and North Bergen, New Jersey. Tracks enter a tunnel portal in North Bergen, passing beneath Union City and Weehawken, New Jersey and the Hudson River before emerging within the Penn Station New York (PSNY) rail complex in New York City. The tunnel has two separate tubes, each accommodating a single track for electrically powered trains, and extends approximately 2.5 miles from the tunnel portal in North Bergen to PSNY. The existing North River Tunnel is a critical NEC asset and is the only intercity passenger rail crossing into New York City from New Jersey and areas west and south.

The NEC is the most heavily used passenger rail line in the U.S., both in terms of ridership and service frequency. Amtrak operates over the

entire NEC, providing regional service, long distance service, and high-speed Acela Express service. Amtrak owns the majority of the NEC, including the North River Tunnel. NJ TRANSIT operates an extensive commuter rail network in New Jersey that extends to Philadelphia, Pennsylvania; Orange and Rockland Counties in New York; and New York City. Amtrak's NEC service and NJ TRANSIT's commuter rail service provide connections between the major cities of the Mid-Atlantic and Northeast states and commuter access for thousands of people who work in the region. Therefore, both services are important to the region's economy. In 2014, Amtrak carried approximately 24,000 weekday passengers each day on more than 100 trains between New York and New Jersey. NJ TRANSIT carried almost 90,000 weekday passengers each day on approximately 350 trains between New York and New Jersey.

Extensive engineering work and environmental documentation have been prepared over the past two decades for a new Hudson River rail tunnel. This has included the detailed studies and design conducted for the Access to the Region's Core (ARC) project from 1995 through 2010. The ARC project evaluated several options for construction of a new tunnel under the Hudson River in combination with an expansion of station capacity in midtown Manhattan to accommodate growing passenger demand. In addition, Amtrak conducted the Gateway Program Feasibility Study in 2011–2013, which assessed options for constructing a new Hudson River tunnel. Amtrak's Gateway Program envisions a series of improvement projects to upgrade and expand the capacity of the NEC. While many of the Gateway improvements are still being fully defined, a new Hudson Tunnel on the NEC is urgently needed to maintain existing service.

In 2012, the FRA launched the NEC FUTURE study to consider the role of rail passenger service in the context of current and future transportation demands and to evaluate the appropriate level of capacity improvements to make across the NEC. The intent of the NEC FUTURE program is to help develop a long-term vision and investment program for the NEC. Through NEC FUTURE, FRA is currently evaluating overall capacity improvements and environmental consequences associated with improved NEC rail services, including trans-Hudson service. However, as described above, this Proposed Action addresses a specific need due to the deterioration of the existing North River Tunnel and can be considered independently from the other projects analyzed in the NEC FUTURE EIS. All three build alternatives evaluated in the NEC FUTURE Tier 1 Draft EIS FRA released in November 2015 included new Hudson River tunnel investments similar to this Proposed Action. This EIS may incorporate the appropriate analysis and other relevant elements from the NEC FUTURE Tier 1 EIS while focusing on the issues specific to this independent Project.

As appropriate, FRA and NJ TRANSIT will use the work conducted for the ARC project and Amtrak's feasibility study to provide baseline information for the study of the Proposed Action. While the Proposed Action addresses maintenance and resilience of the NEC Hudson River crossing, it would not increase rail capacity. At the same time, the Proposed Action would not preclude other future projects to expand rail capacity in the area. Accordingly, although the Proposed Action may also be an element of a larger program to expand rail capacity, it would meet an urgent existing need and will be evaluated as a separate project from any larger initiative. Ultimately, an increase in service between Newark Penn Station and PSNY would not occur until other substantial infrastructure capacity improvements are built in addition to a new Hudson River rail tunnel. These improvements will be the subject of one or more separate design, engineering, and appropriate environmental reviews.

Purpose and Need

The purpose of the Proposed Action is: (1) To preserve the current functionality of Amtrak's NEC service and NJ TRANSIT's commuter rail service between New Jersey and PSNY by repairing the deteriorating North River Tunnel; and (2) to strengthen the NEC's resiliency to support reliable rail service by providing redundant capacity under the Hudson River for Amtrak and NJ TRANSIT NEC trains between New Jersey and the existing PSNY. These improvements must be achieved while maintaining uninterrupted commuter and intercity rail service and by optimizing the use of existing infrastructure.

Service reliability through the tunnel has been compromised due to damage to tunnel components Superstorm Sandy caused, when it inundated both tubes in the North River Tunnel with seawater in October 2012. That storm resulted in the cancellation of all Amtrak and NJ TRANSIT service into New York City for five days. Although the tunnel was restored to service and is now safe for travel, chlorides from the seawater remain in the tunnel's concrete liner and bench walls, causing ongoing damage to the bench walls, imbedded steel, track, and signaling and electrical components.

The damage Superstorm Sandy caused is compounded by the tunnel's age and the intensity of its current use (operating at capacity to meet current demands), resulting in frequent delays due to component failures within the tunnel. With no other Hudson River passenger rail crossing into PSNY, single-point failures can suspend rail service, causing delays that cascade up and down the NEC as well as throughout NJ TRANSIT's commuter system, disrupting service for hundreds of thousands of passengers. For example, on March 17, 2016, a NJ TRANSIT train became disabled in one of the tunnel's tubes during the morning peak period, resulting in delays to 57 other Amtrak and NJ TRANSIT trains headed into and out of PSNY that day. Service disruptions will continue and will over time happen more frequently as the deterioration from the seawater inundation continues and components fail in an unpredictable manner.

Because of the importance of the North River Tunnel to essential commuter and intercity rail service between New Jersey and New York, City, rehabilitation of the existing North River Tunnel must be accomplished without unacceptable reductions in weekday service. Removing one tube in the existing North River Tunnel from operation without new capacity in place would reduce weekday service to volumes well below the current maximum capacity of 24 peak direction trains per hour.

In addition, the existing two-track North River Tunnel is operating at full capacity and does not provide redundancy for reliable train operations during disruptions or maintenance. Therefore, any service disruption results in major passenger delays and substantial reductions to overall system flexibility, reliability and on-time performance. This condition is exacerbated by the need to perform increased maintenance to address damage Superstorm Sandy caused. These maintenance demands are difficult to meet because of the intensity of rail service in the tunnel. Efforts to maintain the North River Tunnel in a functional condition currently require nightly and weekend tunnel outages with reductions in service due to single-track operations. Train service is adjusted to allow the closure of one tube of the North River Tunnel each weekend for maintenance for a 55-hour window beginning Friday evening and ending early Monday morning.

Proposed Action and Alternatives

The Proposed Action, the Hudson Tunnel Project, consists of:

- A new NEC rail tunnel with two tubes and electrified tracks beneath the Hudson River, extending from a new tunnel portal in North Bergen, New Jersey to the PSNY rail complex;
- Ventilation shaft buildings above the tunnel on both sides of the Hudson River to provide smoke ventilation during emergencies;
- Modifications to the existing NEC tracks in New Jersey and additional track on the NEC to connect the new tunnel to the NEC, beginning just east of Frank R. Lautenberg Station in Secaucus, New Jersey, and approaching the new tunnel portal in North Bergen, New Jersey;
- Modifications to connecting rail infrastructure at PSNY to connect the new tunnel's tracks to the existing tracks at PSNY; and
- Rehabilitation of the existing North River Tunnel.

Once the North River Tunnel rehabilitation is complete, both the old and new tunnel would be in service, providing redundant capacity and increased operational flexibility for Amtrak and NJ TRANSIT.

In addition to those permanent features, the Proposed Action would involve the following types of construction activities, which will be described and evaluated in the Draft EIS:

- Construction of new tracks along the NEC between Frank R. Lautenberg Station and the new tunnel portal;
- Construction of the new tunnel using Tunnel Boring Machine (TBM) technology, which is conducted underground from a tunnel portal. At this time, it is anticipated that tunneling would likely occur from the New Jersey side of the new tunnel;
- Construction staging sites near the tunnel portal and at the vent shaft site in New Jersey. These locations would be used to access the tunnel and to remove rock from the tunnel while it is being bored;
- Construction staging site at the vent shaft site in Manhattan; and
- Potential construction activities that affect the Hudson River riverbed above the tunnel location.

Alternatives will be developed based on the purpose of and need for the Project, information obtained through the scoping process, and information from previous studies. The EIS process will consider a No Action Alternative and a reasonable range of Build Alternatives identified through an alternatives development process. The Draft EIS will document the alternatives development and screening process. On the basis of that screening process and further analysis in the Draft EIS itself, FRA anticipates that the Draft EIS will also identify and describe the Preferred Alternative consistent with 40 CFR 1502.14(e).

Possible Effects

Consistent with NEPA and FRA's Environmental Procedures, the EIS will consider the potential direct, indirect, and cumulative effects of the Project alternatives on the social, economic, and environmental resources in the study area. This analysis will include identification of study areas; documentation of the affected environment; evaluation of direct and indirect effects of the alternatives; and identification of measures to avoid and/or mitigate adverse impacts.

The analysis will include detailed consideration of impacts that would occur during the Project's construction—including construction of the new tunnel and rehabilitation of the existing tunnel—as well as consideration of the impacts once the construction is complete. The Proposed Action would not expand capacity on this portion of the NEC as compared to the No Action Alternative, and therefore service changes are not an anticipated consequence of the Proposed Action. FRA and NJ TRANSIT will evaluate direct, indirect and cumulative changes to the human and natural environment resulting from the alternatives, including analyses of the following resource areas:

- Transportation;
- Social and economic conditions;
- Property acquisition;
- Parks and recreational resources;
- Visual and aesthetic resources;
- Historic and archaeological resources;
- Air quality;
- Greenhouse gas emissions and resilience;
- Noise and vibration;
- Ecology (including wetlands, water and sediment quality, floodplains, and biological resources);
- Threatened and endangered species;
- Contaminated materials; and
- Environmental justice.

A Section 4(f) evaluation will also be included in the Draft EIS.

Scoping, Public Involvement, and Agency Coordination

This NOI initiates the scoping process under NEPA, which helps guide the development of the Draft EIS. FRA and NJ TRANSIT invite all interested individuals, organizations, and federal, state, and local agencies to comment on the scope of the EIS. Comments are encouraged on the Proposed Action's purpose and need; the alternatives to consider in the EIS; the analyses to include in the EIS and the study area and methodologies to be used; the approach for public and agency involvement; and any particular concerns about the anticipated impacts of the Proposed Action.

Public agencies with jurisdiction are requested to advise FRA of the applicable permit and environmental review requirements of each agency, and the scope and content of the environmental information germane to the agency's statutory responsibilities in connection with the Proposed Action. Public agencies are requested to advise FRA if they anticipate taking a major action in connection with the Proposed Action and if they wish to cooperate in the preparation of the EIS under 40 CFR 1501.16.

FRA will coordinate with participating agencies during development of the Draft EIS under 23 U.S.C. 139. FRA will also coordinate with federally recognized tribes and Consulting Parties established under Section 106 of the NHPA.

The lead agencies will invite all Federal and non-Federal agencies and Native American tribes that may have an interest in the Proposed Action to become participating agencies for the EIS. If an agency or tribe is not invited and would like to participate, please contact FRA at the contact information listed above. The lead agencies will develop a Coordination Plan summarizing how they will engage the public, agencies, and tribes in the process. The Coordination Plan will be posted to the Project Web site (*www.hudsontunnelproject.com*) and to FRA's Web site (*www.fra.dot.gov/Page/P0214*). NJ TRANSIT will lead the outreach activities during the public scoping process, beginning with the scoping meeting and comment period identified under **DATES** above. Public meetings, open houses and other public involvement initiatives, including newsletters and outreach, will be held and used throughout the course of this study. Public outreach activities will be announced on the Project Web site (*www.hudsontunnelproject.com*) and through mailings, public notices, advertisements and press releases.

Issued in Washington, DC, on April 27, 2016.

Amitabha Bose,

Chief Counsel.

[FR Doc. 2016–10277 Filed 4–28–16; 11:15 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2016–0053]

Reports, Forms and Record Keeping Requirements, Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice of proposed extension, without change, of a currently approved collection of information.

SUMMARY: Before a federal agency may collect certain information from the public, the agency must receive approval from the Office of Management and Budget (''OMB''). Under procedures established by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), before seeking OMB approval, federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections. In compliance with the Paperwork Reduction Act of 1995, this notice describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be submitted on or before July 1, 2016.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, please be sure to mention the docket number of this document and cite OMB Clearance No. 2127–0609, ''Criminal Penalty Safe Harbor Provision.''

You may call the Docket at 202–366–9322.

Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Kerry Kolodziej, Office of the Chief Counsel, NCC–100, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–366–5263). Please identify the relevant collection of information by referring to OMB Clearance Number 2127–0609 ''Criminal Penalty Safe Harbor Provision.''

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected; and

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comment on the following proposed extension, without change, of a currently approved collection of information:

Criminal Penalty Safe Harbor Provision

Type of Request—Extension, without change, of a currently approved collection.

OMB Clearance Number—2127–0609.

Form Number—This collection of information uses no standard forms.

Requested Expiration Date of Approval—Three (3) years from the date of approval of the collection.

Summary of the Collection of Information—Each person seeking safe harbor protection from criminal penalties under 49 U.S.C. 30170 related to an improper report or failure to report is required to submit the following information to NHTSA: (1) A signed and dated document that identifies (a) each previous improper report and each failure to report as required under 49 U.S.C. 30166, including a regulation, requirement, request or order issued thereunder, for which protection is sought and (b) the specific predicate under which the improper or omitted report should have been provided; and (2) the complete and correct information that was required to be submitted but was improperly submitted or was not previously submitted, including relevant documents that were not previously submitted to NHTSA or, if the person cannot do so, provide a detailed description of that information and/or the content of those documents and the reason why the individual cannot provide them to NHTSA. *See* 49 U.S.C. 30170(a)(2) and 49 CFR 578.7; *see also* 66 FR 38380 (July 24, 2001) (safe harbor final rule); 65 FR 81414 (Dec. 26, 2000) (safe harbor interim final rule).

Description of the Need for the Information and Use of the Information—This information collection was mandated by Section 5 of the Transportation Recall Enhancement, Accountability, and Documentation Act, codified at 49 U.S.C. 30170(a)(2). The information collected will provide NHTSA with information the Agency should have received previously and will also promptly provide the Agency with correct information to do its analyses, such as, for example, conducting tests or drawing conclusions about possible safety-related defects. NHTSA anticipates using this information to help it to accomplish its statutory assignment of identifying safety-related defects in motor vehicles and motor vehicle equipment and, when appropriate, seeking safety recalls.

Description of the Likely Respondents, Including Estimated Number and Proposed Frequency of Response to the

Collection of Information—This collection of information applies to any person who seeks a ''safe harbor'' from potential criminal liability for violating section 1001 of title 18 with respect to the reporting requirements of 49 U.S.C. 30166, with the specific intention of misleading the Secretary with respect to a safety-related defect in motor vehicles or motor vehicle equipment that caused death or serious bodily injury to an individual. Thus, the collection of information applies to the manufacturers, and any officers or employees thereof, who respond or have a duty to respond to an information provision requirement pursuant to 49 U.S.C. 30166 or a regulation, requirement, request or order issued thereunder.

We believe that there will be very few criminal prosecutions under section 30170, given its elements. Since the safe harbor related rule has been in place, the Agency has not received any reports. Accordingly, the rule is not likely to be a substantial motivating force for a submission of a proper report. We estimate that no more than one person a year would invoke this new collection of information, and we do not anticipate receiving more than one report a year from any particular person.

Estimate of the Total Annual Reporting and Recordkeeping Burdens Resulting from the Collection of Information—2 hours.

As stated before, we estimate that no more than one person a year would be subject to this collection of information. Incrementally, we estimate that on average it will take no longer than two hours for a person to compile and submit the information we are requiring to be reported. Therefore, the total burden hours on the public per year is estimated to be a maximum of two hours.

Since nothing in the rule requires those persons who submit reports pursuant to this rule to keep copies of any records or reports submitted to us, recordkeeping costs imposed would be zero hours and zero costs.

Authority: 44 U.S.C. 3506; delegation of authority at 49 CFR 1.95.

Issued: April 21, 2016.

Paul A. Hemmersbaugh,

Chief Counsel.

[FR Doc. 2016–10201 Filed 4–29–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Community Development Advisory Board Meeting

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Community Development Advisory Board (the Advisory Board), which provides advice to the Director of the Community Development Financial Institutions Fund (CDFI Fund). The meeting will be open to the public via live webcast at *https://www.treasury.gov/press-center/Video-Audio-Webcasts/Pages/Webcasts.aspx*.

DATES: The meeting will be held from 9:00 a.m. to 4:00 p.m. Eastern Daylight Time on Tuesday, May 17, 2016.

ADDRESSES: The Advisory Board meeting will be held in the Cash Room at the U.S. Department of the Treasury located at 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Submission of Written Statements: Participation in the discussions at the meeting will be limited to Advisory Board members, Department of the Treasury staff, and certain invited guests. Anyone who would like to have the Advisory Board consider a written statement must submit it by 5:00 p.m. Eastern Daylight Time on Thursday, May 5, 2016. Send paper statements to Bill Luecht, Senior Advisor, Office of Legislative and External Affairs, CDFI Fund, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Send electronic statements to *AdvisoryBoard@cdfi.treas.gov*.

In general, the CDFI Fund will make all statements available in their original format, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers, for public inspection and photocopying at the CDFI Fund. The CDFI Fund is open on official business days between the hours of 9:00 a.m. and 5:00 p.m. You can make an appointment to inspect statements by emailing *AdvisoryBoard@cdfi.treas.gov*. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Bill Luecht, Senior Advisor, Office of Legislative and External Affairs, CDFI Fund, 1500 Pennsylvania Avenue NW., Washington, DC 20220, (202) 653–0322 (this is not a toll free number) or *AdvisoryBoard@cdfi.treas.gov*. Other information regarding the CDFI Fund and its programs may be obtained through the CDFI Fund's Web site at *http://www.cdfifund.gov*.

SUPPLEMENTARY INFORMATION: Section 104(d) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(d)) established the Advisory Board. The charter for the Advisory Board has been filed in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and with the approval of the Secretary of the Treasury.

The function of the Advisory Board is to advise the Director of the CDFI Fund (who has been delegated the authority to administer the CDFI Fund) on the policies regarding the activities of the CDFI Fund. The Advisory Board does not advise the CDFI Fund on approving or declining any particular application for monetary or non-monetary awards. The Advisory Board shall meet at least annually.

It has been determined that this document is not a major rule as defined in Executive Order 12291 and therefore regulatory impact analysis is not required. In addition, this document does not constitute a rule subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 2 and the regulations thereunder, Bill Luecht, Designated Federal Officer of the Advisory Board, has ordered publication of this notice that the Advisory Board will convene an open meeting which will be held in the Cash Room at the U.S. Department of the Treasury located at 1500 Pennsylvania Avenue NW., Washington, DC 20220, from 9:00 a.m. to 4:00 p.m. Eastern Daylight Time on Tuesday, May 17, 2016. The room will accommodate up to 50 members of the public on a first-come, first-served basis.

Because the meeting will be held in a secure federal building, members of the public who wish to attend the meeting must register in advance. The link to the online registration system can be found in the meeting announcement found at the top of *www.cdfifund.gov/cdab*. The registration deadline is 11:59 p.m. Eastern Daylight Time on Tuesday, May 10, 2016. To register, each member of the public must provide his/her full name as it appears on a government issued ID, date of birth, and Social Security Number. For entry into the building on the date of the meeting, each attendee must present his/her government issued ID, such as a driver's

license or passport, which includes a photo.

The Advisory Board meeting will include a report from the CDFI Fund Director on the activities of the CDFI Fund since the last Advisory Board meeting and on Fiscal Year 2016 priorities, and a discussion on the development of a five-year strategic plan.

Authority: 12 U.S.C. 4703.

Mary Ann Donovan,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2016–10194 Filed 4–29–16; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0691]

Agency Information Collection Activity; Comment Request; Learner's Perceptions Survey (LPS)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 1, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0691'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492 or email *crystal.rennie@va.gov.* Please refer to ''OMB Control No. 2900–0691.''

SUPPLEMENTARY INFORMATION:

Titles:

1. Learners' Perceptions Survey PR, VA Form 10–0439.

2. Learners' Perceptions Survey AH, VA Form 10–0439.

OMB Control Number: 2900–0691.

Type of Review: Revision.

Abstracts:

Under the authority of Federal Law 38 U.S.C. Part V, Chapter 73, Section 7302, the Department of Veterans Affairs (VA) provides education and training to over 120,000 national cohorts of health care trainees per year to assist in providing an adequate supply of health personnel for VA and the Nation. VA is further required to evaluate this program on a continuing basis and determine its effectiveness in achieving its goals (Federal Law, 38 U.S.C. Part I, Chapter 5, Section 527). In addition, the Government Performance and Results Act (GPRA) of 1993, requires Federal agencies to set goals, measure performance, and report on the accomplishments.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 80 FR 77083 on December 11, 2015.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. Learners' Perceptions Survey PR, VA Form 10–0439—3,750 hours.

b. Learners' Perceptions Survey AH, VA Form 10–0439—3,750 hours.

Estimated Average Burden Per Respondent:

a. Learners' Perceptions Survey PR, VA Form 10–0439—15 minutes.

b. Learners' Perceptions Survey AH, VA Form 10–0439—15 minutes.

Frequency of Response: Annually.

Estimated Annual Responses:

a. Learners' Perceptions Survey PR, VA Form 10–0439—15,000.

b. Learners' Perceptions Survey AH, VA Form 10–0439—15,000.

By direction of the Secretary.

Kathleen M. Manwell,

Program Analyst, U.S. Department of Veterans Affairs.

[FR Doc. 2016–10195 Filed 4–29–16; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 81 Monday,
No. 84 May 2, 2016

Part II

Library of Congress

Copyright Royalty Board

37 CFR Part 380

Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 14–CRB–0001–WR (2016–2020)]

Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their determination of rates and terms for two statutory licenses (permitting certain digital performances of sound recordings and the making of ephemeral recordings) for the period beginning January 1, 2016, and ending on December 31, 2020.

DATES: *Effective Date:* This rule is effective on May 2, 2016.

Applicability dates: These rates and terms are applicable to the period January 1, 2016, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, Program Specialist, at 202–707–7658 or *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: The Copyright Royalty Judges (Judges) hereby issue their written determination of royalty rates and terms to apply from January 1, 2016, through December 31, 2020, to digital performance of sound recordings over the Internet by nonexempt, noninteractive transmission services and to the making of ephemeral recordings to facilitate those performances.

The rate for commercial subscription services in 2016 is $0.0022 per performance. The rate for commercial nonsubscription services in 2016 is $0.0017 per performance. The rates for the period 2017 through 2020 for both subscription and nonsubscription services shall be adjusted to reflect the increases or decreases, if any, in the general price level, as measured by the Consumer Price Index applicable to that rate year, as set forth in the regulations adopted by this determination.

The rates for noncommercial webcasters are: $500 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, for each year in the rate term. In addition, if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 ATH on any individual channel or station, the noncommercial webcaster shall pay per-performance royalty fees for the transmissions it makes on that channel or station in excess of 159,140 ATH at the rate of $0.0017 per performance. The rates for transmissions over 159,140 ATH per month for the period 2017 through 2020 shall be adjusted to reflect the increases or decreases, if any, in the general price level, as measured by the Consumer Price Index applicable to that rate year, as set forth in the regulations adopted by this determination.

The Judges also determine herein details relating to the rates for each category of webcasting service, such as minimum fee and administrative terms. The regulatory language codifying the rates and terms of the Judges' determination [1] are set out below this Supplementary Information section.

I. Background

A. Purpose of the Proceeding

The licenses at issue in the captioned proceeding, *viz.,* licenses for commercial and noncommercial noninteractive webcasting, are compulsory. Title 17, United States Code (Copyright Act or Act), establishes exclusive rights reserved to copyright owners, including the right to ''perform the copyrighted work publicly by means of a digital audio transmission.'' *See* 17 U.S.C. 106(6). The digital performance right is limited, however, by § 114 of the Act, which grants a statutory license for nonexempt noninteractive Internet transmissions of protected works. 17 U.S.C. 114(d). Eligible webcasters are entitled to perform sound recordings without an individual license from the copyright owner, provided they pay the statutory royalty rates for the performance of the sound recordings and for the ephemeral copy of the sound recording necessary to transmit it. 17 U.S.C. 114(f) and 112(e). Licensee webcasters pay the royalties to a Collective, which distributes the funds to copyright owners. The statutory rates and terms apply for a period of five years.

The Act requires that the Judges ''shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 114(f)(2)(B). The marketplace the Judges look to is a hypothetical marketplace, free of the influence of compulsory, statutory licenses. *Web II,* 72 FR 24084, 24087 (May 1, 2007). The Judges ''*shall* base their decision on economic, competitive[,] and programming information presented by the parties . . . .'' 17 U.S.C. 114(f)(2)(B) and 112(e)(4) (emphasis added). Within these categories, the Judges' determination shall account for (1) whether the Internet service substitutes for or promotes the copyright owner's other streams of revenue from the sound recording, and (2) the relative roles and contributions of the copyright owner and the service, including creative, technological, and financial contributions, and risk assumption. *Id.* The Judges *may* consider rates and terms of comparable services and comparable circumstances under voluntary, negotiated license agreements. *Id.* The rates and terms established by the Judges ''*shall* distinguish'' among the types of services and ''*shall* include'' a minimum fee for each type of service. *Id.* (emphasis added).

B. Procedural Posture

Following the timeline prescribed by the Act, the Judges published notice of commencement of this proceeding in the **Federal Register**.[2] 79 FR 412 (Jan. 3, 2014). Twenty-nine parties in interest filed petitions to participate in the proceeding.[3] Ten of those petitioners subsequently withdrew from the proceeding, the Judges rejected the petitions of three petitioners because the

[1] The Judges proposed to the parties a reorganization of the regulations. Only one party's (Pandora's) proposed regulations followed the proposed new format. The other parties submitted proposed new subparts for each type of entity. One party (SoundExchange) specifically opposed the reorganization. The Judges find that reducing the amount of repetition in the regulations is not prejudicial to SoundExchange, and in the interests of plain language have used the new format.

[2] Contemporaneously, the Judges commenced a proceeding to establish rates and terms for ephemeral recording and digital performance of sound recordings by ''New Subscription Services'' (NSS). *See* 79 FR 410 (Jan. 3, 2014). The NSS at issue in that companion proceeding were limited to NSS transmitting to residential subscribers through a cable television provider. *See* 37 CFR 383.2(h). That proceeding was resolved by negotiated agreement and the Judges published rates and terms for new subscription licensees at 80 FR 36927 (Jun. 29, 2015). Settlement of the cable NSS did not have any effect on the Internet subscription services at issue in this proceeding.

[3] The 29 parties that filed Petitions to Participate were: 8tracks, Inc.; AccuRadio, LLC; Amazon.com, Inc.; Apple Inc.; Beats Music, LLC; Clear Channel (nka iHeartMedia, Inc.); CMN, Inc.; College Broadcasters, Inc. (CBI); CustomChannels.net, LLC; Digital Media Association (DiMA); Digitally Imported, Inc.; Educational Media Foundation; Feed Media, Inc.; Geo Music Group; Harvard Radio Broadcasting Inc. (WHRB); idobi Network; Intercollegiate Broadcasting System, Inc. (IBS); Music Reports Inc.; National Association of Broadcasters (NAB); National Music Publishers Association (NMPA); National Public Radio (NPR); National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC); Pandora Media Inc.; Rhapsody International, Inc.; Sirius XM Radio Inc.; SomaFM.com LLC; SoundExchange, Inc. (SX or SoundExchange); Spotify USA Inc.; and Triton Digital, Inc.

Judges determined they lacked the requisite substantial interest in the proceeding, and the Judges dismissed the Petition to Participate of another party due to a procedural default.[4]

1. Negotiated Settlements

a. Educational Webcasters

The Judges published notice of the CBI-SoundExchange settlement in November 2014.[5] The Judges received approximately 60 comments in response to the Notice. The Judges considered the comments, some of which supported and others of which opposed the proposed settlement, and concluded that the CBI-SoundExchange agreement provides a reasonable basis to adopt its proposed rates and terms. On September 28, 2015, the Judges published amended regulations substantially in conformity with the proposal.[6]

b. Public Broadcasters

The NPR–CPB settlement with SoundExchange proposed creation of a new Subpart D to part 380 of the Regulations entitled Certain Transmissions by Public Broadcasting Entities. IBS was the only commenting party. IBS made procedural and substantive objections to the settlement. Notwithstanding, the Judges concluded that, as the proposed settlement would bind only the ''Covered Entities,'' *i.e.,* NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB, adoption of the settlement would not preclude the Judges' separate consideration of the concerns of IBS, which is not one of the ''Covered Entities'' subject to the new Subpart D. On October 2, 2015, the Judges published the settlement, substantially as proposed, as a final regulation.[7]

2. The Current Proceeding To Adjudicate Rates and Terms

The Act provides that the Judges shall make their determinations ''on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress . . .'' and their own prior determinations to the extent those determinations are ''not inconsistent with a decision of the Register of Copyrights . . .'' 17 U.S.C. 803(a). Pursuant to 17 U.S.C. 803(b), the Judges conduct a hearing to create that ''written record,'' in order to issue their determination as required by 17 U.S.C. 801(b)(1) and 803(1).

To that end, non-settling parties appeared before the Judges for a determination hearing. At the hearing, SoundExchange, Inc. (SoundExchange), a member organization comprised of copyright owners and performing artists, and the designated Collective in this proceeding, and Mr. George Johnson, dba GEO Music, represented the interests of licensors. Seven licensees participated in the hearing.[8]

The hearing commenced on April 27, 2015, and concluded on June 3, 2015. The parties submitted proposed findings and conclusions (and responses thereto) in writing, prior to their closing arguments on July 21, 2015. During the hearing, the Judges heard oral testimony from 47 witnesses, some of them for both direct case and rebuttal testimony. The witnesses included 16 qualified experts. The Judges admitted 660 exhibits into evidence, consisting of over 12,000 pages of documents, and considered numerous illustrative and demonstrative materials that focused on aspects of the admitted evidence and the permitted oral testimony.

On December 16, 2015, the Judges issued their Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR part 353, SoundExchange and George Johnson dba GEO Music Group (GEO) filed motions for rehearing. The Judges sought responses to the issues raised in the SoundExchange motion, but did not solicit written responses to the GEO Music motion.[9] NAB, Pandora, and iHeart filed written arguments responsive to the SoundExchange motion. Having reviewed the motions, written arguments, and responses, the Judges denied the motions for rehearing. The Judges determined that neither of the motions presented the exceptional case required for rehearing or reconsideration. In other words, neither SoundExchange nor GEO established that the Determination (1) is not supported by the evidence, (2) is erroneous, (3) is contrary to legal requirements, or (4) requires the introduction of new evidence.[10] *See* 17 U.S.C. 803(c)(2)(A); 37 CFR 353.1 and 353.2. The motions did not meet the required standards set by statute, by regulation, or by case law. Nevertheless, as discussed in the order denying SoundExchange's motion for rehearing, the Judges amended certain of the royalty terms regulations to enhance clarity. The Judges incorporate the regulatory clarifications, making this Determination final and subject to legal review by the Register of Copyrights.

II. Context of the Current Proceeding

A. Prior Rate Determinations

Congress created the exclusive sound recordings digital performance copyright in 1995. *See* Digital Performance Right in Sound Recordings Act of 1995, Public Law No. 104–39, 109 Stat. 336 (Nov. 1, 1995). At the same time, Congress limited that performance right by granting noninteractive subscription services a statutory license to perform sound recordings by digital audio transmission. In 1998, Congress created the ephemeral recording license and further defined and limited the statutory license for digital performance of sound recordings. *See* Digital Millennium Copyright Act, Public Law 105–304, 112 Stat. 2860 (Oct. 28, 1998) (DMCA).

1. Web I

The Copyright Office commenced the first webcasting rate determination in November 1998. The resulting rates, published in July 2002, covered a rate period from October 1998 through December 2002.[11] Interested parties negotiated rates and terms for 2003–2004, including for the first time radio broadcasters with Internet simulcast

[4] The ten parties that withdrew their Petitions to Participate were: 8tracks, Inc.; Amazon.com, Inc.; CMN, Inc.; CustomChannels.net, LLC; Digitally Imported, Inc.; Feed Media, Inc.; idobi Network; Rhapsody International, Inc.; SomaFM.com LLC; and Spotify USA Inc. The three parties whose Petitions to Participate were dismissed for lacking a substantial interest in the proceeding were: Music Reports Inc., NMPA, and Triton Digital. The Petition to Participate of AccuRadio was dismissed by the Judges due to a procedural default. Although they did not formally withdraw from the proceeding, Apple, Beats, and DiMA did not file Written Direct Statements and did not participate in the hearing. Educational Media Foundation joined with NAB and appeared by and through NAB and its counsel.

[5] 79 FR 65609 (Nov. 5, 2014).

[6] 80 FR 58201 (Sept. 28, 2015).

[7] 80 FR 59588 (Oct. 2, 2015). In publishing both negotiated settlements, the Judges postponed the designation of a Collective until issuance of the current determination.

[8] Harvard Radio Broadcasting, Inc. (WHRB), Intercollegiate Broadcasting System, Inc., iHeartMedia, Inc., National Association of Broadcasters (also representing the interests of Educational Media Foundation), National Religious Broadcasters Noncommercial Music Licensing Committee, Pandora Media, Inc., and Sirius XM Radio, Inc.

[9] Order Permitting Written Response(s) to SoundExchange Motion for Rehearing (Revised) (Jan. 6, 2016).

[10] Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions (Feb. 10, 2016) and Order Denying George Johnson's Motion for Rehearing (Feb. 10, 2016).

[11] *See* 67 FR 45240 (Jul. 8, 2002); *see also* 67 FR 78510 (allowing non-precedential, negotiated modification of 1998–2002 rates and terms for ''small webcasters'' under the Small Webcaster Settlement Act of 2002).

service.[12] The published webcasting rate determination confirmed that the willing buyer/willing seller standard in the Act is the determining standard. The Librarian of Congress (Librarian) determined that rate-setters must consider the promotion/substitution and relative contribution factors, although they must not consider those factors determinative, nor are they to use those additional factors to adjust a rate derived from the willing buyer/willing seller analysis. *See* 67 FR 45240, 45244 (July 8, 2002). This conclusion is part of the rate-setting precedent that instructs the Judges in the current proceeding.

2. Web II Determination and Appeals and Webcaster Settlement Acts

In November 2004, Congress passed the Copyright Royalty and Distribution Reform Act of 2004 (Reform Act), which became effective in May 2005. The Reform Act established the Copyright Royalty Judges as the institutional successor to the arbitration panel program managed by the Copyright Office. The new statute continued the extant 2004 rates through 2005 to enable the newly created Copyright Royalty Judges program to initiate rate proceedings. The new statute also expanded the rate period to five years.[13]

The Judges published the determination from their first webcasting rate proceeding, covering the period 2006 to 2010, on May 1, 2007 (*Web II*).[14] In *Web II,* the Judges differentiated the rate structure for commercial and noncommercial webcasters. They set commercial webcasters' rates using a per-performance structure and set noncommercial webcasters' rates as a flat fee up to a certain usage level, after which the commercial rates would apply. *See* 72 FR 24084, 24096, 24097–98. In accordance with the statute, the Judges established a minimum fee of $500 for each channel or station in either category. The Judges did not differentiate the minimum fee, as they based it upon the cost to SoundExchange, the designated Collective, to administer the license. For noncommercial webcasters, the minimum fee is the only royalty fee due, unless the webcaster exceeds established usage limits.

Intercollegiate Broadcasting System, Inc. (IBS) appealed the amount of the minimum fee as it applied to noncommercial webcasters. The U.S. Court of Appeals for the D.C. Circuit remanded the issue for further fact-finding.[15] The Judges received further evidence and ruled on remand to keep the minimum fee at $500 for all licensees. *See* 75 FR 56873, 56874 (Sept. 17, 2010). IBS again appealed to the D.C. Circuit, challenging the application of the minimum fee to noncommercial educational webcasters. The court stayed the second *Web II* appeal pending its resolution of a constitutional question raised by IBS in relation to the Judges' *Web III* determination. Ultimately, the court again remanded *Web II* to the Judges.[16] The Judges conducted a *de novo* review of the record and published their determination on the second remand in 2014. *See* 79 FR 64669 (Oct. 31, 2014). IBS moved to drop its third appeal of *Web II* and the court dismissed it on September 11, 2015.[17]

After the Library published the *Web II* determination, Congress passed the Webcaster Settlement Act of 2008 (2008 WSA) and the Webcaster Settlement Act of 2009 (2009 WSA). These acts enabled webcasters to renegotiate rates and terms for a portion of the *Web II* rate period and set rates for the succeeding rate period (2011–2015). Entities accounting for 95% of the webcasting royalties paid to SoundExchange negotiated settlements under the 2008 WSA and the 2009 WSA.[18]

3. Web III Determination and Appeals

On January 5, 2009, the Judges commenced a proceeding to establish rates and terms for webcasting for the period January 1, 2011, through December 31, 2015 (*Web III*).[19] Many interested webcasters had recently reached agreements with SoundExchange pursuant to the WSAs and did not participate in the *Web III* proceeding. Only three licensees did participate: College Broadcasters, Inc. (CBI), Live365, Inc. (Live365), and IBS.[20]

CBI's participation was limited to its defense of a proposed settlement it negotiated with SoundExchange. Under the CBI/SoundExchange agreement, the Judges were asked to adopt regulations that established a subcategory of noncommercial webcasters, *viz.,* noncommercial educational webcasters (NEWs). The Judges did so and established the minimum fee for the educational category at the same level as every other category of webcasting service, *i.e.,* $500 per year for each station or channel, applicable to the flat fee for usage. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 76 FR 13026 (March 9, 2011) (*Web III*). Recognizing the operational constraints on educational webcasters, the Judges also adopted less burdensome usage reporting standards for the category. Educational webcasters not exceeding 159,140 Aggregate Tuning Hours (ATH) of webcasting per month could opt for sample reporting in *lieu* of census reporting of each sound recording performance. Educational webcasters not exceeding 55,000 ATH could forego reporting usage at all by paying a $100 proxy fee to defray the cost to SoundExchange of developing proxy usage data.

For the commercial webcaster rates, SoundExchange and Live365 each proposed a per-performance rate structure. Live365 attempted to reach a per-performance rate by way of a revenue analysis, factoring in the webcasting services' costs and a presumed 20% profit, and applying the remainder of revenue to royalties. SoundExchange approached the calculation by analyzing comparable market ''benchmark'' agreements, with adjustments as necessary to account for differences in the services. SoundExchange relied on interactive services rate agreements.

The *Web III* Judges rejected the Live365 attempt to base rates on a service's ability to pay. Instead, the Judges derived the commercial webcasting rate in *Web III* from a review of market benchmarks presented by SoundExchange. SoundExchange provided only *interactive* services' licenses as benchmarks. The Judges adjusted those benchmarks to account for significant functional differences between interactive services and

[12] *See* 68 FR 35008 (Jun. 11, 2003) (noncommercial webcasters' rates, effective 1998–2004); 37 FR 5693 (Feb. 6, 2004) (subscription and nonsubscription services' and simulcasters' rates, effective 2003–04, and new subscription services' rates, effective 1998–2004).

[13] Public Law 108–419, 118 Stat. 2341. In 2004, the Copyright Office initiated a proceeding to adjust rates and terms for the Section 114 and 112 licenses for 2005–2006 under the CARP system. Congress terminated this proceeding, however, and directed that the rates and terms in effect on December 31, 2004, remain in effect at least for 2005. *See* 70 FR 7970 n.2 (Feb. 16, 2005) and 70 FR 6736 (Feb. 8, 2005).

[14] 72 FR 24084.

[15] *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 771 (D.C. Cir. 2009).

[16] *Intercollegiate Broadcasting Sys., Inc.,* v. *Copyright Royalty Board,* No. 10–1314 (D.C. Cir. Sept. 30, 2013) (order granting joint motion for vacatur and remand).

[17] *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* No. 14–1262 (D.C. Cir. Sept. 11, 2015) (order granting joint motion to dismiss appeal).

[18] 79 FR 23102 n.5 (Apr. 25, 2014).

[19] 74 FR 318 (Jan. 5, 2009).

[20] As part of the *Web III* determination, the Judges confirmed their adoption of agreed rates and terms for commercial broadcasters (simulcasters) proposed in a settlement agreement between SoundExchange and the NAB. 76 FR at 13027.

noninteractive services subject to the statutory rates and terms.

IBS appealed the *Web III* determination.[21] The D.C. Circuit agreed with the IBS argument that the Librarian's appointment of the Judges under the Reform Act violated the Appointments Clause of the Constitution. The D.C. Circuit severed that portion of the Reform Act that limited the Librarian's ability to remove Judges, remanding the substantive merits of the determination for decision by a validly appointed panel of Judges. The Librarian appointed the current Judges and they issued a determination on remand in April 2014.[22] In their *Web III Remand,* the Judges relied upon the rates set forth in the WSA agreements between SoundExchange and the NAB and between SoundExchange and Sirius XM, and, to a lesser extent, SoundExchange's benchmark analysis of various interactive agreements. *Id.*

IBS appealed the Judges' remand determination on May 2, 2014. The D.C. Circuit affirmed the determination on August 11, 2015.[23]

B. Web IV

When the Judges commenced the present proceeding (Web IV) in January 2014, they invited all potentially affected entities to consider in the presentation of their respective cases: (1) The pros and cons of revenue-based rates, (2) the existence or propriety of price differentiation in a market in which the product (digital sound recordings) can be reproduced at a near-zero marginal cost, and (3) economic variations among buyers and sellers in the relevant market. [24] The parties addressed many of these issues in their filings (including their rate proposals) and in testimony provided during the proceeding.

III. Judges' Resolution of General Issues

A. Rate Differentiation

1. Majors vs. Indies

In the evidence presented during the hearing, the Services established a potentially meaningful dichotomy between rates they pay to Major Labels and those they pay to independent record companies (Indies). Put simply, in the marketplace, Services have agreed to pay higher royalty rates to Majors than to Indies.[25]

The Act provides that the Judges must differentiate rates based upon differences in the webcasting services, but is less clear on whether the Judges may also establish differential rates based on differences among copyright owners as revealed by the evidence. To gain clarity on the latter issue, the Judges referred to the Register of Copyrights the novel question whether the Copyright Act permits the Judges to differentiate based on types of licensors. After careful review, the Register concluded that the Judges' question ''d[id] not meet the statutory criteria for referral,'' and declined to answer it. *Memorandum Opinion on Novel Question of Law* at 7 (Nov. 24, 2015) (Register's Opinion).

Citing the fact that no party in the proceeding had proposed a rate structure that differentiated among licensors, the Register found that ''such a structure was not understood to be a subject of litigation.'' *Id.* at 8–9. Consequently, the Register found that the issue was not ''presented'' in the proceeding as required by the ''novel question'' provision in 17 U.S.C. 802(f)(1)(B). *Id.* at 7. The Register's Opinion appears to be premised, in part, on an interpretation of the D.C. Circuit's decisions in *Settling Devotional Claimants* v. *Copyright Royalty Bd.,* 797 F.3d 1106 (D.C. Cir. 2015), and *Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 574 F.3d 748 (D.C. Cir. 2009). *See Register's Opinion* at 9. The Register appears to interpret those cases as barring the Judges from relying on theories ''first presented in the Judges' determination and not advanced by any participant.'' *Id.*

Section 802(f)(1)(B) provides that the Register's timely decision of a novel question is binding on the Judges. Because the Register has *declined* to decide the question that the Judges referred to her in the current proceeding, however, there is *no decision* that binds the Judges on this issue. Moreover, to the extent that the Register's Opinion rests on an interpretation of the D.C. Circuit's application of traditional standards of administrative law to particular facts, that interpretation does not constitute a resolution of a ''novel question concerning an interpretation of . . . provisions of'' title 17 that would bind the Judges.

Nevertheless, the Judges acknowledge that interpretation of the evidence out of context and without adequate input of the parties would be capricious. Moreover, reopening the proceeding at this juncture, long after the closing of the record pursuant to 37 CFR 351.12, for further evidence and argument on this issue would be improper. The Judges, therefore, do not resolve the legal issue they referred to the Register and do not set rates in this proceeding that distinguish among classes of copyright owners.

2. Commercial Webcasters vs. Noncommercial Webcasters

In accordance with the statutory direction to ''distinguish among the different types of eligible nonsubscription transmission services,'' 17 U.S.C. 114(f)(2)(A), the Judges (and the Librarian of Congress before them) have recognized noncommercial webcasters as a separate rate category from commercial webcasters in prior proceedings.[26] The Judges deemed different (and lower) rates for noncommercial webcasters to be appropriate because ''certain 'noncommercial' webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined . . . for Commercial Webcasters.'' *Web II Original Determination,* 72 FR at 24097.

The record in the instant proceeding demonstrates some of the reasons why, in a hypothetical marketplace, a noncommercial webcaster's willingness to pay for sound recordings would be lower than a commercial webcaster's willingness to pay. For example, a noncommercial religious broadcaster that streams a simulcast of its broadcasts is prohibited under FCC regulations from selling advertising.[27] NRBNMLC Ex. 7000 ¶ 18 (Emert WDT). Increased Internet performances are thus unlikely to lead to increased revenue, even as

[21] *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.,* 684 F.3d 1332 (2012). SoundExchange and CBI intervened.

[22] *See* Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 FR 23102 (Apr. 25, 2014) (Web III Remand).

[23] *See Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, Case No. 14–1098 (Aug. 11, 2015).

[24] *See* 79 FR 412 (Jan. 3, 2014).

[25] This point is exemplified by the different effective rates in the Pandora/Merlin Agreement and the iHeart/Warner Agreement, discussed *infra.*

[26] *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 FR 45240, 45258–59 (July 8, 2002) (Web I); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 FR 24084, 24097 (May 1, 2007) (Web II Original Determination); Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 FR 23102, 23122 (April 25, 2014) (Web III Remand).

[27] The NRBNMLC also highlights a number of differences between broadcasters and other ''pure play'' webcasters. *See, e.g.,* NRBNMLC PFF ¶ 33. No party has proposed noncommercial broadcasters as a rate category separate from other noncommercial webcasters, and the record does not provide the Judges a sufficient basis to establish separate rates for those separate categories. Consequently, the differences that the NRBNMLC highlights are irrelevant.

they result in an increased royalty burden. *See* 5/21/15 Tr. at 5270 (Henes).[28]

Indeed, the NRBNMLC and SoundExchange both proposed that the Judges adopt a different rate structure for noncommercial webcasters than for commercial webcasters, which suggests to the Judges that there is continued support in the marketplace for a different rate structure for commercial and noncommercial webcasters.

Therefore, for all of the foregoing reasons, and in accordance with the Judges' reasoning from *Web II* and *Web III,* the Judges adopt a separate rate structure for noncommercial webcasters than the one applicable to commercial webcasters.

3. Simulcasters vs. Other Commercial Webcasters

The NAB participated in this proceeding on behalf of its member terrestrial radio stations that simulcast over-the-air broadcasts on the Internet. iHeartMedia (iHeart) also owns and operates terrestrial broadcasting stations that simulcast, in whole or in large part, their over-the-air programming. In this proceeding, the Judges focus solely on the Internet transmissions of these broadcasters.

The NAB argues that simulcasting is different from other forms of commercial webcasting. Given these purported differences, the NAB advocates for a separate (lower) rate for simulcasters than for other commercial webcasters. The NAB avers that simulcasting constitutes a distinct submarket in which buyers and sellers would be willing to agree to lower royalty rates than their counterparts in the commercial webcasting market. *See* NAB Proposed Rates and Terms at 2 (definition of eligible transmission) (Oct. 7, 2014). No other party's rate proposal treats simulcasting differently from other commercial webcasting.

As the proponent of a rate structure that treats simulcasters as a separate class of webcasters, the NAB bears the burden of demonstrating not only that simulcasting differs from other forms of commercial webcasting, but also that it differs in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market. As discussed below, based on the record in the current proceeding, the Judges do not believe that the NAB satisfied that burden. Therefore, the Judges do not adopt a different rate structure for simulcasters than that which applies to other commercial webcasters.

a. History

No prior rate determination has treated simulcasters differently from other webcasters. In *Web I,* the Librarian, at the recommendation of the Register, rejected a CARP report that set a separate rate for retransmission of radio broadcasts by a third-party distributor, and adopted a single rate for commercial webcasters. 67 FR at 45252.[29]

In *Web II,* the Judges rejected broadcasters' arguments that rates for simulcasting should be different from (and lower than) royalty rates for other commercial webcasters.

> The record before us fails to persuade us that these simulcasters operate in a submarket separate from and noncompetitive with other commercial webcasters. Indeed, there is substantial evidence to the contrary in the record indicating that commercial webcasters . . . and simulcasters . . . regard each other as competitors in the marketplace.

Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 FR 24084, 24095 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 571 F.3d 69 (D.C. Cir. 2009) (*Web II*).

The NAB reached a WSA settlement with SoundExchange prior to the conclusion of *Web III* covering the remainder of the *Web II* rate period and all of the *Web III* rate period.[30] At the request of the NAB and SoundExchange, the Judges adopted the settlement as statutory rates and terms binding on all simulcasting broadcasters. *See* 75 FR 16377 (April 1, 2010). Consequently, simulcasters did not participate in the *Web III* proceeding, in which the Judges determined rates for ''all other commercial webcasters.'' Although the Judges did not determine separate rates for simulcasters in *Web III,* because the Judges adopted the NAB settlement, simulcasting broadcasters currently pay different rates than webcasters that operate under the rates determined by the Judges.[31]

b. Comparable Agreements

In the current proceeding, the NAB presented no benchmarks in support of its rate proposal, opting instead for an alternative economic analysis.[32] The NAB does not, therefore, direct the Judges to any marketplace benchmarks to demonstrate different prevailing royalty rates for simulcasters than for other webcasters.

The only agreements in the record that relate specifically to simulcasting are the NAB WSA settlement agreement and the 27 direct licenses between iHeartMedia and independent record labels (the iHeart/Indie Agreements). The NAB settlement (which the NAB repudiates as a benchmark) does not support the NAB proposal. The average of the settlement rates over the *Web III* rate period is precisely the same as the average of the rates that the Judges determined for all other commercial webcasters in *Web III.*[33] The 2015 rate of $0.0025 per performance is *five times* the rate that the NAB proposes for the 2016–2020 rate period ($0.0005).

The Judges cannot compare the iHeart/Indie rates directly to the NAB settlement rate because they do not employ a per-performance royalty rate. Instead those agreements set royalties at the record company's pro-rata share of [REDACTED]% of [REDACTED]. *See, e.g.,* Ex. 3351 at 7–8 (Clear Channel-RPM Entertainment License Agreement). Without additional data (*e.g.,* iHeart's net simulcasting revenues and the number of simulcast performances of recorded music), the Judges are unable to convert the [REDACTED] rate into a per-performance rate. Moreover, there is insufficient evidence and economic analysis in the record for the Judges to determine whether the headline rate for simulcasting in the iHeart-Indie agreements fully accounts for the economic value of the licenses to the parties.[34] The Judges are unable to

[28] As discussed above, SoundExchange and two groups of noncommercial webcasters—CBI and NPR/CPB—submitted settlement agreements covering certain noncommercial webcasters that establish separate, lower effective royalty rates for some noncommercial webcasters. The Judges adopted these agreements. 80 FR 58201 (Sept. 28, 2015); 80 FR 59588 (Oct. 2, 2015). These agreements demonstrate that willing sellers are prepared to accept royalty rates for at least some noncommercial webcasters that are different and lower than commercial webcasting rates.

[29] The Librarian also rejected arguments that broadcasters who stream their own radio broadcasts should be treated differently from third parties who stream the same broadcasts. *Id.* at 45254.

[30] The NAB Settlement rates rose from $0.0017 per performance in 2011 to $0.0025 in 2015. 37 CFR 380.12(a).

[31] Under the NAB settlement, participating simulcasters initially paid lower per-performance royalty rates than those set by the Judges in *Web III.* In later years, however, the rates increased to levels that exceed those set by the Judges in *Web III.* As a consequence, simulcasters currently pay a *higher* royalty rate than all other commercial webcasters. Since no party has asserted that simulcasters should pay a higher rate than other commercial webcasters, the Judges do not reach that issue at this time.

[32] *See* discussion *infra,* section IV.G.2.

[33] In both cases the average per-performance royalty rate over the 2011–2015 period is $0.00214.

[34] For example, the agreements include payments that are characterized as royalties for performances of recorded music by means of [REDACTED]. *See, e.g.,* IHM Ex. 3351 at 7. Since U.S. copyright law

determine on this record whether or not the iHeart-Indie agreements support the NAB proposal. Therefore, the Judges find that the iHeart-Indie agreements do not provide adequate evidentiary support for the NAB's proposed differential rate for simulcasters.

c. NAB's Qualitative Arguments for a Separate Rate for Simulcasters

In lieu of quantitative benchmarks, the NAB offers several qualitative arguments why willing buyers and sellers would agree to lower simulcasting rates. Each argument proceeds from two basic premises: (1) The programming content on a simulcast stream is the same as programming content on terrestrial radio; and (2) terrestrial radio is fundamentally different from music services.[35]

i. FCC License and Public Interest Requirement

Radio broadcasters, which are licensed and regulated by the Federal Communications Commission (FCC), are legally required to act in the public interest. *See* NAB Ex. 4001 ¶ 14 (Newberry WDT). By extension, this requirement distinguishes simulcasters from other commercial webcasters.

The NAB's witnesses testified persuasively that the public interest requirement is a key consideration for radio broadcasters as they conduct their business. *See, e.g.,* 5/20/15 Tr. at 5075 (Newberry); Dimick WDT ¶ 33. What is far less clear is the connection between this requirement and the NAB's proposal that simulcasters should pay lower royalty rates than other commercial webcasters. The NAB did not present any persuasive evidence that the public interest requirement would in any way affect the royalty rates that willing buyers and sellers would agree to in the hypothetical market. To the extent the NAB's argument is that, as a matter of public policy, radio broadcasters' public interest requirement justifies lower royalty rates for simulcasting, that argument is without any basis in § 114.

ii. Local Focus and Community Involvement

NAB witnesses testified that radio broadcasters focus on their local market both in their terrestrial broadcasts and in their simulcast streams. They attribute this local focus to their legal obligations under FCC regulations, 5/20/15 Tr. at 5075 (Newberry), to the needs of their advertisers to reach customers proximate to their places of business, *id.* at 5077–78, and to their desire to connect with their listeners and, presumably, build listener loyalty. *Id.* One aspect of that local focus is involvement in, and reporting of, activities in the community. *See, eg.,* Knight WDT ¶ 18; Dimick WDT ¶ 33. The Judges find neither record evidence nor an articulated rationale to support a lower royalty rate for simulcasters based on the purported local focus of radio broadcasters. The Judges decline to infer such a rationale.

iii. On-Air Personalities and Other Non-Music Content

The NAB stresses the role of on-air personalities, news, weather, and other non-music content in cultivating the loyalty of radio listeners and distinguishing a radio station from its competitors. Once again, the NAB ably demonstrated a distinction between simulcasting and other webcasting, but failed to articulate why that distinction supports differential royalty rates for simulcasters.

The NAB cites a survey conducted by Professor Dominique Hanssens that concluded that 12.2% of the value that simulcast listeners derive from listening to music-formatted stations is attributable to ''hosts, DJs, and other on-air personalities.'' NAB Ex. 4012 ¶ 62, App. 8 (Hanssens WRT); NAB Ex. 4015 ¶ 67, Table 5 (Katz AWRT). The NAB presents no evidence, however, that the on-air time consumed by on-air personalities exceeds, on a percentage basis, the value that listeners attribute to them. By including non-music content in their transmissions, simulcasters reduce the number of performances of recorded music, thus reducing their royalty obligation under a per-performance rate structure. The NAB failed to present any evidence that the value of non-music content is not fully accounted for in this reduction of royalties.[36] Absent such evidence, the Judges find that the relative amount of non-music content transmitted by simulcasters versus the amount transmitted by other commercial webcasters does not support a reduced royalty rate for simulcasters.

iv. Degree of Interactivity

The NAB argues that simulcasters should pay a lower royalty rate in recognition of the fact that simulcast transmissions are the least interactive form of webcasting. The NAB contends that three SoundExchange fact witnesses—Dennis Kooker, Raymond Hair, and Aaron Harrison—conceded as much in their testimony and pretrial depositions. NAB PFF ¶¶ 114–118.

(A) Kooker Testimony

Dennis Kooker, President, Global Digital Business at Sony Music Entertainment, testified that

> statutory licensees pay for their content at compulsory rates, and as a consequence exert downward pressure on privately negotiated rates. One of the original justifications for allowing statutory services to pay these lower rates was that the offering under the statutory license would provide a user experience similar to terrestrial radio. Statutory services could offer channels of particular musical genres, but the programming would be selected by the service. If listeners wanted to select their programming, they would have to pay for it through directly licensed services.

SX Ex. 12 at 15 (Kooker WDT). The NAB contends that ''Mr. Kooker recognized a dichotomy between service-selected programming, which is eligible for the lower statutory rate, and listener-selected programming, which requires payment of a higher, directly licensed rate.'' NAB PFF ¶ 115.

Even accepting Mr. Kooker's testimony at face value,[37] it is not a concession that simulcasters should be charged lower rates than other webcasters. It is clear in context that the ''dichotomy'' that Mr. Kooker identifies is that established in § 114 between interactive services, which are directly licensed, and noninteractive services, which are subject to the statutory license that is the subject of this proceeding.[38] Mr. Kooker does not state that, among statutory services, some should pay lower rates than others based on how interactive they are. Mr. Kooker's testimony does not support a conclusion that he believes simulcasters should pay lower rates than other

confers no exclusive right of public performance by means of terrestrial radio transmissions for sound recording copyright owners, the Judges would need further evidence to determine whether, as an economic matter, these payments should be treated, at least in part, as compensation for other uses (such as [REDACTED]) covered by the agreements that *do* require a license under copyright law.

[35] *See, e.g.,* NAB Ex. 4002 ¶¶ 4, 11, 30–40 (Dimick WDT); NAB Ex. 4009 ¶ 5 (Dimick WRT); 5/26/15 Tr. 5798–99 (Dimick); 5/20/15 Tr. at 5076–78, 5104 (Newberry); NAB Ex. 4003 ¶¶ 2, 13–26, 29 (Knight WDT); NAB Ex. 4005 ¶ 14, 24–34 (Downs WDT); 5/21/15 Tr. at 5217–19 (Downs); NAB Ex. 4006 ¶¶ 3, 9–19 (Koehn WDT).

[36] Were the Judges to adopt a percentage-of-revenue rate structure, an appropriate adjustment would be necessary to reflect the lower percentage of recorded music as compared with an Internet music service. As the Judges do not adopt a percentage-of-revenue rate structure in this proceeding, however, no adjustment is needed.

[37] Mr. Kooker does not cite any evidence of legislative history to support his conclusion that the similarity of noninteractive webcasting to terrestrial radio was a ''justification'' for allowing statutory services to pay lower rates. That statement is merely an expression of Mr. Kooker's lay opinion.

[38] Mr. Kooker then argues that that distinction is ''rapidly disappearing'' in the marketplace. Kooker WDT at 15.

webcasters, much less support the conclusion that willing sellers would accept a lower rate in the hypothetical marketplace.

(B) Hair Testimony

In his hearing testimony, Raymond Hair, International President of the American Federation of Musicians, confirmed that he had previously expressed [39] the opinion that services with greater ''functionality'' should pay higher rates than services with less functionality. 4/29/15 Tr. at 806 (Hair).[40] Mr. Hair's opinion is not authoritative in this context, however, because he represents neither the buyer nor the seller in the hypothetical transaction that he describes.

(C) Harrison Testimony

The strongest evidence the NAB offers on this point is Aaron Harrison's testimony. Mr. Harrison, Senior Vice President, Business and Legal Affairs of UMG Recordings, agreed with the statement ''the higher the level of interactivity, the higher the rate'' because ''higher levels of interactivity are more substitutional than less on-demand.'' 4/30/15 Tr. at 1101 (Harrison). Mr. Harrison also agreed that ''simulcast is the least substitutional.'' *Id.*

As a record company executive, Mr. Harrison's testimony provides some evidence that record companies would be willing to accept lower royalties from services that are less interactive, because those services are less likely to displace sales of sound recordings. The probative value of his evidence in determining whether a differential rate is justified for simulcasters is limited, however. First, Mr. Harrison was responding to a question posed in the abstract, rather than identifying specific transactions that he had witnessed or in which he had participated. Second, Mr. Harrison stated that he was aware of no empirical data on the subject, and was merely testifying as to his ''perception from being in the industry.'' *Id.* at 1102. In sum, testimony regarding the perceptions of an industry participant carries considerably less weight than actual examples of marketplace behavior. Nevertheless, Mr. Harrison's testimony carries *some* weight that hypothetical sellers view the amount of interactivity that a service offers as a relevant factor in assessing the royalty rate that a service should be required to pay. As such, the Judges consider it together with the other evidence relevant to the NAB's arguments.

Nevertheless, Mr. Harrison's testimony provides little support for the NAB's assertion that simulcasters generally should be entitled to pay lower royalty rates than other commercial webcasters. While the NAB posits that simulcasting is less interactive than custom webcasting, it has not established (or attempted to establish) that simulcasting as a rule is materially less interactive than any other form of non-custom, noninteractive webcasting, all of which would be subject to the general commercial webcasting rates. The statutory license is available to services that offer a continuum of features, including various levels of interactivity, which are offered in a manner consistent with the license. On the record before them, the Judges find little support for attempting to parse the levels of interactivity that the various statutory services offer to try to cobble together a customized rate structure among categories of commercial webcasters based solely on statutorily permissible levels of interactivity.

v. Promotional Effect

The record of this proceeding is replete with statements concerning the promotional value of terrestrial radio play for introducing new artists and new songs to the public and stimulating sales of sound recordings. *See, e.g.,* Knight WDT ¶¶ 30–31; Dimick WDT ¶ 43; IHM Ex. 3226 ¶ 7 (Poleman WDT); 4/28/15 Tr. at 386–87, 461–62 (Kooker). There appears to be consensus, or near-consensus, on this point.

The consensus breaks down, however, when it comes to the promotional effect of webcasting, including simulcasting. The NAB offers a somewhat tautological argument: Simulcasting is, by definition, simultaneous retransmission of the content of a terrestrial radio broadcast over the Internet; it is, therefore, the same as radio; therefore, it must have the same promotional impact as terrestrial radio. NAB PFF ¶¶ 107–113; *see* NAB Ex. 4000 ¶ 83 (Katz WDT); Katz AWRT ¶ 98; *see also* iHeartMedia PFF ¶¶ 123–124. SoundExchange disputes this conclusion. *See* SoundExchange PFF ¶¶ 897–938.

As SoundExchange points out, there are a number of differences between terrestrial radio and simulcasting. For example, terrestrial radio broadcasts are (as the NAB stresses) locally-focused; simulcasts, by contrast, can be accessed throughout the country or even overseas. *See* 5/14/15 Tr. at 3909–10 (Peterson); 5/29/15 Tr. at 6556 (Kooker); Dimick WDT ¶ 12. The choices available to radio listeners are more limited than those available to simulcast listeners. *See* 5/7/15 Tr. at 2522–23 (Wilcox); 5/29/15 Tr. at 6556 (Kooker). Through aggregation sites, such as iHeartRadio and TuneIn, simulcasting offers listeners greater functionality (*e.g.,* the ability to search, pause, rewind and record) than radio does. *See* 6/1/15 Tr. at 7075–77 (Burress); SX Ex. 27 at 5 (Kooker WRT); 5/26/15 Tr. at 5840–51 (Dimick).

These differences may affect listening habits in a way that diminishes the promotional effect of simulcasting. This is supported by uncontroverted evidence that radio advertisers are generally unwilling to pay to promote their products and services on simulcast streams, *see* Downs WDT ¶ 22; 5/21/15 Tr. at 5242–43 (Downs), and record companies do not view simulcasting as having the same promotional impact as terrestrial radio.[41] *See* 6/1/15 Tr. at 7045, 7048, 7050 (Burress); Ex. 3242 at 20, 33 (Walk Deposition at 75, 129). *See also* Blackburn WRT ¶ 42 (''neither interactive nor noninteractive services have a statistically significant promotional impact on users' propensity to purchase digital tracks'') (Ex. 24).

In short, there is no empirical evidence in the record that simulcasting is promotional to the same degree as terrestrial radio, and the narrative the NAB puts forward to support that proposition is flawed at best. The Judges need not, however, decide that particular question in order to determine whether simulcasters should receive a discounted rate. Whether or not simulcasting is as promotional as terrestrial radio simply is not the relevant question. The relevant questions are (1) whether simulcasting is *more* promotional *than other forms of commercial webcasting* and, if so, (2) whether such heightened promotional impact justifies a discounted rate for simulcasters. Assuming for the sake of argument that a promotional impact *could* justify a discounted royalty rate for simulcasters, the NAB would be

[39] The earlier statement was in comments Mr. Hair submitted on behalf of the AFM to the Copyright Office in connection with a study on music licensing issues. The comments are not a part of the record of this proceeding.

[40] Mr. Hair's view of what constitutes ''functionality'' is not entirely clear, however, though it appears to include the ability to ''hear what I want to hear and hear it when I want to hear it.'' *Id.* at 809.

[41] The NAB and iHeart repeatedly point to evidence that record company promotional personnel thank music services for playing their artists' music to support the conclusion that such ''spins'' are promotional. *See, e.g.,* Emert WDT ¶ 25; 5/13/15 Tr. at 3573 (Morris); 5/21/15 Tr. at 5165 (Poleman); Exs. 3241, 3569, 3570, 3576, 3575, 3576, 3643. The Judges do not find this argument persuasive. It is at least equally plausible that record company executives were merely displaying ''common courtesy.'' 6/1/15 Tr. at 7046–47 (Burress).

required to demonstrate that such promotional effect is greater for simulcasting than for other forms of commercial webcasting to an extent that would justify a lower rate for simulcasters. The NAB has not done so.

The licensee services introduced two studies in this proceeding to demonstrate empirically that statutory webcasting is promotional. Pandora presented a study by Dr. Stephen McBride that examined the effect on sales of particular albums (in the case of new music) or songs (in the case of catalog material) in particular geographic regions if Pandora did not play that music in that region. *See generally* McBride WDT (PAN Ex. 5020). iHeartMedia presented a study by Dr. Todd Kendall that examined the relationship between music purchases made on certain machines (PCs) and the amount of time that music was streamed on those same machines. *See generally* Kendall WRT (IHM Ex. 3148).

Dr. McBride's study concluded that Pandora has a positive effect on music sales. *See* McBride WDT ¶ 49. As it focused solely on the effect that Pandora, a custom radio service, has on music sales, the McBride study reveals nothing about the relative promotional value of performances by simulcasters as compared with other commercial webcasters.

Dr. Kendall's study compares the promotional effect of interactive and noninteractive streaming services, finding that noninteractive services have a greater promotional effect. *See* Kendall WRT ¶¶ 25–29. Again, however, this study fails to compare simulcasters with other commercial webcasters. The noninteractive services that were included in Dr. Kendall's study included both simulcast and non-simulcast webcasters. *See* IHM Ex. 3151 (Exhibit A to Kendall WRT).

The Judges are well aware of SoundExchange's criticisms of these two studies. However, for purposes of assessing the strength of the NAB's argument for a separate rate for simulcasters, it suffices to note that these studies do not even purport to answer the central question whether simulcasting has a greater promotional effect than other forms of commercial webcasting. In conclusion, the record does not support a separate rate for simulcasters on the basis of any purported promotional effect simulcasting may have.

vi. Additional Considerations Supporting the Same Rate for Simulcasters and Other Commercial Webcasters

(A) Competition With Other Commercial Webcasters

Simulcasters and other commercial webcasters compete for listeners. The record shows that Pandora, the largest commercial webcasting service, regards iHeartRadio, one of the largest services that aggregates simulcast streams (as well as providing a custom streaming service), as a competitor, and vice versa. *See, e.g.,* SX Ex. 269 at 18 (including iHeart among Pandora competitors); *see generally* Ex. 166 (including Pandora among iHeart competitors). Pandora broadly includes other interactive and noninteractive streaming services, as well as terrestrial radio, as its competitors. *See* Ex. 159 at 18–19. Internal iHeartMedia emails demonstrate [REDACTED]. *See, e.g.,* Exs. 373, 1028, 1189.The mutual competition between simulcasters and other commercial webcasters is a strong indication that simulcasters and other commercial webcasters operate in the same, not separate submarkets. *See Web II,* 17 FR at 24095.

(B) Proposed Definitions of Simulcast

The NAB proposes to define ''broadcast retransmissions'' (the term used to denote simulcasts in the Judges' regulations) as follows:

> Broadcast Retransmissions means transmissions made by or on behalf of a Broadcaster over the Internet, wireless data networks, or other similar transmission facilities that are primarily retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including transmissions containing (1) substitute advertisements; (2) other programming substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained, (3) substituted programming that does not contain Performances licensed under 17 U.S.C. 112(e) and 114, and; (4) occasional substitution of other programming that does not change the character of the content of the transmission.

NAB Proposed Rates and Terms at 2.

iHeartMedia proposes to amend the current definition of ''broadcast retransmission'' in 37 CFR 380.11 by adding:

> [A] Broadcast Retransmission does not cease to be a Broadcast Retransmission because the Broadcaster has replaced programming in its retransmission of the radio broadcast, so long as a majority of the programming in any given hour of the radio broadcast has not been replaced.

iHeartMedia Proposed Rates and Terms at 3.

Both proposed definitions would permit the substitution of substantial portions of the content of a broadcast before retransmitting it over the Internet. [REDACTED], in fact, has already developed and deployed [REDACTED] to accomplish this substitution more easily. *See* 5/13/15 Tr. at 3662 (Littlejohn); *see generally* IHM Ex. 3210 (Littlejohn WDT). Even if the Judges were persuaded that simulcast streams bear unique characteristics that distinguish them from other webcast streams, the ability and demonstrated willingness of broadcasters to alter those streams casts doubt on any proposal to grant simulcasting lower rates than other commercial webcasters.

d. Conclusion Regarding Separate Rate for Simulcasters

Based on the record in the current proceeding, the Judges do not find that a separate rate category for simulcasters is warranted. The NAB's arguments in favor of a separate rate category for simulcasters lack support in the record, or are otherwise unpersuasive. The bulk of relevant evidence in the record persuades the Judges that simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others.

B. Greater-of Rate Structure

In their notice commencing this proceeding, the Judges inquired about price differentiation in the market and the desirability of using a percentage-of-revenue rate structure *in lieu* of, or in addition to, the per-performance rate structure in use for the licenses at issue in this proceeding. Perhaps in response to this solicitation of comment, SoundExchange and Pandora each proposed different greater-of rate structures employing a per-play rate and a percentage-of-revenue rate. Nevertheless, all of the Services apart from Pandora oppose adoption of this two-prong approach. As discussed below, after careful consideration of all rate structure proposals presented in the proceeding, the Judges find that a greater of rate structure is not warranted in the current rate period.

1. SoundExchange's Support for a Greater-of Rate Structure

In support of its proposed greater-of rate structure, SoundExchange makes the following arguments.

• According to Dr. Daniel Rubinfeld and Dr. Thomas Lys (two SoundExchange economic expert witness), willing buyers and willing sellers have demonstrated a ''revealed preference'' for a greater-of rate structure, as evidenced by the adoption of such rates in the market.[42] For example, many agreements that allow for more ''lean-forward'' functionality contain a two-pronged per-play and revenue percentage structure like the one SoundExchange proposes.[43]

• A greater-of structure provides positive economic efficiencies that benefit licensees as well as licensors. 5/5/15 Tr. 1756–58 (Rubinfeld).

• In particular, the greater-of structure provides reasonable compensation to the record companies because: (1) The per-play prong provides a guaranteed revenue stream, especially against the vicissitudes of consumer demand; and (2) the percentage-of-revenue prong allows record companies to share in any substantial returns generated by a Service. Rubinfeld CWDT ¶¶ 96; 100.

• The greater-of structure benefits the Services because the presence of the percentage-of-revenue prong, on the upside, allows for a lower per-play rate than would exist if a single-prong, per-play rate were established, and a lower per-play rate would encourage entry into the market by new services. Rubinfeld CWDT ¶ 95.

• The greater-of structure would enable a beneficial form of price discrimination. All else being equal, services facing relatively low price elasticities (facing more inelastic demand) would be more likely to charge higher prices, earn greater revenues and thus trigger the percentage-of-revenue prong. Conversely, services facing relatively high price elasticities (facing more elastic demand) would be more likely to charge lower prices, generate lower revenues and therefore pay royalties on the per-play basis. Rubinfeld CWDT ¶ 112.[44]

2. The Services' Opposition to a Greater-of Rate Structure

The Services that oppose the greater-of structure in principle argue[45] that such a structure allocates all of the downside risk to the Services alone, while allocating to the record companies a share of potential upside benefits. *See, e.g.,* Katz AWRT ¶ 140. Such misallocation of risk and reward, according to the opposing Services, not only unjustifiably allows the record companies to free-ride on a service's economic success, but also ignores the services' downside risk that they will fail to execute their respective business models and go out of business. *See, e.g.,* IHM Ex. 3216 ¶ 19–26 (Pakman WDT); Katz AWRT ¶ 149.[46]

A further economic deficiency in this two-prong approach, according to the opposing Services, is that it utilizes a percentage of *revenue* rather than a percentage of *profits*. An investment that raises revenues by less than the cost of the investment would reduce *profits,* yet, under a percentage-of-*revenue* prong, royalty payments would rise. In such a scenario, the ''upside'' from increases in revenues would not necessarily translate into an increase in profits. *See* Katz AWRT ¶ 150.

According to the opposing Services, forty-two percent of the Majors' contracts examined by Dr. Rubinfeld *do not* contain a per-play prong, contradicting SoundExchange's claim that the market has demonstrated a consistent ''revealed preference'' for a greater-of approach. Katz AWRT ¶ 143. According to these Services, all but one of the 62 ''label-service pairings'' identified by Dr. Lys related to interactive services, thereby further contradicting SoundExchange's claim of a revealed marketplace preference for a greater of rate structure. 5/4/15 Tr. 1474–75 (Lys).

The opposing Services also note that the agreements entered into by [REDACTED] and [REDACTED], relied upon by Dr. Rubinfeld, were negotiated as parts of overall interactive agreements with their record company counterparties, and the specific services within those agreements upon which Dr. Rubinfeld relies have extra-statutory interactive functionality. *See* NAB PFF ¶¶ 510, 528–530, 515–518, 525–527 (and citations to the record therein).[47]

The opposing Services point out that the parties to the other agreements relied upon by Dr. Rubinfeld did not demonstrate an expectation that the revenue prong of the greater-of formula would ever be triggered (given the relative levels of the per-play and revenue percentage prongs). *See, e.g.,* PAN Ex. 5110 5/6/15 Tr. 6956–57 (Lexton). Rather, according to the opposing Services, the percentage-of-revenue prongs were added by the record companies merely to create favorable precedent for future proceedings. *See generally* Katz AWRT ¶ 193–196; PAN Ex. 5365 at 5–6 (Shapiro SWRT); 5/15/15 Tr. 4025 (Lichtman); 6/2/15 Tr. 7362–63 (Cutler). Consistent with this point, the opposing Services note that:

• There is no evidence that [REDACTED] has paid royalties under

[42] SX Ex. 17 ¶ 94 (Rubinfeld CWDT); SX Ex. 14 ¶¶ 25–32 (Lys WDT) (94% of 62 label-service pairings adopt a greater-of structure). The majority (50% to 60%) of the purely interactive agreements that contain a greater-of structure utilize the same two prongs that SoundExchange proposes–a per-play rate and a percentage-of-revenue rate. Rubinfeld CWDT ¶ 206; SX Ex. 63 (App. 1a).

[43] *See* SX Ex. 2070 (the [REDACTED] Agreement § 1(b), at1); SX Ex. 2071 (the [REDACTED] Agreement § 1(d), at 2; SX Ex. 33 (the [REDACTED] Agreement § 3(b)(2), at 15–16); IHM Ex. 3343 at 9; IHM Ex. 3365 at 11; IHM Ex. 3356 at 9–10; Rubinfeld CWRT ¶ 87 ([REDACTED]'s agreements with [REDACTED]); SX Ex. 80; ([REDACTED] Agreement); SX Ex. 87 ([REDACTED] Agreement); SX Ex. 100 ([REDACTED] Agreement); IHM Ex. 3476 ([REDACTED] Term Sheet); SX Ex. 100 ([REDACTED] Agreement); SX Ex. 80 ([REDACTED] Agreement); PAN Ex. 5014 ([REDACTED] Agreement).

[44] SoundExchange proposed a ''55% of revenue'' rate as the second prong of its proposed greater-of rate structure based on Dr. Rubinfeld's survey of the revenue percentage shares contained in his interactive benchmark agreements, which identified a range between 50% and 60% of the services' revenues, with the majority falling between 55% and 60%. Rubinfeld CWDT ¶ 206; SX Ex. 63, App. 1a (Rubinfeld CWDT App. 1a). The following noninteractive services and/or nonsubscription services also have percentage-of-revenue prongs that approximate the 55% rate SoundExchange has proposed:

[REDACTED]'s agreements with Universal, Warner, and Sony for [REDACTED] Service, which purportedly does not have on-demand functionality, has a greater-of structure with percentage-of-revenue shares of between [REDACTED]%-[REDACTED]% paid by the labels.

[REDACTED]'s agreements with Universal, Sony, and Warner for [REDACTED] streaming service, which allegedly does not have on-demand functionality, has a greater-of structure with a pro-rata share of [REDACTED]% of [REDACTED] premium net revenue.

[REDACTED]'s free radio service has a percentage-of-revenue prong in its agreement with [REDACTED] for a pro-rata payment of [REDACTED]% of revenue. *See* SX Ex. 80, SNDEX_0024312_[REDACTED]_20130101 at SNDEX0024322 ([REDACTED] Agreement). SoundExchange acknowledges that several other agreements contain a percentage-of-revenue prong of 45%. More particularly, the [REDACTED] agreements with [REDACTED] and [REDACTED] have a greater-of compensation formula that includes a pro-rata [REDACTED]% share of ad revenues for the [REDACTED] service. SX Ex. 2070 at section 1(b), p. 1 ([REDACTED] Agreement); SX Ex. 2071 at section 1(d), p. 2 ([REDACTED] Agreement). Also, the [REDACTED] Agreement contains a greater-of structure that includes a *pro rata* share of [REDACTED]% of gross, non-simulcast webcasting revenues. SX Ex. 33 § 3(b)(2), at 15–16.

[45] The NAB, iHeart, and Sirius XM raise additional objections to the use of a percentage-of-revenue prong as applied to *simulcasters*. Because the Judges decline to adopt a separate rate that applies only to simulcasters they need not address these additional objections.

[46] These Services assert that there is no economic justification for ''rewarding'' record companies for ''incremental value that is created by the webcaster above and beyond that created directly by the music itself,'' an additional value that may arise from lower price elasticities not attributable to the sound recordings. *See, e.g.,* Katz AWRT ¶ 148.

[47] With particular regard to the [REDACTED] agreements, the opposing Services also note that they were global deals (rather than U.S.-only deals) and tied rates to the sale of [REDACTED], rendering those agreements inapplicable as benchmarks. Katz AWRT ¶ 248.

the percentage-of-revenue prongs of its agreements with [REDACTED] or the Indies. *See* NAB PFF 603 (and record citations therein); and

• [REDACTED] has not paid royalties under the percentage-of-revenue prong of its agreement with [REDACTED]. 6/1/15 Tr. 6896–97 (Lexton).[48]

3. The Services' Opposition to the Percentage of Revenue That SoundExchange Proposed

Even assuming that a percentage-of-revenue prong should be included in a greater-of rate structure, the Services (*including* Pandora) oppose the 55% percent figure SoundExchange proposed. Their opposition is based on the following arguments:

First, as with his per-play proposal, Dr. Rubinfeld bases his percentage-of-revenue analysis entirely on the unsupported and economically improper *assumption* that, in a competitive market, noninteractive services would pay the same percentage-of-revenue rates as do interactive services.[49]

Second, the Services assert that SoundExchange's reliance on evidence that the Majors were able to extract similar supra-competitive rates from a handful of services that are not fully on-demand fails to support an importation of the 55% revenue rate into a fully and effectively competitive noninteractive market. Pandora's RPFF ¶ 227 (responding to SX PFF ¶¶ 425–430).

Third, the Services argue that Dr. Rubinfeld inexplicably ignored an agreement between Slacker and Warner for Slacker's *DMCA-compliant noninteractive radio service* that requires Slacker to pay the greater of [REDACTED]% of revenue (or the stated per-play rates). The terms of this agreement are in stark contrast to Slacker's agreement with Warner for Slacker's *on-demand service,* under which Slacker pays the greater of [REDACTED]% of revenue (or the stated per-play rates). PAN Ex. 5222 (Nov. 2013 agreement) at 16–17; *see also* 5/7/15 Tr. 2495:5–2498:8 (Wilcox).

Similarly, the Services note that Dr. Rubinfeld ignored a Slacker agreement with Universal, under which Slacker paid (until June 2014), the greater of [REDACTED]% of revenue (or the stated per-play rates) *for the on demand service,* but only the greater of [REDACTED]% of revenue (or the stated per-play rates) *for Slacker's radio service.* PAN Ex. 5034 at 0022479–80; 4/30/15 Tr. 1133:6–1135:18 (Harrison).[50]

The Services further note that the [REDACTED] revenue-sharing provision relied on by SoundExchange is not for ''[REDACTED]'s free radio service,'' but rather applies only to two premium subscription services and specifically excludes [REDACTED]'s free offerings.[51] Both subscription services offer on-demand functionality, among other interactive features.[52] [53]

Fourth, the Services point out that Dr. Rubinfeld ignored the percent-of-revenue levels in the Pandora/Merlin Agreement and the 27 agreements between [REDACTED] and independent labels as they related to custom (Pureplay) webcasting. Among those agreements, all but one contained an alternative greater-of prong with a [REDACTED]% of revenue rate, far less than Dr. Rubinfeld's proposed 55% rate. *See, e.g.,* PAN Ex. 5014; IHM Ex. 3343.[54]

This discussion is largely academic, however, because, as discussed below, the Judges have determined not to adopt a greater of rate structure and instead will continue the current per-play structure for commercial webcasters.

4. The Judges Reject Adoption of a Greater-of Rate Structure

The Judges reject the proposals by SoundExchange and by Pandora that the statutory rate should contain a greater-of structure. Rather, the Judges find that the statutory rate should continue to be set on a per-play basis for commercial webcasters. The Judges reach this conclusion for several reasons, any one of which the Judges find to be sufficient to reject the greater-of approach with a percentage-of-revenue prong.

The Judges first note that none of the percentage-of-revenue prongs in the greater-of agreements in the record has been triggered, which may suggest that the parties to those agreements viewed the per-play rate as the rate term that would most likely apply for the length of the agreement. *See, e.g.,* 6/2/15 Tr. 7362–63 (Cutler) (distinguishing ''hard'' negotiations over the iHeart/Warner per-play rate from the percentage-of-revenue prong to which Warner ''agreed because we were never really going to hit that feature anyway.'').

Additionally, the agreements, or portions of agreements, relied upon by SoundExchange in support of a greater of rate structure, are not contained within the benchmarks relied on by SoundExchange. SoundExchange, through Dr. Rubinfeld, looked at agreements *other than* his benchmark agreements to find rate structures with a percentage-of-revenue prong. In other words, the agreements that SoundExchange contends are most reflective of the marketplace value of the copyright owners' rights under the statutory licenses do not contain a greater of rate structure.

Further, for its part Pandora pointed to the 25% revenue rate from the Pandora/Merlin Agreement to support a greater of rate structure. Unlike the steered rate provision in the Pandora/Merlin Agreement, however, the 25% of revenue prong was nothing other than a figurative ''cut and paste'' of the Pureplay percentage rate. As such, it reveals nothing about whether the parties in the marketplace would agree to include such a prong in an

[48] Moreover, in this vein, the opposing Services point out that [REDACTED] did not even estimate the potential value of the percentage-of-revenue prong in its agreement with [REDACTED]. *Id.* at 6895.

[49] Pandora's RPFF ¶ 226 (*quoting* Rubinfeld CWDT ¶ 169 (''I have *assumed* that the ratio of the average retail subscription price to the per-subscriber royalty paid by the licensee to the record label is approximately the same in both interactive and noninteractive markets.'')) (emphasis added). Pandora's RPFF ¶ 226 (*quoting* Rubinfeld CWDT ¶ 169 (''I have *assumed* that the ratio of the average retail subscription price to the per-subscriber royalty paid by the licensee to the record label is approximately the same in both interactive and noninteractive markets.'')) (emphasis added).

[50] Additionally, the Services point out that beginning in June 2014, Slacker and [REDACTED] agreed to a reduction in the on-demand percentage to [REDACTED]% in exchange for an increase in the basic radio percentage to [REDACTED]%, but the radio service percentage-prong royalty rate therefore was still significantly *only 64% of the rate for the on demand service.* PAN Ex. 5035 at 116684–87; 4/30/15 Tr. 1137:19–1140:10 (A. Harrison).

[51] *See* [REDACTED] Agreement, SNDEX_0024312_[REDACTED] 20130101 (SX Ex. 80) at 11 of 82 (revenue-share provisions); *id.* at 3 of 82 (defining ''Portable Service''); [REDACTED] Agreement, SNDEX0023904_[REDACTED]_20100528 (SX. Ex. 80) at 15 of 155 (defining ''Tethered Service'' and ''Subscription Service'').

[52] *See* [REDACTED] Agreement, SNDEX0023904_[REDACTED]_20100528 (SX. Ex. 80) at 15 of 155 (describing functionality of ''Subscription Service'').

[53] Additionally, the Services aver that [REDACTED] service relied on by SoundExchange is not DMCA compliant, and therefore is not a noninteractive service, as SoundExchange claims. *See* IHM PFF ¶¶ 352–355 (and citations to the record therein). Furthermore, the [REDACTED]% of revenue share agreed to by [REDACTED] for the [REDACTED] service is below SoundExchange's proposed interactive-based 55% benchmark rate. According to the Services, the provisions of the [REDACTED] agreements cited in this paragraph do not reflect a comparable ''greater of compensation formula,'' as SoundExchange claims, but rather reflect a formula whereby a per-play rate is *added to a different percent-of-revenue figure. See* [REDACTED] Agreement § (1)(b), at 1–2 (SX Ex. 2070) (''[REDACTED]% of Net Advertising Revenue Per Play''); [REDACTED] Agreement § 1(d), p.2 (SX Ex. 2071) (''[REDACTED]% of Net Advertising Revenues per Play'').

[54] Pandora notes one outlier, the agreement between [REDACTED] and iHeartMedia, that contains a [REDACTED]% of revenue prong for iHeartMedia's custom offering. The Services argue that this [REDACTED]% rate should be given little weight, in that it ''was only agreed to because it was almost certainly not going to become binding during the term of the agreement.'' 6/2/15 Tr. 7362:21–7363:5 (Cutler).

agreement.[55] Indeed, Dr. Shapiro proffered virtually no justification for the inclusion of the percentage-of-revenue prong in Pandora's proposal.

Relatedly, SoundExchange's rationale in support of a greater of structure that record companies should share in the upside if the Services monetize their models at a faster rate is wholly unconvincing. Absent proof that the per-play prong had been set too low, there is no justification for assuming that the record companies should share in that monetization through a percentage-of-revenue prong in the rate structure.[56] Dr. Rubinfeld indicated that his ''ratio equivalency'' per-play methodology resulted in a per-play royalty payment that approximated 55% of service revenue. Successful monetization by the Services might drive the percent-of-revenue equivalence below 55%, but there is no economic basis to support maintaining that level with a separate percent-of-revenue prong.[57]

Only SoundExchange and Pandora proposed a two-prong approach, and, as discussed above, the Judges find their reasons in support of such a structure unpersuasive. Moreover, other parties raised numerous, valid objections to the use of a greater-of structure with a percent-of-revenue prong. *See, e.g.,* NAB Ex. 4011 (Weil WRT) (a percent-of-revenue rate would create uncertainty and controversy regarding the definition and allocation of revenue).

Finally, by maintaining the statutory rate as a per-play rate, the Judges are acting in a manner consistent with prior decisions, consistent with 17 U.S.C. 803(a)(1). Although new and persuasive evidence could cause the Judges in future proceedings to consider a greater-of rate structure and a percent-of-revenue rate, no such evidence has been provided to the Judges in this proceeding.[58]

For these reasons, the Judges reject the two-pronged rate proposals proposed by SoundExchange and Pandora, and shall continue the current practice of setting the statutory webcasting rates on a per-play basis.

C. Promotion and Substitution

The Act provides, among other things, that the Judges base their hypothetical marketplace rates on ''economic, competitive[,] and programming information'' that the parties present, *including promotion and substitution as factors that would influence rates in the marketplace.* 17 U.S.C. 114(f)(2)(B).[59]

As set forth in this determination, *infra,* the Judges have relied upon certain marketplace agreements as benchmarks for the setting of the statutory rates. In prior determinations, the Judges have concluded that contracting parties, as rational economic actors, factor in the promotion and substitution effects when negotiating direct licenses.[60] That is, parties negotiating direct licenses for the performance of sound recordings on services will be cognizant of the promotion and substitution effects, and those effects will influence the rate at which they agree to a license. Witnesses on both sides in this proceeding generally agree that promotion and substitution effects are factored into negotiated agreements. *See, e.g.,* Rubinfeld CWDT ¶ 31(d); Shapiro WDT at 39).[61]

The parties' mutual awareness reconfirms the Judges' earlier conclusion that the promotion and substitution effects on royalty rates are ''baked in'' to a negotiated license rate. To the extent the Judges adopt a rate based on benchmark evidence, it is not necessary to make additional adjustments to benchmarks to reflect the promotion and substitution factors. The Judges hold in this determination, as they have held consistently in the past, that the use of benchmarks ''bakes-in'' the contracting parties' expectations regarding the promotional and substitutional effects of the agreement. For the noninteractive benchmarks upon which the Judges rely, this long-standing position to deem substitution and promotion effects as incorporated into the agreements appears to be fully applicable.

SoundExchange disagrees, however, and points, for example, to testimony from Charlie Lexton of Merlin who stated that Merlin never considered the promotional or substitutional effects when agreeing to the terms of the Pandora/Merlin Agreement. 6/1/15 Tr. 6910 (Lexton). The Judges find that such testimony is not credible and not sufficient to support abandonment by the Judges of their long-standing treatment of promotional and substitutional issues. Indeed, the fact that Merlin arguably was so cavalier regarding the impact of the Pandora/Merlin Agreement on the positive promotional effects or the negative substitutional effects (to interactive streaming, download sales, and other revenue channels) implies that Merlin either understood the net value of these factors to be positive or, at worst, neutral. Apparently, SoundExchange infers: ''This is not to say that [Merlin] did not value those terms—of course it did, but there was no precise calibration of the negotiated rate to Merlin's view of the promotional and substitutional impact of the deal.'' SX PFF ¶ 1101. It strains credulity to think that Merlin was oblivious to the potential promotional and substitutional effects of the Pandora/Merlin Agreement, yet proceeded with the deal on unaltered terms.

Additionally, the Judges reject the argument, advanced by SoundExchange, that the Pandora/Merlin and iHeart/Warner Agreements are too new and untested to support the longstanding understanding that substitution and promotional effects are ''baked in'' to benchmark agreements. An important aspect of the benchmarking approach is

[55] When Pandora and Merlin agreed to a lower per-play rate through steering, they created a rate that was *not* the higher Pureplay rate. By contrast, the 25% of revenue prong that they incorporated into the agreement, which equaled the Pureplay rate, reveals nothing about any specific negotiations between Pandora and Merlin over that term. For example, if Pandora and Merlin had agreed to a 20% or a 30% revenue prong, that fact would perhaps have been informative of a marketplace term.

[56] A potential rationale for the percentage-of-revenue prong is that it could offset a per-play rate that is ''too low.'' The Judges have taken great care to discount any proposed rate that they believe would be too low to compensate adequately the licensors for the rights under the licenses. As discussed below, the per-play rates that the Judges adopt for commercial webcasters are consistent with rates negotiated in marketplace agreements.

[57] This criticism would not apply to the subscription rates for noninteractive services, based upon Dr. Rubinfeld's ''ratio equivalency'' model. However, the other criticisms set forth in the text are sufficient to reject the use of a greater-of rate structure with a percentage-of-revenue prong even for the subscription rate.

[58] Moreover, the Judges are concerned that, given the limitations of the evidence in this proceeding regarding agreements with greater of rate structures, any attempt to ''mix and match'' per-play rates with percentage-of-revenue rates could cause licensors and licensees alike to experience undesirable and potentially destabilizing swings in anticipated revenues and payments over the length of the license. Continuation of the current per-play rate structure helps to ameliorate this concern.

[59] In prior proceedings, the focus of the question of substitution has been physical record sales. In the current market, however, digital access through interactive services is a revenue stream that might be affected by consumers choosing the statutory noninteractive streaming services. To evaluate interactive licenses as benchmarks for noninteractive services, therefore, the Judges must look at how the latter might prove a substitute for the former.

[60] *See Web III Remand,* 79 FR 23102, 23119 n.50 (''The adoption of an adjusted benchmark approach to determine the rates leads this panel to agree with *Web II* and *Web I* that such statutory considerations implicitly have been factored into the negotiated prices utilized in the benchmark agreements. *Web II,* 72 FR at 24095; *Web I,* 67 FR at 45244.'').

[61] The more particular issue of whether noninteractive services substitute for interactive services is part and parcel of the issue of whether there has been important ''convergence'' between the two types of services, discussed at length in connection with the evidence regarding segmentation of listeners based on their willingness to pay.

that it credits sophisticated business entities that have carefully negotiated their agreements with an understanding of market forces. That is, there is a presumption that marketplace benchmarks demonstrate how parties to the underlying agreements commit real funds and resources, which serve as strong indicators of their understanding of the market. If promotional or substitutional effects had separate values that were not already reflected in those rate and play-quantity terms, rational commercial entities would identify those promotional and substitutional effects and account for them explicitly.

The ''baked-in'' aspect of promotional and substitutional effects does not address the issue of whether there is a difference between the promotional/substitutional effects of interactive services, on the one hand, and noninteractive services, on the other. To the extent the Judges rely on SoundExchange's interactive benchmark to set statutory rates in the noninteractive market, the Judges must identify and consider any difference in the promotional/substitutional effects between these markets to determine whether to adjust the interactive benchmark rate.

These potential promotional/substitutional effects hypothetically could occur in two different ways. First, the availability of noninteractive services could cause listeners to substitute noninteractive listening at the expense of interactive services. Second, noninteractive services could substitute for, or promote less, the sale of sound recordings through downloads or otherwise. To address these issues, the parties rely on expert witness testimony and on the observational and anecdotal testimony of industry witnesses. The Judges find the lay testimony to be unhelpful and essentially self-serving. Rather, the Judges find this issue to be technical in nature, and consider the expert testimony, discussed below, to be the type of evidence that has the potential to identify whether such differences exist. SoundExchange relied upon the survey work undertaken by Sarah Butler, a Vice President at NERA Economic Consulting. The Services' position was supported by the survey work of Larry Rosin, President of Edison Research.

Ms. Butler, a survey expert, designed and constructed a consumer survey to identify the types of music listening Pandora and iHeart substituted for, in the opinion of listeners. SX Ex. 5 at 3. Ms. Butler gathered information from on-line survey respondents on age, gender, and familiarity with different types of music listening formats. She then defined the relevant population as comprising those individuals who reported themselves as currently using iHeart or Pandora. For listeners who reported using both of these services, Ms. Butler testified that she assigned them to either the iHeart or the Pandora group. *Id.* ¶¶ 30–31.

Survey respondents were asked two substantive questions relating to each service. The first question asked:

Imagine you could no longer listen to music on iHeart [or Pandora]. Which of the following statements represents what you would be most likely to do?

- I would find a substitute for the music I listen to on iHeart [or Pandora]
- I would stop listening to music
- Don't know/unsure

Id. ¶ 38.

The second question asked respondents who answered the first question by stating they would find a substitute for the music they listened to on either Pandora or iHeart:

Which of the following, if any, would be your most preferred substitute for iHeart [Pandora]?

Id. ¶ 40. Respondents were given a list of alternatives. *Id.*

Ms. Butler's survey found that for Pandora users, 43.3% would listen to one of the following services: Spotify (19.7%), iTunes Radio (9.7%), Amazon and Rhapsody (about 4% each), Google Play and Slacker (about 2% each), and Beats and Rdio (about 1% each). *Id.* ¶ 48, Figure 3. For iHeart users, Ms. Butler's survey showed that 30% would switch to Pandora, and 23.1% would instead listen to another service, including Spotify (10.7%), iTunes Radio (7.5%), or Amazon, Google Play, Slacker, or Rhapsody (about 1% each). *Id.* ¶ 50, Figure 5.

According to SoundExchange, these results show that interactive services are common, if not predominant, substitutes for noninteractive services, and that listeners would turn to such interactive services in a hypothetical world in which no statutory noninteractive services were available. SX PFF ¶¶ 1130–1131.

The Judges have evaluated Ms. Butler's survey and the criticisms by the Services, and the Judges find that there are three significant problems with Ms. Butler's survey that preclude its usefulness in attempting to demonstrate that noninteractive statutory services substitute for interactive services. Any one of these problems, standing alone, is sufficient to preclude the Judges' reliance on Ms. Butler's survey.

First, Ms. Butler's survey fails even to attempt to measure listeners' willingness to pay (WTP) for different services. *See* 5/29/15 Tr. 6779, 6796–98 (Butler) (acknowledging that she did not measure WTP—including whether WTP for any listener was greater than zero). Her survey also did not test whether the responding listeners had any knowledge of the prices of the potential substitute services she provided to them when asking her second question. Given that the Judges are attempting to set rates in this proceeding, a survey that asks ''listeners'' to rank substitute services without providing price information fails to provide any meaningful information as to how those ''listeners'' will act as ''consumers'' of streaming services.

Second, Ms. Butler did not select her survey respondents in a random manner, and therefore had no ability to calculate margins of error or confidence intervals for her results. *See* 5/29/15 Tr. 6782 (Butler).

Third, Ms. Butler intentionally assigned virtually all respondents who reported listening to both Pandora *and* iHeart to the iHeart group only for further questioning. This caused her to omit about 40% of actual Pandora users from her results as they related to such Pandora users, including respondents who reported using Pandora daily. *Id.* at 6789, 6806–08.

Accordingly, the Judges cannot and do not rely on Ms. Butler's survey results.

Mr. Rosin, on whose survey the Services rely, conducted his survey in a manner consistent with the standards and code of ethics of the American Association for Public Opinion Research, a major survey research standards organization. PAN Ex 5021 at 5 n.2. (Rosin WRT). Specifically, Mr. Rosin conducted a national telephone survey of Americans 13 years of age and older. Respondents were selected randomly, and 2,006 interviews were conducted via landlines and cell phones. The margin of error for his results was +/− 2%, with a confidence interval of 95%. Rosin WRT at 5, 7.

The responses to Mr. Rosin's survey revealed, *inter alia,* that

- only 1% to 1.6% of noninteractive users reported that their listening was replacing listening on interactive services;
- only 3.8% of survey respondents would subscribe to pay for an interactive service;
- only 2% of survey respondents were ''very likely'' to pay the market monthly subscription rate of $9.99 for an interactive service, and only 7% were ''somewhat likely'' to subscribe at this price point—91% were ''not at all

likely'' or ''not very likely'' to subscribe at that price.

Rosin WRT at 9, 12.

Based upon these findings, Mr. Rosin concluded that:

1. Most consumers are unwilling to pay monthly subscription fees for access to streaming services.

2. Noninteractive services like Pandora and iHeart are not close substitutes for interactive on-demand services such as Spotify.

3. Only a small market exists for paid (subscription) services.

4. Listeners to Pandora would not otherwise be listening to interactive services.

Rosin WRT at 4.

The Judges find Mr. Rosin's *random* survey to be generally credible, and certainly more informative than the *non-random* survey work done by Ms. Butler. Most importantly, Mr. Rosin treated ''listeners'' as ''consumers''—inquiring as to their WTP rather than their preferences unconstrained by prices. SoundExchange argues that even this price-point inquiry indicates that some listeners, at some lower price points, might be somewhat likely to subscribe to an on-demand service. *See* Rosin WRT at 10 (only 79% of respondents ''not at all likely'' or ''not very likely'' to spend $4.99 per month for a streaming subscription, and that percentage drops to 69% if the price is lowered to $2.99 per month). However, there is no dispute that subscribers constitute a minority of overall streaming listeners (as noted *infra* in the discussion of ''Convergence''), so it is not particularly revealing that these levels of survey respondents would consider subscribing instead to an on-demand interactive service at various lower price points.[62]

The Judges reject the additional criticism by SoundExchange that Mr. Rosin should not have presented specific price points to respondents, but rather should have asked if they were willing to pay a ''small fee'' for interactive subscriptions. Such a vague phrase would be less informative, and more subjective, than particular price points. The Judges also reject the criticism that Mr. Rosin should not have indicated that an alternative to noninteractive services was to listen to ''free'' FM radio and that another alternative was to ''pay'' for a subscription to an interactive service, because interactive services do offer ''freemium'' subscriptions, which begin as free subscriptions subject to a conversion option. The Judges find that Mr. Rosin's language meaningfully reinforces the different pricing and pricing strategies that exist in the market, because FM radio *is* free to the listener and on-demand services are designed to obtain paying subscribers, whether at the outset of the subscription period or by using ad-supported services as a ''freemium'' tool to convert listeners into subscribers. (Indeed, SoundExchange's economic expert, Dr. Rubinfeld, testified that he did not even use interactive ad-supported rates as a benchmark because they were designed as tools to convert listeners into subscribers.)

The Judges take note of SoundExchange's criticism of Mr. Rosin's decision not to rotate one of his multiple choice answers to the question of what a listener would do if no free streaming services existed. *See* Rosin WRT at App. B. The choice ''would you just listen to less music'' was always asked last, whereas the other three choices (listen to free FM radio, listen to your CDs and downloads or watch music videos, YouTube, or Vevo) were rotated. SoundExchange notes the presence of a potential ''recency effect'' if one choice is always presented last, possibly inducing respondents to favor that choice. Mr. Rosin acknowledged the general existence of such an effect, 5/14/15 Tr. 3755 (Rosin), but he indicated that ''pinning'' certain options in a multiple choice question was necessary to enhance the respondents' ability to comprehend the question. 5/14/15 Tr. 3743–44 (Rosin). The Judges do not find that there was record evidence sufficient to find that it was unreasonable for Mr. Rosin, in applying his expertise, to weigh these technical survey issues and construct his choices in this manner, nor do the Judges find that there was sufficient record evidence to indicate that Mr. Rosin's fundamental conclusions would have been materially different if he had rotated that final choice on that single question.

Finally, the Judges do not agree with SoundExchange's criticism that Mr. Rosin's survey is deficient because he failed to describe in sufficient detail the features offered by a hypothetical on-demand interactive subscription service in one of his questions.[63] However, in that question, he specifically mentioned Spotify, Rhapsody, and Rdio, *see* Rosin WRT App. B at 9, and he identified additional features of an on-demand service (Spotify) in a prior question. *See id.,* Question 7E. There is not sufficient record evidence to suggest that the structuring of these questions in this manner weakens the probative value of Mr. Rosin's survey and conclusions.

Turning to the question of whether there is a difference between the substitution or promotion effects of interactive versus noninteractive services with regard to *music sales,* the parties presented different empirical analyses.

iHeart relied upon the expert testimony of Dr. Todd Kendall, who attempted to analyze the effect of listening to online streaming on music purchases, by reviewing data from 10,000 personal computers over a six month period. IHM Ex. 3148 ¶ 8 (Kendall WRT). Dr. Kendall used three categories of monthly data for each sample computer: (1) The amount of time spent listening to music; (2) the number of digital music purchases made on Amazon and iTunes; and (3) the amount of time spent visiting music sites, such as *RollingStone.com. Id.* ¶¶ 10, 12; *see* IHM Exs. 3151–3153.

He then compared the relative promotional effect of fourteen on-demand services, including Spotify, with the relative promotional effect of nine Internet radio services, including Pandora and iHeart. Kendall WRT ¶¶ 9, 15–17. Dr. Kendall found that a 10% increase in listening to Internet radio was associated with a statistically significant 0.070% increase in music purchasing. *See id.* ¶ 22; IHM Exs. 3154, 3156–3158. Based on this finding, Dr. Kendall opined that noninteractive services are *15 times* more promotional than interactive services. Kendall WRT ¶ 5.

There are several important flaws in Dr. Kendall's work, however, that render it insufficient for the Judges to conclude that Dr. Rubinfeld's interactive benchmark should be reduced to reflect a supposed lower promotional effect. Most importantly, Dr. Kendall's conclusion is premised on his finding that on the computers he analyzed individuals spent *18 times* more time listening to interactive services than to noninteractive services. 5/12/15 Tr. 3274 (Kendall). When listeners spend more time on a service, that drives down the calculation of the number of purchases per hour of listening, which is the promotional effect being sought by the analysis.

SoundExchange demonstrated in its cross-examination of Dr. Kendall that this extreme multiple resulted from the different methods of recording listening

[62] Also, to the extent subscribership might increase if the subscription price were lowered, then the commensurate royalty derived by SoundExchange's interactive ''ratio equivalency'' benchmark analysis (discussed *infra*) would likewise be reduced. Thus, these criticisms of Mr. Rosin's survey results undermine any broad use of SoundExchange's own interactive benchmark.

[63] Mr. Rosin described them in Question 9A as services that allow listeners to stream music as they choose, for access but not ownership.

time for interactive and noninteractive services. More particularly, Spotify, a leading interactive service, is more widely used on desktop applications, and Pandora is more widely accessed through web browsers. SX Ex. 1568; 5/12/15 Tr. 3305 (Kendall). Web site listening measurements were cut off if the listener had not interacted with the Pandora Web site. Kendall WRT ¶ 5 n.14. By contrast, listening measurements based on the use of desktop applications simply measured the time the application was open on a user's desktop, and otherwise not in hibernation mode, screen saver mode, or some other similar mode. *Id.* Further, the default setting for the Spotify application is for it to launch when the computer is turned on—even if no one is listening. 5/12/15 Tr. 3306–07 (Kendall).

Simply put, these differences in measuring listening time alone skew Dr. Kendall's analysis and results. Accordingly, the Judges cannot conclude from his testimony and analysis that noninteractive services are more promotional of music sales than interactive services.

With regard to the relative promotional or substitutional effects of interactive versus noninteractive streaming services on music sales, SoundExchange relies on the testimony of Dr. David Blackburn. Unlike Dr. Kendall, he did not attempt to relate the amount of time spent listening to these services to increases in purchasing music. Rather, Dr. Blackburn attempted to determine whether there was any meaningful promotional or substitution effect on music sales as between those who use the two different types of services.

In this instance, the particulars of the study are less important than the conclusion. Dr. Blackburn opined that, based on his analysis, ''neither interactive nor non-interactive services have a statistically significant promotional impact on users' propensity to purchase digital tracks.'' SX Ex. 24 ¶ 42 (Blackburn WRT). Because Dr. Blackburn is a SoundExchange witness, and because the point of the present discussion is to determine whether an interactive benchmark rate must be lowered or raised to reflect such differences, his conclusion fails to support any change in SoundExchange's interactive benchmark for promotional or substitutional effects.

Finally, the Judges take note of Pandora's ''Music Sales Experiments'' conducted by its Senior Scientist, Economics, Dr. Stephan McBride. The purpose of that experiment was ''to test whether performance of sound recordings on Pandora have a positive or negative impact on sales of those sound recordings.'' PAN Ex. 5020 ¶ 23 (McBride WDT). However, whether or not Pandora has a net promotional or substitutional effect does not address the issue of whether that net effect is different from the net promotional/substitutional effect of interactive services.

Rather, when relying on benchmarks, the Judges deem the benchmark agreements of rational actors to include an implicit understanding of the promotional and substitutional effects of their transaction. Therefore, Dr. McBride's conclusions, as well as Dr. Blackburn's criticisms of those ''Music Sales Experiments,'' do not affect the Judges' rate determination.

D. Impact of Parties' Financial Circumstances

The Services aver that the rates set in this proceeding must be sufficiently *low* to permit their business models to be profitable. *See, e.g.,* NAB PFF ¶¶ 119–149; IHM ¶¶ 245–257 (and citations to the record therein). Reciprocally, SoundExchange argues that the rates must be sufficiently *high* to allow the record companies to cover their costs and to obtain the necessary return on investment (ROI), plus a profit. *See, e.g.,* SX PFF ¶¶ 165–208 (discussing costs and investments and noting (¶ 165) that ''[t]he rates that record companies receive from streaming services ha[ve] been—and over the next five years will continue to be—critical to [the record companies'] ability to make such recurring investments.''); 4/30/15 Tr. 972–73 (A. Harrison) (''[T]he profit maximization goal is definitely . . . a top goal of the company . . . and also provides the incentive to create music.'').

The Judges find that they do not need to relate the rates set in this proceeding directly to the parties' proposed business models. Rather, the Judges' adoption of the benchmark method of determining rates obviates the need to: (1) Analyze whether the record companies' costs require a particular rate to allow them to obtain an appropriate ROI; and (2) protect particular noninteractive services whose business models might require a low enough rate to sustain their survival and/or growth. Benchmarks based on marketplace agreements, by their very nature, reflect the parties' need for rates that allow them to project a sufficient ROI and enable them to implement their respective business models.

As with the promotional and substitutional impact of the rates, the Judges conclude that the benchmarking process ''bakes-in'' (internalizes) these necessary elements, given the assumed rational, maximizing nature of sophisticated business entities. Moreover, even if the Judges were to attempt to ascertain whether a particular ROI could be met by a given rate, or whether a particular business model could be sustained, the present record would preclude such an analysis. The Judges would require much more detailed financial and economic data regarding the parties' costs and revenues before attempting to make such determinations.

Further, as the Judges have previously held, the statute neither requires nor permits the Judges to protect any given business model proposed or adopted by a market participant. *Web II,* 72 FR at 24089. The Judges further noted in the *Web III Remand* that any attempt by the Judges to set rates with these ROI and business model issues in mind would essentially convert this § 114(f)(2)(B) proceeding into a classic public utility style rate-of-return hearing. 79 FR at 23107. None of the parties argues that the statutory standard permits such a process, and neither the D.C. Circuit, nor the Judges (or any of their predecessors) have so held.

E. The Effect of the Alleged ''Shadow'' of the Statutory Rate

The parties assert that the benchmarks that are adverse to their positions are compromised by the fact that they were set in the ''shadow'' of the statutory rate. *See, e.g.,* Rubinfeld CWDT ¶¶ 80–85 (statutory rate as a shadow pushing rates *down*); Talley WRT at 46; Shapiro WDT at 36 (statutory rate as a shadow pulling rates *up*); 5/15/15 Tr. 3993–94 (Lichtman); Fischel (same). There are essentially two types of statutory shadows noted by the parties.

The first purported shadow is cast by the *existing* statutory rate, whether set in a CRB proceeding or through the parties' WSA settlements. As an initial matter, the Judges find that any such ''shadows'' that could have been cast by existing statutory rates did not meaningfully affect the effective steered rates in the Pandora/Merlin Agreement or the IHeart/Warner Agreement. As discussed herein, those rates are below the otherwise applicable statutory rates, and it would be irrational for a licensor to accept a rate below the statutory rate when it could have rejected the direct deal and enjoyed the higher statutory rate. Also, the supposed shadow of the existing rate is less relevant to the subscription-based benchmark proffered by SoundExchange, because it is based on benchmarks that are at a further

remove from the statutory license. Rubinfeld CWDT ¶ 18.

Dr. Shapiro argues that the statutory shadow not only exceeds the marketplace rate, but also acts like a ''focal point,'' or ''magnet,'' pulling a freely negotiated rate higher than it would be in the absence of the statutory shadow. Shapiro WDT at 36–37. However, neither Dr. Shapiro nor any other expert provides a sufficiently detailed explanation as to how the statutory rate would pull up a below-statute consensual rate that is otherwise mutually beneficial. Rather, the experts who advance this variant of the shadow argument simply note the existence of a ''focal point,'' ''magnet'' or ''anchor'' theory in the economic literature and then posit that such an effect is present in the noninteractive market—without making a sufficient connection between theory and evidence. Indeed, Dr. Shapiro candidly acknowledged that the focal point/magnet/anchor hypothesis is not an ''ironclad'' economic law. *Id.* at 37 n. 65. In sum, the Judges do not credit this conjecture as sufficient to affect their determination of the rate in this proceeding.

On behalf of SoundExchange, Dr. Talley asserts that the existing statutory rate casts a shadow so dark as to obscure entirely evidence of consensual transactions that would have been consummated in the noninteractive space, but for the statutory rate. More particularly, Dr. Talley notes that any pairing of willing licensors and licensees (''dyads'' in Dr. Talley's parlance) in which the licensee's WTP was greater than the statutory rate, and greater than or equal to a licensor's ''willingness to accept'' (WTA) (also above the statutory rate), would not consummate an agreement at a consensual rate, because the buyer would always default to the lower statutory rate. SX Ex. 19 at 58 (Talley WRT) (Concluding ''in an economic environment most relevant to this setting, a statutory licensing option can crowd out negotiated transactions for relatively high-valuing buyer-seller dyads while not affecting other, low-valuing dyads. . . . [T]his crowding out phenomenon can generate downward statistical bias, leaving behind only a subset of negotiated deals involving buyers and sellers whose valuations . . . reflect[ ] prices which serve as poor benchmarks for estimating the price [to which] willing buyers and sellers would agree.) [64]

The Services counter that, although the logic of Dr. Talley's point may be correct, Dr. Talley's analysis is purely theoretical and he did not examine the evidence to determine whether his analysis was supported by the facts. In particular, the Services criticize Dr. Talley's ''shadow'' argument because he assumes that the ''missing dyads'' would reflect a significantly different WTP and WTA than those of the parties who entered into agreements (*e.g.,* the Pandora/Merlin dyad and the iHeart/Warner dyad). *See, e.g.,* Pandora RPFF 96–103 (and citations to the record therein). Dr. Talley counters, quite correctly, that the very point of his analysis is that no negotiations or agreements for above-statutory rates would exist because the parties would not waste their time engaging in bargaining that was made moot by the statutory rate. *Id.* at 6032–34.

Dr. Talley suggests though that Dr. Rubinfeld's interactive benchmark may approximate the ''unseen'' noninteractive transactions because it is affected less by the shadow of the statutory rate. *Id.* at 6036. However, that argument fails to note the fundamental distinction in Dr. Rubinfeld's benchmark—that it pertains to an upstream market for interactive licensees in which upstream demand is derived from downstream consumers who have a positive WTP for streaming services. The ''missing dyads,'' so to speak, would be those in the upstream noninteractive market in which the ''missing'' agreements would reflect only the downstream demand of listeners to free-to-the-listener ad-supported platforms, not those dyads identified by Dr. Rubinfeld in the *subscription* market.[65]

Relatedly, the Services also criticize Dr. Talley's argument because it fails to note the potential steering, ''competitive dynamics'', or other interactions that would cause dyads to cluster closely. 5/19/15 Tr. 4660–61 (Shapiro).

On balance, the Judges find Dr. Talley's criticism, albeit rational and hypothetically correct, too untethered from the facts to be predictive or useful in adjusting for the supposed shadow of the existing statutory rate. The Services' criticisms are likewise speculative, but that simply underscores the factual indeterminacy of Dr. Talley's argument. Further, Dr. Talley's point appears to be a back-door way to question both the applicability of the benchmarks in the noninteractive market, as well as the benchmarking process itself. However, the Judges have found that the Pandora/Merlin Agreement and the iHeart/Warner Agreement to be sufficiently representative benchmarks (and have found that Dr. Rubinfeld's benchmark analysis is likewise representative) *in particular segments of the statutory market.* This *segmented* analysis strengthens the representativeness of the benchmarks and weakens the speculative argument that ''missing dyads'' might tell a different story.

The second shadow identified by the parties is cast by the statutory rate yet to be established in this proceeding. The record is replete with evidence that the parties entered into various transactions with the knowledge, if not the intent, that such agreements could be used as evidentiary benchmarks in this proceeding. *See* SX PFF ¶¶ 567–570 (and citations to the record therein regarding the Pandora/Merlin Agreement); IHM PFF ¶¶ 359–362 (and citations to the record therein regarding Apple's agreements with the Majors); NAB PFF ¶¶ 456–458. Of course, a proposed benchmark is not disqualified because a contracting party wanted it to be a benchmark. Such a desire would apply to otherwise proper benchmarks as it would to dubious benchmarks. The Judges analyze the proposed benchmarks based on the overall factual merits attendant to their formation and applicability, not based upon the parties' hopes or manipulations. If a benchmark is deficient in some manner, the adversarial process of this proceeding allows the parties to expose those deficiencies.

The Judges agree with a particular criticism made by iHeart of the shadow argument asserted by SoundExchange: In the absence of the statutory shadow, the antitrust policy toward the noninteractive streaming market could well be different. *Cf.* 141 Cong. Rec. S. 11,962–63 (daily ed. Aug. 8, 1995) (Letter from Assistant Attorney General Andrew Fois to Hon. Patrick Leahy, July 21, 1995, noting that any noncompetitive rates created by the existence of only a single collective could be corrected by the ''rate panel.''). Although that comment was made in connection with the potential anticompetitive consequence of a single collective, it suggests to the Judges that the so-called ''shadow'' of the statutory rate offsets any potential device that

[64] For example, assume the statutory rate was $0.0010. If a licensor had a WTA of $0.0015 and a licensee had a WTP of $0.0020, then in the absence of a statutory rate, these parties would strike a deal between $0.0015 and $0.0020. However, with the statutory rate at $0.0010, the licensee would not negotiate, but would default to the lower statutory rate. Dr. Talley describes such a foreclosed agreement as having been obscured by the shadow of the statutory rate.

[65] This important distinction between listeners based on their differentiated WTP is discussed in greater detail *infra* in connection with Dr. Rubinfeld's proposed benchmark.

would cause rates to deviate from an ''effectively competitive'' level.[66]

Thus, to the extent the ''shadow of antitrust law'' has receded, it was counterbalanced by the ''shadow of the statutory rate.'' Accordingly, the presence of the so-called statutory shadow appears to reflect a trade-off and a second-best solution, rather than a distortion of an effectively competitive marketplace.

Additionally, the Judges' consideration of the Pandora/Merlin Agreement and the iHeart/Warner Agreement as appropriate benchmarks for the ad-supported (free-to-the-listener) market obviates the supposed ''shadow'' problem. In both benchmarks, the rate is *below* the otherwise applicable statutory rates. The statutory rates did not cast a shadow that negatively affected the licensors in those agreements because (as noted *infra*) they voluntarily agreed to rates below the applicable statutory rates (in exchange for the steering of more plays), rather than defaulting to the higher statutory rate.

Further, in the *subscription* market the Judges have adopted the SoundExchange benchmark approach, which analogizes between the interactive and noninteractive markets. As Dr. Rubinfeld testified, the interactive contracts on which he relied for his subscription-based benchmark ''minimize[] the effect of the statutory shadow'' because the interactive services cannot default to the statutory rate. Rubinfeld CWDT ¶ 18.

Finally, the Judges emphasize that they find the ''shadow'' criticism to be both nihilistic and self-contradictory. If the ''shadow'' infects all benchmarks so as to disqualify that method of rate-setting, then the parties would need to adjust or abandon their benchmarking strategies and develop new bases for analysis. That could mean the wholesale abandonment of benchmarking, to be replaced by a valuation approach yet to be applied and accepted in these proceedings.[67]

F. The Legal Issue of Whether Effective Competition Is a Required Element of the Statutory Rate

The statutory language that includes the ''willing buyer/willing seller language also commands that ''[i]n determining such rates . . . the . . . Judges ''*shall* base their decision on economic, *competitive* and programming information presented by the parties . . .'' 17 U.S.C. 114(f)(2)(B) (emphasis added). *Accord,* 17 U.S.C. 112(e)(4) (regarding ephemeral licenses). Several previous decisions by the D.C. Circuit, the Librarian, the Judges and the CARP (in *Web I*) have discussed the concept of ''effective competition'' and its relationship to § 114(f)(2)(B).

SoundExchange and the Services disagree as to whether § 114(f)(2)(B) and prior decisions require the Judges to set a rate that reflects an ''*effectively competitive*'' market populated by willing buyers and willing sellers. SoundExchange argues that no authority allows for such a requirement, while the Services assert that the statute and prior decisions require the Judges to set rates that would be established an ''effectively competitive'' market.[68]

The Services construe § 114(f)(2)(B) as explicitly requiring the Judges to utilize competitive information introduced in evidence to set a marketplace rate that reflects ''effective competition,'' and to adjust an otherwise appropriate benchmark in order to reflect ''effective competition.'' In support of this position, the Services make several principal arguments.

The Services assert that prior decisional law constitutes precedent that requires the Judges to set rates that are ''effectively competitive.'' They point to the most recent determination by the Judges, the *Web III Remand,* in which the Judges approvingly cited and relied upon the language in prior decisions by the Librarian in *Web I* and the Judges in *Web II* regarding the need to set rates under § 114(f)(2)(B) that reflect those that would be set in an ''effectively competitive market.'' *Web III Remand* at 23114 n. 37. The NAB further notes that in *Web II,* the Judges held that ''neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.'' *Web II* at 24091. Sirius XM emphasizes other particular language from *Web II,* which states: ''An effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or buyers . . . .'' 72 FR at 24091.

The NAB emphasizes that in the present proceeding the Judges must follow these decisions because 17 U.S.C. 803(a)(1) expressly requires the Judges to act in accordance with the Librarian of Congress's interpretation. NAB PFFCL ¶ 689. The Services also rely on a decision by the D.C. Circuit as persuasive, if not binding precedent, because it states that § 114(f)(2)(B) ''does not require that the market assumed by the Judges achieve *metaphysical* perfection in competitiveness.'' *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 757 (D.C. Cir. 2009) (emphasis added). Apparently, the Services construe the use of the adjective ''metaphysical'' to require, or at least suggest, that the rates reflect some lesser yet nonetheless effective quantum of competition.

The Services further argue that the legislative history of Section 114 reflects a Congressional intention for rates to be set at a level that avoids ''higher-than-competitive prices.'' *See* 141 Cong. Rec. S11945–04, S11962 (1995). In similar fashion, according to the Services, the legislative history makes it plain that the willing buyer/willing seller standard in § 114 was intended to direct the CARP (now the Judges) ''to determine reasonable rates and terms.''). H.R. Rep. No. 105–796 at 86 (Conf. Rep.); *see* H.R. Rep. No. 104–274 at 22 (1995) (legislative history of DPRSRA expressly provides ''[i]f supracompetitive rates are attempted to be imposed on operators, the copyright arbitration royalty panel can be called on to set an acceptable rate.''). In this regard, the Services note that the Department of Justice's objection to an earlier draft of the statute, relating to whether the record companies could negotiate exclusively through a common agent, was resolved because the ratemaking body (now the Judges) could intercede and establish reasonable rates. 141 Cong. Rec. S. 11,962–63 (daily ed. Aug. 8, 1995) (Letter from Assistant Attorney General Andrew Fois to Hon. Patrick Leahy, July 21, 1995, noting that any noncompetitive rates created by the existence of only a single collective could be corrected by the ''rate panel.'').

The Services also note that, in comparable circumstances, courts

[66] The issue of ''effective competition'' is discussed at length, *infra.*

[67] As explained elsewhere in this determination, the Judges have rejected the non-benchmarking approaches to rate setting proposed by some parties in this proceeding. They were not rejected because they were not benchmarks, but because each was unpersuasive in its own right.

[68] As discussed in more detail in this determination, SoundExchange asserts that its interactive benchmark need not be reflective of an ''effectively competitive'' market because such a requirement is not contained within section 114(f)(2)(B). SoundExchange also argues that, assuming an ''effectively competitive'' market standard is part of the statutory scheme, its interactive benchmark is a product of effective competition. The Services argue that their respective proposed benchmarks reflect rates that have been set in an ''effectively competitive'' market, unlike SoundExchange's proposed interactive benchmark that is the product of a market lacking the necessary competitive features. iHeart and Pandora each maintains that, even assuming that the statute does not contain an ''effectively competitive'' market standard, their respective benchmarks are nonetheless appropriate, because they represent the rates to which willing sellers and willing buyers would agree in the market, notwithstanding whether those rates reflect ''effective competition.''

construe ''reasonable rates'' to be those ''rates that would be set in a competitive market.'' *ASCAP* v. *Showtime/The Movie Channel, Inc.,* 912 F.2d 563, 576 (2d Cir. 1990); *see also* NAB PFFCL ¶¶ 706–709 (and cases cited therein); *In re Pandora Media, Inc.,* 6 F. Supp. 3d 317, 353–54 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc.* v. *ASCAP,* 785 F.3d 73 (2d Cir. 2015).

Finally, the NAB asserts that the statutory histories of the DPRA and the DMCA reflect a Congressional intent to create a three-tier performance right/rate structure, whereby: (1) Terrestrial radio continues to enjoy free access to sound recordings; (2) interactive services must pay market-negotiated royalties in order to play sound recordings on demand; and (3) noninteractive services, falling between these two extremes, cannot play sound recordings for free, shall not to be subjected to the purely market rates paid by on-demand interactive services and, instead, shall pay intermediate rates set by the Judges (formerly the CARP arbitrators subject to Librarian review). *See* NAB ¶¶ 678 *et seq.;* 682 *et seq.* (and authorities cited therein).

On the other hand, SoundExchange construes § 114(f)(2)(B) as precluding the Judges from adjusting an otherwise appropriate benchmark in order to reflect ''effective competition.'' In support of this position, SoundExchange makes several principal arguments.

First, SoundExchange emphasizes that the words ''effective competition'' or the like are not included within the statute. Thus, SoundExchange maintains that the plain language of the statute clearly does not include such a standard. SX PCOL ¶ 21.

Second, SoundExchange relies upon a statement by the CARP in *Web I* that ''the willing buyer/willing seller standard is the only standard to be applied.'' *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings,* No. 2000–9 CARP DTRA 1&2 at 21 (Feb. 20, 2002), *appv'd and modif'd by Librarian,* 67 FR 45240 (July 8, 2002) (*Web I*). SoundExchange construes this language as confirming the exclusion of the ''effectively competitive'' condition from the ''willing buyer/willing seller'' marketplace standard.

Third, SoundExchange argues that the ''willing buyer/willing seller'' standard is essentially a restatement of the traditional ''fair market value'' test. *See id.* at 45244 (the *Librarian's Web I* decision notes that the statutory standard requires rates that reflect ''strictly fair market value''). The Supreme Court has defined ''fair market value'' as SoundExchange notes, as ''the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.'' *United States* v. *Cartwright,* 411 U.S. 546, 551 (1931).

Fourth, SoundExchange argues that statutory enactments of the fair market value test and its willing buyer/willing seller component constitute adoptions of a recognized common law definition of the test. Therefore, the common law meaning should prevail because it is a ''settled principle of statutory construction that, *absent contrary indications,* Congress intends to adopt a common law definition of statutory terms. *United States* v. *Shabani,* 513 U.S. 10, 13 (1994); *see also United States* v. *Wells,* 519 U.S. 482, 491 (1997) (same).

Fifth, SoundExchange points out that, when Congress intends a legal standard to be based on ''effective competition,'' it makes the point expressly and explicitly defines ''effective competition.'' *Cf.* 47 U.S.C. 543(1)(1) (defining ''effective competition'' in the Cable Television Consumer Protection and Competition Act of 1992).

Sixth, SoundExchange characterizes the references to effective competition in *Intercollegiate Broad. Sys.* and *Web I* as mere *dicta* that may be ignored by the Judges.

Seventh, SoundExchange asserts that any attempt to apply an ''effective competition'' requirement would render the statutory test indeterminate, unworkable, and vague. SoundExchange notes that the Services' economic experts acknowledged the absence of a ''bright line'' separating a market that is ''effectively competitive'' from one that is not. Moreover, SoundExchange asserts that there is no evidence or testimony setting forth what the level of rates would need to be in SoundExchange's proffered interactive benchmark market, in order for it to equate with ''effectively competitive'' rates.

Having considered the issue and the parties' positions, the Judges conclude that they are required by law to set a rate that reflects a market that is effectively competitive. The Judges reach this conclusion through a consideration of the plain meaning of the statute, the clear statutory purpose, applicable prior decisions, and the relevant legislative history.

The Judges' starting point is the language of the statute itself. The statute *requires* that the Judges ''*shall* base their decision on [*inter alia*] competitive . . . information presented by the parties . . . .'' 17 U.S.C. 114(f)(2)(B) (emphasis added); *accord,* 17 U.S.C. 112(e)(4) (identical language for the setting of rates for the ephemeral license). The D.C. Circuit has expressly noted that, by this specific language, ''Congress *required* the Judges to follow certain statutory guidelines'' one of which is that ''the Judges *must* 'base [their] decision on . . . *competitive* . . . information presented by the parties.' '' *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 753 (D.C. Cir. 2009).

SoundExchange invites the Judges to ignore this statutory directive and judicial command. The Judges cannot. The parties presented the Judges with voluminous evidence and testimony comprising the required ''competitive information'' relating to Dr. Rubinfeld's proposed interactive benchmark market, the Services' proposed noninteractive benchmarks, the noninteractive market at issue in this proceeding, and the alleged differences and similarities among them.[69] The Judges are commanded by the statutory language quoted above to ''base their decision'' on precisely this sort of information, and, as *Intercollegiate Broadcast System* makes plain, it would be legal error for the Judges to ignore this statutory directive.

The Judges further conclude that, even if the directive that they ''shall'' consider competitive information could be construed as ambiguous, their consideration of ''competitive information'' is certainly a permissible, reasonable, and rational application of § 114, for a number of reasons.

First, the D.C. Circuit, the Librarian, the Judges, and the CARP have all acknowledged that the Judges can and should determine whether the proffered rates reflect a sufficiently competitive market, *i.e.,* an ''effectively competitive'' market. The Judges made this point clearly in their decision in the *Web III Remand,* which included a summary of the past decisional language regarding the § 114 standard:

> The D.C. Circuit has held that this statutory section does not oblige the Judges to set rates by assuming a market that achieves ''metaphysical perfection and competitiveness.'' *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* 574 F.3d

[69] The ''competitive information'' provided by the parties was extensive. SoundExchange and the Services provided factual and expert testimony regarding: (1) The ''upstream'' market (in which streaming services acquire licenses from the record companies); (2) the ''downstream'' market (in which streaming services may (or may not) compete with each other for listeners); (3) the horizontal ''upstream'' market (where the record companies compete (or fail to compete) with each other; and (4) the interactions of these several markets.

748, 757 (D.C. Cir. 2009). Rather, as the Librarian of Congress held in *Web I,* the ''willing seller/willing buyer'' standard calls for rates that would have been set in a ''*competitive* marketplace.'' 67 FR at 45244–45 (emphasis added); *see also Web II,* 67 FR at 24091–93 (explaining that *Web I* required an ''*effectively* competitive market'' rather than a ''*perfectly* competitive market.'' (emphasis added)). Between the extremes of a market with ''metaphysically perfect competition'' and a monopoly (or collusive oligopoly) market devoid of competition there exists ''[in] the real world . . . a mind-boggling array of different markets,'' Krugman & Wells, *supra,* at 356, all of which possess varying characteristics of a ''competitive marketplace.''

Web III Remand, 79 FR at 23114 n. 37.

It is noteworthy that SoundExchange has not characterized the *Web III Remand* decision as *dicta.* Thus, even if the prior language on which the *Web III Remand* Judges had relied was *dicta,* there is no argument that the holding in the *Web III Remand* was *dicta.* It is also noteworthy that SoundExchange did not assert that the holding in *Web II,* that an excess of market power can preclude a finding that a buyer or seller was a ''willing'' participant, was *dicta.*[70]

In *Web III,* a licensee, Live365, asked the Judges to reject certain of SoundExchange's proposed benchmarks that were based on the Webcaster Settlement Act (WSA) agreement between SoundExchange and the NAB, and the WSA agreement between SoundExchange and Sirius XM. (The parties to those agreements agreed to allow those WSA agreements to be introduced as evidence in *Web III.*) Live365 argued ''the rates . . . reflect the monopoly power of a single seller in those two contracts.'' 79 FR at 23113. The Judges rejected that argument and did so by taking a ''decisional path'' of reasoning based on: (1) A conclusion that an effective level of competition was required for the Judges to adopt those benchmarks; and (2) the facts of the case that demonstrated the sufficiently competitive nature of those benchmarks.[71] That legal conclusion and that factual finding led the Judges to an application of law to fact whereby they concluded that the proposed benchmarks were reflective of an effectively competitive market and therefore satisfied the § 114(f)(2)(B) standard. Specifically, the Judges held in the *Web III Remand:*

> An oligopolistic marketplace rate that did approximate the monopoly rate could be inconsistent with the rate standard set forth in 17 U.S.C. 114(f)(2)(B), as that standard has been set forth by the D.C. Circuit and the Librarian of Congress. . . . [I]n this proceeding the *evidence* demonstrates that sufficient competitive factors exist to permit the [benchmarks] to serve as useful benchmarks, and does not demonstrate that the rates in the [benchmarks] approximated monopoly rates.
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> * * * * *
>
> The parties presented no evidence from which the Judges could conclude . . . that SoundExchange necessarily wielded a level of pricing power sufficient to affect the use of the WSA Agreements as benchmarks.

79 FR at 23114 (emphasis added). Thus, in the *Web III Remand,* the Judges unequivocally applied the prior pronouncements of the D.C. Circuit, the Librarian, and the Judges to render an unambiguous holding: (1) Adopting a competitiveness standard; (2) applying the facts to the competitiveness standard; and (3) using that application of facts to law to reach their judgment. Alternately stated (and applying the D.C. Circuit's *Lawson* definition of *dicta* quoted *supra*), this decision regarding ''effective competition'' in the *Web III Remand* was *necessary* to determine an issue raised in the proceeding (the effectively competitive status of the WSA settlement agreements), after argument and full consideration.

Moreover, even past *dicta* ''deserves serious consideration'' in subsequent decisions when ''sufficiently persuasive.'' *U.S.* v. *Libby,* 475 F. Supp. 2d 73, 81 (D.D.C. 2007). Thus, ''persuasive dictum in an important early case [can] establish[ ] [a] principle'' to be followed by other courts. *Committee of U.S. Citizens Living in Nicaragua* v. *Reagan,* 859 F.2d 929, 938–39 (D.C. Cir. 1988). Accordingly, although SoundExchange assets that the statements relating to an effectively competitive market in the D.C. Circuit's *Intercollegiate Broadcast System* decision and the Librarian's *Web I* decision were *dicta,* the Judges in *Web II,* the *Web III* Remand and the present proceeding were all clearly able to convert such asserted *dicta* into binding holdings.

Thus, the Judges conclude that they are bound to follow the prior directives that instruct them to make certain that the statutory rates they set are those that would be set in a hypothetical ''effectively competitive'' market. In light of this conclusion, based on the foregoing reasons, the remainder of the arguments are insufficient to alter the Judges' decision in this regard. However, in the interest of completeness, the Judges address other arguments, including those raised by the parties, that further support their conclusion.

The Judges agree that the legislative history supports the conclusion that § 114 directs the Judges to set rates that reflect the workings of a hypothetical effectively competitive market. The legislative history equates rates set under the willing buyer/willing seller standard with ''reasonable rates.'' As the Services note, the phrase ''reasonable rates'' has been construed by the rate court, in an analogous context, as ''rates that would be set in a competitive market.''

The Judges are informed by the analogous use of the willing buyer/willing seller standard in eminent domain law. *See, e.g., Kirby Forest Ind., Inc.* v. *U.S.,* 467 U.S. 1, 10 (1984) (applying willing buyer/willing seller test in eminent domain valuation dispute). In such cases, the courts must consider whether to award a forced seller the ''holdout'' value of the seller's parcel, an additional value that exists solely because the seller's property is a necessary *complement* to the other properties that are needed by the governmental unit. As discussed in detail *infra,* it is precisely this *complementary oligopoly* value that the Judges are declining to include in the statutory rate based upon their analyses of the parties' benchmarks proffered in this proceeding. *Cf.* Thomas Miceli and C.F. Sirmans, *The Holdout Problem, Urban Sprawl and Eminent Domain,* 16 J. Housing Econ. 309, 314 (2006) (''*complementarities* among properties in the assembly case that are not present in the individual transaction'' are the consequence of ''market failure,'' economic ''rent seeking'' and generate

[70] Not only did SoundExchange fail to assert that the *Web III Remand* decision regarding ''effective competition'' was *dicta,* that decision could not possibly be construed as *dicta.* The distinction between a holding and *dictum* has been thoroughly analyzed and succinctly stated:

> A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as *dicta.*

M. Abramowicz and M. Stearns, *Defining Dicta,* 57 Stan. L. Rev. 953, 961 (2005). Courts have long held that, in contrast with a ''holding,'' *dicta* as ''language unnecessary to a decision, ruling on an issue not raised, or [an] opinion of a judge which does not embody the resolution or determination of the court, . . . made without argument or full consideration of the point.'' *Lawson* v. *U.S.,* 176 F.2d 49, 51 (D.C. Cir. 1949). As detailed in the text, a consideration of the pertinent ruling in the *Web III Remand* and of the ultimate decision in the *Web III Remand* itself, demonstrates that the statements regarding the necessary competitive state of the market were clearly holdings rather than *dicta.*

[71] Both Sirius XM and the NAB assert in the present proceeding that those two WSA settlement agreements were not reflective of effective competition, based on evidence they have presented in *this* proceeding but was not presented in *Web III.* That issue is addressed *infra,* but, for present purposes, the pertinent point is that the Judges found on the *Web III record* that these WSA settlement agreements reflected an effectively competitive market.

inefficient ''transaction costs'') (emphasis added).

The Judges are also persuaded that the structure of the Act with regard to the sound recording performance right—as it relates to terrestrial radio, noninteractive services, and interactive services—confirms the necessity of adopting an ''effectively competitive'' standard in the rate-setting process. Copyright owners were provided a limited performance right with regard to the use of their sound recordings by noninteractive services—something less than the purely private market-based rate for interactive use, but clearly more than the ''zero rate'' required from terrestrial radio. The Judges conclude that a rate that simply reflected or overemphasized either of the polar extremes would be inconsistent with the three-tier structure of the statute.[72] As the Services note, if the Judges were simply to apply the competitive dynamics of the interactive market, they would be disregarding the particular statutory history that led to the three-tier rate structure. *See generally,* William W. Fisher III, *Promises to Keep* at 104–05 (2004) (different statutory treatment of terrestrial radio, interactive services, and noninteractive services based upon fundamental ability and limits regarding the performance, promotion of, and substitution for sound recordings).

SoundExchange's arguments to the contrary are unavailing. First, the fact that the statute requires the Judges to consider ''competitive information'' adequately rebuts SoundExchange's contention that the statutory language does not address the issue of competitiveness. That provision, combined with the legislative history and the prior judicial and administrative pronouncements make it clear that the statutory language requires the Judges to establish rates that are effectively competitive.

Second, the Judges do not find that the traditional fair market value test permits the Judges to ignore the competitive status of the hypothetical market in which the statutory rate is established. As SoundExchange concedes in the very case law that it quotes, the common law meaning of a phrase should only prevail when construing a statute ''absent contrary indications.'' Here, the requirement that the Judges consider ''competitive information,'' the prior judicial and administrative holdings and pronouncements, and the legislative history all combine to clearly provide more than ''indications'' that the Judges must set reasonable rates that reflect ''effective competition.''

Third, the mere fact that, in another setting (regarding the cable television industry) Congress chose to define ''effective competition'' hardly suggests that such an ''effective competition'' standard does not exist in the present case. Indeed, the absence of a definition, combined with the requirement that the Judges weigh ''competitive information,'' is more consistent with the idea that Congress intended to delegate discretion to the Judges to determine whether the rates they set reflected an appropriate level of competitiveness.

Finally, the Judges reject SoundExchange's assertion that there is no pre-existing ''bright line'' test sufficient to distinguish a rate which is ''effectively competitive'' from one that is not. The very essence of a competitive standard is that it suggests a continuum and differences in degree rather than in kind. Once again, the statutory charge that the Judges weigh ''competitive information'' indicates that the Judges are empowered to make judgments and decide whether the rates proposed adequately provide for an effective level of competition. Moreover, in the present case, the Judges were presented with highly specific facts regarding how to use the impact of steering on rate setting in order to measure and account for the ''complementary oligopoly'' power of the Majors that serves to prevent effective competition.

IV. Commercial Webcasting Rates

A. Analyses and Findings

The rates proposed by the Services and SoundExchange are marked by a wide disparity. Although it is unsurprising that adverse parties would have strikingly different positions, what is surprising is that, despite these differences, the parties' positions are supported to a great extent (but not in all cases) by persuasive and logical economic analyses. Initially, this created a conundrum for the Judges, because none of these persuasive and logical economic analyses could easily be rejected.

On closer inspection, however, what became clear to the Judges was that the reason why many of these disparate economic analyses and models could all appear to be correct was that they each reflected *only a portion of the marketplace.* That is, to draw on a classic analogy, the experts testified to different aspects of the market in much the same manner as the several proverbial blind men[73] who, after touching but one part of an elephant, were asked to describe the animal, and gave starkly different descriptions based upon whether they had touched only the trunk, the torso or the tail. Perhaps an even more apt analogy has been made with regard to the testimony of experts as similar to the men in another fable:

> In a certain kingdom was a cave containing a treasure, guarded by a beast of fierce repute. The king wished to know the nature of the beast, and dispatched three of his subjects to invade the pitch darkness of the cave and report. The first returned and declared that he had felt the head of the beast, and it was toothed and maned like a lion. The second reported that he had felt the sides of the beast, and that it was winged and feathered like an eagle. The third reported that the legs of the beast were long and hoofed like a horse. A fearsome portrait of the beast was drawn up, and all were thereafter afraid to approach the cave. Of course, in reality, the cave contained a lion, an eagle, and a horse.
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> * * * * *
>
> Another, less allegorical, way of saying this is that many of the problems that the law has had in handling expertise in the courtroom have sprung from a failure to examine the concept of expertise in appropriate taxonomic detail.

Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise for the* Post-Kumho *World,* 31 Seton Hall L. Rev. 508, 508–09 (2000).

This phenomenon among experts has particular applicability to economists. As one prominent economist has recently written:

> Rather than a single, specific model, economics encompasses a collection of models . . . . The diversity of models in economics is the necessary counterpart to the flexibility of the social world. Different social settings require different models. Economists are unlikely ever to uncover universal, general-purpose models. But . . . economists have a tendency to misuse their models. They are prone to mistake a model for *the* model, relevant and applicable under all conditions. Economists must overcome this temptation.

Dani Rodrik, *Economics Rules* 5–6 (2015) (emphasis in original). Each party and its experts nonetheless invite the Judges to rely on but a single economic model—their model—as representative of the entire noninteractive market. As this determination makes clear, the

[72] As discussed *infra,* the Judges also reject rates proposed by several of the Services that attempt to use the ''zero rate'' paid by terrestrial radio as a guide in this proceeding. The rejection of such proposals can be seen as a bookend to the Judges' requirement that the statutory rate reflect effective competition, rather than the complementary oligopoly power present in the interactive market.

[73] The analogy is not meant to suggest that the testifying experts were metaphorically blind. Indeed, they were all learned and persuasive with regard to the aspects of the market upon which they opined.

Judges decline that invitation. Rather, the Judges have found that no single economic model—no one mythic beast—reigns over the noninteractive market *writ large.* Rather, the evidence and testimony reveal a marketplace for sound recordings that is segmented, if not fragmented. Indeed, the Judges note the economic dichotomies demonstrated by the evidence:

• Market Segmentation by WTP

Services that attract listeners who have no willingness to pay (WTP) for access to a noninteractive service, and therefore who listen mainly to ad-supported services, versus services that attract relatively more listeners who have a WTP greater than zero, and therefore can attract more subscription-based listeners.

• Market Segmentation by On-Demand Functionality

Services that meet the statutory definition of an ''interactive service'' and thus provide an on-demand function, *i.e.,* that allow listeners to select the sound recording they wish to hear whenever they choose, versus noninteractive services, that—despite whatever other functionality they may include—do not and cannot provide an on-demand feature.

• Market Segmentation by Major or Indie

The Majors, who have the ability to negotiate relatively higher rates, versus the Indies, who have relatively less market power when negotiating rates.

• Complementary Oligopoly Power versus Oligopoly Market Structure

''Complementary oligopoly'' power exercised by the Majors designed to thwart price competition and thus inconsistent with an ''effectively competitive market,'' versus the Majors' non-complementary oligopolistic structure not proven to be the consequence of anticompetitive acts or the cause of anticompetitive results.

• Custom Pureplay Webcasting versus Simulcasting

Custom (Pureplay) noninteractive services that play only sound recordings, versus simulcasters, who play principally (but not exclusively) the sound recordings and other materials transmitted simultaneously on a terrestrial broadcast.

The presence of such dichotomies is not particularly unusual. For example, in *Web II,* the Judges noted that the marketplace consisted of a variety of commercial actors, who had a heterogeneous mix of features regarding costs, customers, business plans, and strategies. Such a variety exists today, and has been amplified by technological changes that have allowed for a greater diversity of music services. The directive in § 114, instructing the Judges to establish ''rates and terms,'' that is, multiple rates and terms, anticipates the potential for more than one set of rates and terms that would have been negotiated in the marketplace between various willing buyers and willing sellers. Because the marketplace as presented by the record in this proceeding reveals important differences across these dichotomies, the Judges, as required by § 114, establish rates and terms in this proceeding that reflect those marketplace realities.

B. SoundExchange's Rate Proposal

1. Introduction

SoundExchange proposes a single rate for all commercial webcasters using a greater-of structure. All commercial webcasters would pay the greater of 55% of revenue attributable to webcasting and the following per-performance rate:

SOUNDEXCHANGE PROPOSED PER-PERFORMANCE RATES

Year	Per-performance rate
2016	$0.0025
2017	0.0026
2018	0.0027
2019	0.0028
2020	0.0029

SoundExchange Rate Proposal at 2–3.

2. Dr. Rubinfeld's Proposed Interactive Streaming Services Benchmark

In support of its proposal, SoundExchange relies principally on an analysis undertaken by one of its economic witnesses, Dr. Daniel Rubinfeld, of rates set forth in direct licenses from record companies to certain interactive streaming services.[74]

a. Foundation for Rubinfeld's Proposed Per-Play Rates Benchmark

Dr. Rubinfeld derived SoundExchange's proposed per-play rates by analyzing more than 80 agreements between interactive streaming services and record companies. Dr. Rubinfeld identified 60 such agreements that contained data on per-play royalty rates. 5/28/15 Tr. 6297 (Rubinfeld). From those 60 agreements, he selected 26 that specified minimum per-play rates. Rubinfeld CWDT ¶ 205; SX Ex. 59 (Rubinfeld CWDT, Exhibit 16a) (listing 26 interactive streaming service agreements).

According to Dr. Rubinfeld, interactive streaming service benchmarks are more probative in this statutory rate proceeding than they were in prior statutory rate proceedings due to: (1) A ''convergence'' in features that interactive and noninteractive streaming services offer to the end-user (''downstream'') market; and (2) greater head-to-head competition for listeners between interactive and noninteractive streaming services. Rubinfeld CWDT ¶ 21.

i. Convergence of Features

SoundExchange avers that the listening choices (*i.e.,* functionality) that interactive and noninteractive streaming services offer their customers are becoming much more similar than they were in previous years, *i.e.,* they are converging. *See, e.g.,* 5/6/15 Tr. 2013 (Rubinfeld) (''[C]onvergence [m]ean[s] that if I'm very active in telling Pandora [a noninteractive service] what I like and don't like, the nature of the station can evolve in ways that can become more similar to what I might do on Spotify [an interactive service] if I were curating my own station.'').

According to SoundExchange, the increasingly similar functionality of interactive and noninteractive streaming services has ''blurred'' the previous distinctions between them. *See, e.g.,* SX Ex. 3, ¶ 13 (Blackburn WDT); SX Ex. 32, ¶ 25 (Wilcox WRT). This purported blurring has occurred, according to SoundExchange, because of technological evolution, marketplace developments, and changes in consumer preferences. *See, e.g.,* Kooker WDT at 16; SX Ex. 21 ¶ 36 (Wheeler WDT). SoundExchange asserts that, because of the market changes that it has highlighted, interactive and noninteractive webcasters alike recognize that any given music consumer ''is both a lean forward and a lean back type of listener,'' whose particular preference ''depends very much on the situation and the time of day'' and the ''mood that they're in.'' 5/29/15 Tr. at 6570 (Kooker); Kooker

[74] An ''interactive service'' is defined as one that ''enables a member of the public to receive transmission of a program specially created for the recipient, or *on request, a transmission of a particular sound recording . . . which is selected by the recipient.*'' 17 U.S.C. 114(j)(7) (emphasis added). A service that fails to meet the definition of an ''interactive service'' is, by default, a noninteractive service that may be entitled to a statutory license if it meets all other applicable criteria, *see* 17 U.S.C. 114(d)(2)(C), including adherence to the ''sound recording performance complement'' as defined in 17 U.S.C. 114(j)(13).

WRT.[75] SoundExchange further notes that even Pandora has recognized that for 75% of music consumers it is important that a music service afford them both ''effortless listening'' *and* ''on demand music.'' SX Ex. 269 at 17 (Pandora Board of Directors: Strategy Day document, Oct. 30, 2014).

SoundExchange contends that to attract and retain listeners, interactive streaming services have moved beyond merely playing, on demand, the recordings selected by a listener, and have developed and promoted curated playlists, radio components and other lean-back methods of music delivery. Blackburn WDT ¶ 13; Wilcox WRT ¶ 25; Kooker WRT at 14; 5/13/15 Tr. 3448–50 (Herring). To support this point, SoundExchange introduced evidence and elicited testimony describing the various custom *radio* features of several predominantly interactive streaming services, *e.g.,* Rdio; Rhapsody; Slacker; Beats; Amazon; Google; and Apple. *See* SX PFF ¶ 266 (and record citations therein).

SoundExchange asserts that ''lean back'' features are a significant part of the consumer listening experience on some of these services. For example, SoundExchange points out that nearly [REDACTED]% of UMG's plays on Slacker are such programmed streams, rather than the traditional on-demand plays of an interactive service. SX Ex. 25 ¶ 11 (Harrison WRT). SoundExchange notes that on Spotify, approximately [REDACTED]% of total listening to Sony's repertoire occurs through playlists created by Spotify or other third parties (*i.e.,* not the listener). Kooker WRT ¶ 15.

SoundExchange further asserts that listener feature convergence is occurring from the other direction as well, with *statutory services* adding new ''lean-forward'' options. In May 2013, SoundExchange notes, Pandora, a noninteractive streaming service, initiated its ''Pandora Premieres'' feature, which ''allows for on-demand selection of certain predetermined albums.'' Pan. Ex. 5002 ¶ 30 (Fleming-Wood WDT); Rubinfeld CWDT ¶¶ 53–54; 5/13/15 Tr. 3444 (Herring). Further, SoundExchange notes that a Pandora listener can ''seed'' multiple stations with various artists and sound recording tracks, and then influence the types of recordings on each station by using Pandora's ''thumbs up/thumbs down'' button. PAN Ex. 5000 ¶¶ 33–34 (Westergren WDT); Fleming-Wood WDT ¶¶ 8–9; Blackburn WDT ¶¶ 9, 12–13; Rubinfeld CWDT ¶ 53; Kooker WRT ¶¶ 10–11. SoundExchange continues that Pandora listeners can also skip songs, another form of customization. Rubinfeld CWDT ¶ 53.

SoundExchange also points out that Sirius XM's noninteractive steaming service (''My Sirius XM'') allows listeners to move ''sliders'' to change the type of music played. For example, a listener can direct the service to play ''more acoustic'' or ''more electric'' within a particular genre. SX Ex. 232 at 15–21; 5/22/15 Tr. 5419–20 (Frear).

SoundExchange also notes that iHeart has developed a custom streaming service that, according to SoundExchange, makes it ''very likely'' that a listener who is seeking out a highly popular artist or song will ''hear the exact song or songs he or she had in mind within minutes of starting the station.'' Kooker WRT at 7.[76]

SoundExchange also notes that the statutory services are developing new functionality that would allow even more listener control (while still satisfying the DMCA requirements).[77] These functions purportedly would allow listeners to:

- Repeat songs, re-listen to songs they've ''thumbed up,'' skip additional tracks, and create playlists of ''thumbed up'' songs, SX Ex. 1678 at 8;
- ban from stations certain artists, live tracks, instrumental recordings and tempos, SX Ex. 269 at 43; 5/13/15 Tr. 3498–3503 (Herring); and
- create stations that contain *only* those songs for which the listener has indicated a preference. SX Ex. 213.

SoundExchange notes that a prime catalyst for increased convergence between interactive and noninteractive streaming services is the trend away from desktop listening toward mobile listening. For example, SoundExchange points out that during the first quarter of 2015, 83% of the hours streamed by Pandora listeners occurred through mobile devices. 5/13/15 Tr. 3443 (Herring). SoundExchange asserts that the leading edge of this competition to ''get into the car'' by both noninteractive and interactive streaming services should hasten this trend. 5/8/15 Tr. 2731–32 (Shapiro). Moreover, because on-demand song selection is often incompatible with driving (absent hands-free voice controls or self-driving cars), SoundExchange opines that interactive streaming services have incentives to add ''lean-back'' functionality, such as Spotify's ''Shuffle'' service, to their mobile services. Blackburn WDT ¶ 39.

Based on the foregoing points, SoundExchange concludes that, notwithstanding the requirements noninteractive streaming services must meet to be eligible for the statutory license, statutory services are increasingly offering enhanced functionality that ''come[ ] close to replicating'' the on-demand listening experience of interactive streaming services. Rubinfeld CWDT ¶¶ 53–54; Blackburn WDT ¶ 9; Kooker WDT at 16. As summarized by one record company witness, statutory services now ''employ sophisticated algorithms, user-interface controls, and other computer technology that allow users to communicate their preferences to the service, and the service to customize and curate programming tailored to the individual user.'' Kooker WDT at 16–17.

SoundExchange concludes that ''[i]t is therefore no longer just directly licensed interactive services that allow users to *select* their programming. Users of statutory services can also lean forward and *influence* what they hear.'' SX PFF ¶ 278 (emphases added).[78]

[75] ''Lean-forward'' and ''lean-back'' are not statutory phrases that define types of services, and the record does not reflect any precise meanings in the industry. Importantly, a ''lean-forward service'' is not necessarily the same as an ''interactive service,'' and a ''lean-back service'' is not necessarily the same as a ''noninteractive service.'' *Compare, e.g.,* 4/30/15 Tr. 1182–83 (A. Harrison) (''on-demand services have lean-back listening options'' and ''statutory [noninteractive] services have lean-forward capabilities.'') *with* 5/13/15 Tr. 3396–97 (Herring) (''lean-back services are radio-like services, one where you hit play and the service kind of chooses for you . . . [w]hereas . . . lean-forward we consider on-demand services. So you go into the service and you choose exactly what you want to listen to.'').

[76] To demonstrate this point, SoundExchange introduced evidence of several experiments that purported to show the high frequency with which an iHeart station played the most popular songs of a popular artist who was used to seed a custom station—in contrast to the uncertain song rotation on terrestrial radio. Kooker WRT at 7–8. In these experiments on iHeart's custom radio (*i.e.,* non-simulcast), a seeded popular artist, Meghan Trainor, and her current highest selling song, would play first 92% of the time. Ms. Trainor's first or second current highest selling song would play first 100% of the time. In 68% of the trials in the experiment, the seeded station played three or more of Ms. Trainor's songs among the first seven songs played. SX Ex. 27 at 7.

[77] None of the parties requested that the Judges interpret or seek an interpretation from the Register on whether any one listener feature or combination of features brought a particular noninteractive service outside the scope of the statutory license.

[78] The words ''*select*'' and ''*influence*'' as used by SoundExchange and quoted in the accompanying text, *supra,* are italicized to foreshadow the important distinction in meaning between those words, as discussed *infra,* section IV.B.3.b. Suffice it to note at present the different meanings of these two verbs: ''to select'' means ''to choose in preference to another or others; pick out; to make a choice; pick,'' whereas ''to influence'' means ''to . . . affect; sway.'' *See Dictionary.com.*

ii. Increased Competition for Listeners in the Downstream Market [79]

SoundExchange avers that interactive services and noninteractive streaming services compete with each other for listeners. SX Ex. 269; 5/13/15 Tr. 3462 (Herring). SoundExchange contends that Pandora, iHeart, and Sirius XM are all keenly aware of the developing competition from interactive services. SoundExchange points to numerous examples in the record of this purported competition for listeners between interactive and noninteractive streaming services.

With regard to Pandora, SoundExchange cites the following evidence:

- Pandora's own internal documents confirm that interactive services ''compete head-to-head for listener hours with services that operate under the statutory license,'' Kooker WDT at 16;
- Pandora identifies Spotify as a ''competitor'' for the ''consumers [it is] trying to attract to use Pandora,'' SX Ex. 266 at 12; 5/13/15 Tr. 3483–84 (Herring);
- Pandora identifies as ''competitor services'' Spotify's Free Mobile App (described by Pandora as ''enabl[ing] [a] hybrid 'lean-in'/'lean-back' experience'') and Beats Music (a ''[p]ure on-demand service with a novel personalization feature''), SX Ex. 266 at 15–21;
- Pandora's ''Competitive Intelligence Report'' details the product offerings of services like Beats, Google Play, Rdio, and Spotify, SX Ex16 52; SX Ex. 2244;
- In 2014, Pandora briefed its incoming CEO Brian McAndrews on the ''[i]ncreased competition [that] exists from Apple, Google, and [other interactive] streaming services like Spotify.'' SX Ex. 2367; 5/27/15 Tr. 6163–65 (Fleming-Wood); and
- Pandora identified Spotify, Rdio, Deezer, Rhapsody, Slacker, Google, and Apple as ''competitors'' in Pandora's survey of competitors' product strategies and business models in a ''Strategic Planning Overview.'' SX Ex. 263 at 23.

Similarly, with regard to iHeart, SoundExchange notes the following evidence of competition between interactive streaming services and iHeart's custom noninteractive streaming service:

- iHeart consistently identifies interactive services like [REDACTED], [REDACTED], and [REDACTED] as competitors. SX Ex. 1262 at 4–11; SX Ex. 2157 at 5.
- iHeart has monitored [REDACTED] on its ''competitor tracker'' since [REDACTED] first launched [REDACTED]. SX Ex. 211 at 6.
- iHeart has strategized as to how it could ''match or beat [[[REDACTED]'s] experience,'' and listed ''major roadmap items to deal with [REDACTED].'' *Id.* at 2.

Finally, SoundExchange notes that Sirius XM also internally identifies interactive streaming services like [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] as ''competitors'' for listeners of its noninteractive streaming service—My Sirius XM—and highlights [REDACTED] as ''offer[ing] the strongest competition in terms of the quality of customization.'' SX Ex.1759 at 15; 5/22/15 Tr. 5461–63 (Frear). Additionally, Sirius XM conducted a service-wide survey of ''competitive listening'' in which it sought input from listeners not only on streaming services like [REDACTED], [REDACTED], [REDACTED], and [REDACTED], but also on interactive streaming services like [REDACTED] and [REDACTED]. SX Ex. 237 at 26.

Based on his proffered evidence of ''convergence'' and ''downstream competition,'' Dr. Rubinfeld concluded that agreements between interactive streaming services and record companies were an appropriate foundation upon which to base a marketplace benchmark for determining rates in this proceeding. 5/15/15 Tr. 1785 (Rubinfeld).

b. Comparability of Dr. Rubinfeld's Proffered Interactive Streaming Services Benchmark to the Hypothetical Market

Dr. Rubinfeld asserts that his proposed interactive streaming services benchmark satisfies the following four part-test that he contends comprises the standard that the Judges applied in the *Web III Remand* to determine the usefulness of a proffered benchmark:

Willing buyer and seller test: Dr. Rubinfeld contends that the rates that the Judges are required to set must be those that would have been negotiated in a hypothetical marketplace between a willing buyer and a willing seller. Rubinfeld CWDT ¶ 122(a). Dr. Rubinfeld opined that the interactive streaming services agreements upon which he based his proffered benchmark are indicative of the results of negotiations between willing buyers and willing sellers because they were entered into voluntarily between parties who did not have the option of electing the statutory license. *Id.* ¶ 158(a).

Same parties test: Dr. Rubinfeld contends that the buyers and sellers in the hypothetical marketplace that the Judges are tasked with replicating (*i.e.,* statutory webcasting services and record companies, respectively) are ''similar'' to the buyers and sellers in his proffered benchmark. *Id.* ¶¶ 122(b) and 158(b).

Absence of Statutory license test: Dr. Rubinfeld contends that the hypothetical marketplace is one in which there is no statutory license. *Id.* ¶ 122(c). He opines that, among the spectrum of potential benchmarks that could have been offered, a benchmark based upon interactive streaming services agreements is least likely to be influenced by the statutory license because interactive services cannot default to the statutory license and therefore, according to Dr. Rubinfeld, his proffered benchmark is an appropriate replication of a market without a statutory license. *Id.* ¶ 158(c).

Same rights test: Dr. Rubinfeld asserts that the products sold in the hypothetical marketplace consist of a blanket license for the record companies' complete repertoires of sound recordings, to be used in compliance with the DMCA requirements. *Id.* ¶ 122(d). Unlike the other three comparability tests discussed above, with regard to the ''same rights test,'' Dr. Rubinfeld contends that certain adjustments must be made to enhance the comparability of the proffered benchmark to the hypothetical market. Dr. Rubinfeld asserts that these adjustments are necessary because the agreements upon which his proposed benchmark is based provide various functionality that is not permitted by the statutory license (*i.e.,* ''on demand'' choice of songs; unlimited skips; and ''cached'' downloads). *Id.* ¶ 158(d).[80]

Therefore, according to Dr. Rubinfeld, ''adjustments can and should be made to account for these differences when applying the set of interactive benchmarks.'' *Id.*[81]

c. Per-Play ''Ratio Equivalency'' in Noninteractive and Interactive Markets

Dr. Rubinfeld ''assumed that the ratio of the average retail subscription price to the per-subscriber royalty paid by the licensee to the record label is approximately the same in both interactive and noninteractive markets.'' Rubinfeld CWDT ¶ 169. This ''ratio equivalency'' is best presented by the following equation:

$$\frac{[A]}{[B]} = \frac{[C]}{[D]}$$

[79] This proceeding involves two aspects of a vertical market: (1) The ''*upstream* royalty market,'' in which record companies charge streaming services for the right to access the record companies' repertoires of sound recordings; and (2) the ''*downstream* consumer market'' in which streaming services offer music to listeners. Rubinfeld CWRT ¶ 132.

[80] Dr. Rubinfeld also noted that in the interactive streaming services agreements that formed the basis of his proffered benchmark, the licensed rights do not consist of a blanket license for the record companies' complete repertoires of sound recordings. Instead, artist/labels may limit (or exclude) the right to license certain content from interactive streaming services. *Id.* Dr. Rubinfeld did not offer any proposed adjustments to account for this distinction.

[81] Dr. Rubinfeld made such adjustments, as discussed *infra.* Understanding those adjustments in the proper context requires a discussion of Dr. Rubinfeld's basic model, which follows.

Where:

[*A*] = Avg. Retail *Interactive* Subscription Price
[*B*] = *Interactive* Subscriber Royalty Rate
[*C*] = Avg. Retail *Noninteractive* Subscription Price
[*D*] = *Noninteractive* Subscriber Royalty Rate

Dr. Rubinfeld testified that this ''ratio equivalency'' assumption is not only important, but indeed is foundational to his entire analysis. 5/6/15 Tr. 2026 (Rubinfeld).[82]

Dr. Rubinfeld calculated the interactive numerator and denominator [*A*] and [*B*], and the noninteractive numerator [*C*], from available data in the agreements he had analyzed. Dr. Rubinfeld did not have data to calculate the noninteractive denominator [*D*]—*i.e.,* the per-play ''Noninteractive Subscriber Royalty Rate.'' Therefore, Dr. Rubinfeld attempted to estimate this number by: (1) Applying the above equation; and (2) making what he describes as the necessary adjustments to the rate he derives to account for differences between the interactive and noninteractive markets and thus satisfy the ''same rights'' test.

More particularly, to determine his Interactive Numerator [*A*] (the average monthly retail interactive subscription price), Dr. Rubinfeld calculated ''the simple average of the [monthly] subscription prices for the interactive services, which turned out to be in this case $9.86.'' 5/5/15 Tr. 1797 (Rubinfeld).

To determine his Interactive Denominator [*B*] in his ratio (the interactive subscriber royalty rate), Dr. Rubinfeld first identified the average minimum per-play rate as defined in each of his selected interactive agreements. Rubinfeld CWDT ¶ 205. Next, Dr. Rubinfeld identified the various forms of non per-play consideration, if any, in these agreements, which included non-recoupable cash payments and advertising commitments with an explicit financial value. Rubinfeld CWDT ¶ 218. To convert these lump-sum payments and values into per-play values, Dr. Rubinfeld divided these payments by the number of actual plays (as set forth in the applicable service's performance statements). *Id.*[83] He then added this derived per-play value to the stated (*i.e.,* headline) per-play rate. Dr. Rubinfeld then took an average of these per-play rates, weighted by revenue, *id.* ¶ 203, to determine the interactive subscriber royalty rate for his interactive benchmark agreements.

Having obtained values for [*A*] and [*B*], Dr. Rubinfeld was able to calculate that the direct agreements with the interactive services provided record companies with a minimum revenue share that generally ranged between 50 percent and 60 percent of the services' revenues (based on the record company's share of total streams), with the majority falling between 55 percent and 60 percent. Rubinfeld CWDT ¶ 206 and, Appx. 1. Thus, given Dr. Rubinfeld's assumption that the ratios should be equal in both markets, the per-play royalty rate for noninteractive services [*D*] (*i.e.,* the statutory rate) would also have to provide record companies with the same minimum percentage of revenue out of [*C*] (the average monthly retail noninteractive subscription price).

However, Dr. Rubinfeld needed first to calculate [*C*] (the average monthly retail noninteractive subscription price). Dr. Rubinfeld calculated [*C*]—as he had calculated [*A*]—as a simple average of the monthly subscription prices for the services he had identified as ''noninteractive.'' Because of varying rates within each service (depending on whether the average is computed using monthly or yearly fees), the average ranged between $4.84 and $5.25. 5/5/15 Tr. 1797 (Rubinfeld); Rubinfeld CWDT ¶ 207.

Having calculated values for [*A*], [*B*] and [*C*], Dr. Rubinfeld thus could, and did, use the ratio of the interactive to noninteractive subscription prices (the ratio of [*A*] to [*C*][84]) to solve for [*D*] (the statutory noninteractive per-play royalty rate). Dr. Rubinfeld determined that the ratio of the two monthly subscription prices ranged between 1.88 and 2.04.[85] Dr. Rubinfeld applied what he considered to be a reasonable and conservative figure within this range, 2.00, as a discount factor to make his proffered downward ''interactivity adjustment'' to the royalty rate for interactive services, which he then applied to determine his proposed royalty rate for noninteractive services.

i. SoundExchange's Alternative Calculation and Confirmation of Its ''Interactivity Adjustment''

Dr. Rubinfeld attempted to confirm the reasonableness of his 2.0 interactivity adjustment by considering a different method of calculating the adjustment, undertaken by another SoundExchange expert economic witness, Dr. Daniel McFadden. Rubinfeld CWDT ¶¶ 171, 209. Dr. McFadden conducted a ''conjoint survey'' [86] to determine the value that future consumers of digital streaming services place on various features of those services. Dr. McFadden determined the value that future consumers place on various features that are available on streaming services, such as: (1) Limited or unlimited skips; (2) offline listening; (3) on-demand (desktop and mobile); (4) addition of mobile service; (5) playlists (from algorithms and ''tastemakers''); (6) presence or absence of advertising; and (7) catalog size between one million and twenty million. SX Ex. 15 ¶ 9 (McFadden WDT).

Relying upon the entire sample of respondents to Dr. McFadden's survey, Dr. Rubinfeld summed the *average* willingness to pay (WTP)[87] values for various attributes for hypothetical interactive and noninteractive services, in the following manner.

- On the interactive side, Dr. Rubinfeld included the following attributes: (1) Unlimited skips; (2) offline listening; (3) on-demand availability (desktop and mobile); (4) mobile service; (5) playlists (from algorithms and ''tastemakers''); (6) absence of advertising; and (7) catalog size between one million and twenty million).

[82] This ''ratio equivalency'' assumption in Dr. Rubinfeld's model is essentially the same as the assumption made by Dr. Pelcovits on behalf of SoundExchange in *Web II* and *Web III. See* Rubinfeld CWDT ¶ 207 n.124 (acknowledging that he followed ''past practices''); 5/6/1/155 Tr. 2026–27 (confirming that his reference to ''past practices'' referred to Dr. Pelcovits's approach). Dr. Rubinfeld indicates, however, that his application of the interactive benchmark analysis does not suffer from the defects in Dr. Pelcovits' application of that model in a prior proceeding. *Id.* at 2027–28.

[83] If the agreements provided the record companies with rights that were not quantifiable (*e.g.,* data provision or equity stakes), Dr. Rubinfeld did not account for the possible value of those rights in his benchmark calculation. *Id.*

[84] As a basic mathematical point, if [*A*]/[*B*] = [*C*]/[*D*], then [*A*]/[*C*] = [*B*]/[*D*]. Thus, assuming Dr. Rubinfeld's approach was valid, he could mathematically determine [*D*] (the statutory noninteractive rate) by applying the ratio of [*A*] to [*C*], since he had calculated a value for [*B*] (the interactive royalty rate).

[85] 9.86/4.84 = 2.04 (rounded). 9.86/5.25 = 1.88 (rounded).

[86] A conjoint survey creates a slate of alternative products and asks the consumer to identify which product he or she most prefers. The sets of products are designed to realistically mimic the actual market process, in which a consumer is presented with and chooses among various competing bundles of alternatives. By presenting each consumer with several sets of choices, the researcher can determine the relative importance and dollar value that consumers place on each of the attributes. McFadden WDT ¶ 13.

[87] The word ''average'' is italicized in the text, *supra,* to presage an important element of Dr. McFadden's results, one that he identified and upon which one of the Services' economic experts, Dr. Steven Peterson, elaborated the relationship between the *average* WTP in Dr. McFadden's survey and the *bimodal nature* of Dr. McFadden's WTP results. That issue is discussed further in this determination.

• On the noninteractive side, Dr. Rubinfeld included these attributes but excluded the following features not offered by statutory services: (1) Unlimited skips; (2) offline listening; and (3) on-demand availability (desktop and mobile); and catalogs greater than ten million (as arguably more reflective of noninteractive catalog sizes in the market). *Id.*

Rubinfeld CWDT ¶ 209, SX Ex. 56 (Rubinfeld CWDT Ex. 14).

According to Dr. Rubinfeld, the survey results from Dr. McFadden's conjoint survey indicated an interactivity ratio of 1.90, which Dr. Rubinfeld noted was less than the 2.0 interactivity ratio calculated by Dr. Rubinfeld through his own methodology, discussed *supra.* (Because the interactivity ratio measures the relationship of interactive subscription prices to noninteractive subscription prices, the lower 1.90 ratio would indicate that noninteractive subscription prices are closer to interactive subscription prices, raising the benchmark interactive royalty rate as compared to Dr. Rubinfeld's 2.0 ratio.) Accordingly, Dr. Rubinfeld concluded that Dr. McFadden's alternative method of calculating the value of interactivity confirmed that Dr. Rubinfeld's own 2.0 interactivity adjustment was not only reasonable, but conservative. Rubinfeld CWDT ¶ 210.

ii. Additional Adjustments Made by Dr. Rubinfeld

The other differences between the interactive market and the noninteractive market that, according to Dr. Rubinfeld, required further adjustment before he could determine a per-play royalty rate based on his interactive benchmark analysis are described below.

(A) Adjustment for Royalty-Bearing Plays (Skips and Pre-1972 Recordings)

In his analysis, Dr. Rubinfeld accounted for the fact that, under the statute, a ''skip,'' *i.e.,* a song that that a listener skips after several seconds, is considered a royalty-bearing play for a noninteractive service. By contrast, interactive services, pursuant to their direct license agreements with record companies, typically are permitted to exclude from the royalty obligation at least some skips. SX Ex.17 ¶ 212 (Rubinfeld CWDT). Offsetting to some extent this downward adjustment, according to Dr. Rubinfeld, was his understanding that statutory services (such as Pandora and Sirius XM) contend that they are not required to pay royalties for pre-1972 sound recordings under federal copyright law.[88] *Id.* ¶ 213 (Rubinfeld CWDT). However, Dr. Rubinfeld understood that directly-licensed interactive services, such as those in his proffered benchmarks, are usually bound by contract to pay royalties on pre-1972 sound recordings. *Id.*

In order to make an ''apples-to-apples'' comparison, Dr. Rubinfeld therefore corrected for these differences in royalty-bearing plays in his interactive benchmark market and the statutory noninteractive market. SX Ex. 29 ¶ 214 (Rubinfeld CWRT). Applying the foregoing factors, Dr. Rubinfeld calculated that the ratio of (i) royalty-bearing plays in his interactive benchmark market to (ii) royalty-bearing plays in the statutory noninteractive market was 1.0:1.1. Accordingly, Dr. Rubinfeld divided his per-play rate (as calculated in the prior steps, *supra*) by a factor of 1.1.[89]

(B) Adjustment for Indies

Dr. Rubinfeld assumed that, on average, independent record companies, commonly known as Indies, (*i.e.,* those not owned by (or by a division of) Universal, Sony or Warner) would likely negotiate less beneficial arrangements with interactive services than would Majors. Rubinfeld CWDT ¶¶ 220, 223. Based on this assumption, he made a further assumption that the difference in the consideration received by the Majors and the Indies in the interactive market would be reflected completely in the assumed fact that Indies ''would not receive any of the non per-play financial or other unquantified consideration major record companies receive . . . .'' *Id.* ¶ 223.[90] Dr. Rubinfeld then determined that the Indies accounted for an average of 24% of the streams on interactive services, and he weighted his benchmark by assuming that this 24% figure was also applicable to the noninteractive market. *Id.* ¶ 225.[91]

After applying the foregoing steps and adjustments, Dr. Rubinfeld calculated that, for the year 2014 (the year for which he had and applied data), the per-play royalty rate for noninteractive services implied by the interactive benchmark equaled $0.002376, or 0.2376 cents. SX Ex. 59 (Rubinfeld CWDT Ex. 16a).

(C) Adjustment for 2016–2020 Period

Finally, Dr. Rubinfeld determined that his proposed per-play rate should increase by a linear $0.00008 for each year in the statutory 2016–2020 period. In support of these annual increases, Dr. Rubinfeld relied upon: (1) The average $0.00008 annual increase in rates as set in *Web III;*[92] (2) his belief that there would be an ever-increasing convergence in the retail prices of statutory and nonstatutory services; (3) the presence of rate escalation provisions in the iHeart/Warner Agreement and the Pandora/Merlin Agreement; and (4) the presence of annual rate escalations in the *Web III* rates. Rubinfeld CWDT ¶¶ 137–141; PAN Ex. 5014 at 4, 5 (Pandora/Merlin Agreement). Thus, Dr. Rubinfeld increased his 2014 interactive benchmark of $0.002376 by $0.00008, for a 2015 benchmark of $0.002456. That 2015 figure was again increased by $0.00008 to reflect a rate for 2016 of $0.002536 (rounded by Dr. Rubinfeld to $0.0025).

iii. The Interactive Rate Is an ''Effectively Competitive'' Benchmark Rate

SoundExchange maintains that Dr. Rubinfeld's interactive benchmark rate reflects effective competition because

[88] The Copyright Act only covers sound recordings fixed after February 15, 1972—the effective date of the Sound Recording Amendment, Pub. L. 92–140, 85 Stat. 391 (1971). Protection, if any, for sound recordings fixed prior to that date derives from state law.

[89] Dr. Rubinfeld calculated the 1.1 adjustment factor by: (i) Estimating the number of royalty-bearing plays on a hypothetical service that does not pay for skips, utilizing information about the number of skips; the average skip length; song length; and ad minutes per hour, and then dividing that number by (ii) the estimated number of royalty-bearing plays as determined by analyzing Pandora's SEC filings. Rubinfeld CWDT ¶ 216; SX Ex. 57 (Rubinfeld CWDT Ex. 15a); SX Ex.58 (Rubinfeld CWDT Ex. 15b).

[90] Apparently, Dr. Rubinfeld did not separately examine the Indies/Services agreements in his collected interactive agreements to test his assumptions and apply the actual differences, if any, between the headline rates and other compensation received by the Indies, on the one hand, and by the Majors, on the other hand. *See* Rubinfeld CWDT ¶ 223 (''I also *assume* that these independent record companies receive the same per-play rates and proportionate revenue shares as the majors.'') (emphasis added). Dr. Rubinfeld later modified his direct testimony to note what he described as confirmatory evidence—that in [REDACTED]'s [REDACTED] agreements with the Majors and the Indies, ''the majors received [REDACTED] and the indies did not.'' SX Ex. 128 ¶ 29 (Rubinfeld CWDT App. 2).

[91] Dr. Rubinfeld noted that Nielsen Soundscan information he possessed indicated that the independent record companies' 2013 market share was higher—it was approximately 35%—but he chose to use the lower 24% interactive market figure. Rubinfeld CWDT ¶ 224 and n.131 (continuing to rely on the 24% figure for interactive plays of Indie sound recordings and noting (but not linking, logically or evidentially) the unsourced assertion that ''a substantial portion of those sound recordings were distributed by major labels.'').

[92] *See* 37 CFR 380.3(a)(1) (setting forth *Web III* rates). Although the *average* rate increased annually by $0.00008, the rate remained constant for 2012 and 2013 (at $0.0021) and also remained constant for 2014 and 2015 (at $0.0023). Thus, in 50% of the year-over-year changes, the Judges declined to make any changes in the *Web III* rates.

downstream competition mitigates any arguable market power record companies may have in the upstream licensing market. (However, it is worthy of note that SoundExchange did not attempt to demonstrate that the interactive market on which it relies for its benchmark is effectively competitive, until its rebuttal case, after the Services had made their direct arguments as to why the interactive market is not effectively competitive.) In support of its argument, SoundExchange relies on the testimony of another of its economic experts, Dr. Eric Talley.

According to Dr. Talley, rates in the interactive market are constrained by two factors. First, if there is an ''elastic downstream demand curve'' for an input (such as a sound recording), upstream prices for that input will be constrained. Second, if the ''expenditure on that input versus other inputs''—''the cost intensity of that particular input''—is proportionately significant compared to other inputs in the downstream market, the constraint on pricing in the upstream market will be more pronounced. 5/27/15 Tr. 6054–55 (Talley).[93]

According to Dr. Talley, both of these factors are present here. First, high price elasticity exists downstream because of the threat from piracy and because of competition from other outlets, such as YouTube. Second, the variable costs associated with licenses are a very significant element of the downstream sellers' expenses. Thus, these elasticities would be passed upstream. *Id.* at 6054–58.

Dr. Talley then noted that his theoretical modeling demonstrated that such downstream competitive forces ''will cause the WBWS price to be tightly clustered, reducing variations due to differences in bargaining power.'' SX Ex. 19 at 35, 44–45 (Talley WRT); *see also* SX Ex. 29 ¶ 132 (Rubinfeld CWRT).

Sound Exchange notes that Dr. Talley's assertions regarding the highly competitive state of the downstream market is essentially undisputed and borne out by the evidence. *See* SX PFF ¶¶ 449–458 (and record citations therein). Moreover, SoundExchange notes that Drs. Shapiro and Katz acknowledged that the presence of some ''free alternatives'' in the downstream market have reduced interactive rates in the upstream market. 5/20/15 Tr. 5049 (Shapiro); 5/11/15 Tr. 2973 (Katz).

SoundExchange also points to its negotiations with interactive services as evidence that the upstream interactive market is effectively competitive. Dr. Rubinfeld, described the negotiations as a ''real give and take,'' where the labels ''have in mind a particular goal, but they have to give up something,'' which is ''consistent'' with the ''view that there's some bargaining power on the part of the services.'' 5/5/15 Tr. 1863 (Rubinfeld). He further testified that the possible bargaining range would at best only reveal ''something about the other party's willingness to pay or willingness to sell.'' *Id.* at 1864–65. Dr. Rubinfeld and SoundExchange reached these conclusions based on their consideration of the back and forth and ultimate concessions record companies make in the final agreements reached (or abandoned) with Apple, Google, Beats, Spotify and Amazon. *See* SX PFF ¶ 471–80 (and citations to the record therein).

d. Direct Licenses for Noninteractive Services Corroborate Dr. Rubinfeld's Interactive Benchmark

SoundExchange offered analyses of direct licenses between record companies and several noninteractive services to corroborate its interactive benchmark analysis. These include two licenses from major record companies to Apple, Inc. (Apple) for its iTunes Radio service, and several licenses for what SoundExchange describes as noninteractive offerings by services that also offer interactive streaming.

i. Apple Agreements

SoundExchange presented evidence of Apple's license agreements with Warner and Sony, respectively, for Apple's iTunes Radio service. iTunes Radio is a streaming service that offers users the opportunity to listen to playlists selected by industry ''tastemakers,'' as well as playlists that are generated by an algorithm based upon a song or artist ''seeded'' by the listener (similar to Pandora's service). Dr. Rubinfeld described the iTunes Radio service as ''DMCA compliant,'' although he acknowledged that the rights granted to Apple are ''not identical to the statutory license.'' Rubinfeld CWRT, App. 2, ¶¶ 1–2.[94] Dr. Rubinfeld concluded that the effective per-play royalty rate under the Apple licenses with Warner and Sony range from $0.[REDACTED] to $0.[REDACTED], the low end of which exceeds the highest rate proposed by SoundExchange. *Id.* ¶¶ 30, 42.

SoundExchange offered the Apple agreements as part of its rebuttal of a number of the licensee services' criticisms of Dr. Rubinfeld's interactive benchmark analysis. Dr. Rubinfeld contended that, because the (noninteractive) Apple agreements were not susceptible to those criticisms, those criticisms would be rebutted by evidence that the royalty rates derived from the Apple agreements were roughly equivalent to those derived from the interactive benchmark analysis. *Id.* ¶ 3.

Specifically, Dr. Rubinfeld argued that the following critiques that the licensee services levied against his interactive benchmark analysis would not apply to Apple's agreements with the majors for its noninteractive service.

- The majors' repertoires are ''must haves'' for interactive services, enabling the majors to charge supracompetitive prices. *Id.* ¶ 4. The majors' repertoires are not ''must haves'' for a noninteractive service, since a noninteractive service (and not its customers) determines which songs will be played.
- ''[B]ecause noninteractive services purportedly have the ability to steer listeners to sound recordings offered by independent music labels and away from majors (or away from any particular major's repertoire), record label catalogs are substitutes.'' *Id.* ¶ 5. iTunes Radio would have the same ability to steer listeners as any other noninteractive service. *Id.* ¶ 7.
- ''[B]ecause interactive services are primarily subscription services, they have substantially higher ARPUs than noninteractive services, which are primarily ad-supported,'' and would therefore pay substantially higher royalties. *Id.* at 6. iTunes Radio, by contrast, is a nonsubscription service that, like other noninteractive services, is primarily ad-supported. *Id.* ¶ 7.

Dr. Rubinfeld also offered two additional reasons why the Judges should consider the Apple agreements. First, he noted that Apple's ''unique position in the marketplace'' confers substantial bargaining power in its negotiations with record companies, tending to negate any argument based on a disparity of bargaining power between licensor and licensee. *Id.* Second, Dr. Rubinfeld argued that the non-precedential language in the agreements demonstrates that the parties did not expect them to be used

[93] Dr. Talley's testimony describes factors pertinent to the economic ''Hicks-Marshall'' principle, which provides that the upstream demand for a factor of production (such as sound recording licenses demanded by a webcaster) is ''derived'' in part from the downstream demand for the finished product (such as a subscription service that offers such sound recordings). Further, the elasticity of demand downstream will be reflected in the upstream demand for that factor of production.

[94] All testimony on the subject of iTunes Radio was taken prior to the launch of Apple Music. Consequently, the discussion of iTunes Radio in this determination does not reflect any changes Apple may have made to the service as a result of that launch.

in this proceeding.[95] As a consequence, he suggested that the shadow of the statutory license may not affect the Apple agreements as strongly as other noninteractive benchmarks (*e.g.,* the Pandora-Merlin and iHeart-Warner agreements). *Id.* ¶ 8.

ii. Other Noninteractive Agreements

SoundExchange also offered Dr. Rubinfeld's analysis of record company licenses to Beats Music's ''The Sentence,'' Spotify's ''Shuffle'' service, Rhapsody's ''Unradio,'' and Nokia's ''MixRadio'' to corroborate its interactive benchmark analysis. SoundExchange describes these services as noninteractive offerings, and concludes that the effective per-play rates in the agreements exceed the per-play rate derived from Dr. Rubinfeld's benchmark analysis of interactive service agreements. *See* Rubinfeld CWRT ¶¶ 179–201.

3. The Services' Opposition to the SoundExchange Rate Proposal and the Judges' Determination on the Issues

a. Dr. Rubinfeld's Interactive Benchmark Must Be Adjusted To Reflect Effective Competition

The Services' expert economic witnesses all agreed that SoundExchange's proposed interactive benchmark would fail to establish rates that are ''effectively competitive.'' *See, e.g.,* Katz WDT ¶¶ 5, 17, 18–34; Shapiro WDT at 3, 10–16; Fischel & Lichtman AWDT ¶ 10; 5/11/15 Tr. 2799:9–16; 2800:3–18; 2801:9–17 (Katz); 5/8/15 Tr. 2604:10–22 (Shapiro); 5/15/15 Tr. 4094:7–19 (Lichtman); *see also, e.g.,* Shapiro WDT at10 n.11 (''My approach here is consistent with the one taken by the Judges in the *Web III Remand*.''). More particularly, the Services' economists equate the ''effectively competitive'' requirement as essentially equivalent to the economic concept of ''workable competition.'' In its essence, ''[a] workably competitive market is one not subject to the exercise of significant market power.'' Shapiro WDT at 10.[96]

The NAB's economic expert, Dr. Katz, essentially analogizes the D.C. Circuit's contrast between ''metaphysical'' and ''effective'' competition to the economists' contrast between ''perfect'' and 'workable'' competition:

> The theoretical conditions of *perfect* competition often are not satisfied in actual markets . . . . It is thus necessary to consider markets that are competitive, but not perfectly so. Economists have long examined this concept, beginning with Professor J.M. Clark, who introduced the concept of ''workable'' competition. Economists also refer to such markets as reasonably or effectively competitive.

Katz WDT ¶ 29 (emphasis in original).

Dr. Shapiro describes a ''workably'' or ''effectively'' competitive market as follows:

> The hallmark of a workably competitive market is regular, significant competition among suppliers for the patronage of buyers. . . . A market can be workably competitive even when the products or services offered by different sellers are differentiated, so long as no single supplier has significant unilateral market power. Indeed, this is the norm for information products such as books, video programming, or software applications. Workable competition does not require marginal cost pricing or anything approaching the textbook model of perfect competition. A market can also be workably competitive even if it is quite concentrated, so long as the suppliers compete regularly and energetically to win business from each other. . . . In contrast, a market that is monopolized or controlled by a cartel is *not* workably competitive. If such markets were considered workably competitive, the concept of workable competition would lose all meaning. Likewise, a moderately or highly concentrated market in which the leading suppliers tacitly collude is not workably competitive. For example, if the leading suppliers have settled into some form of coordinated interaction, *e.g.,* by refraining from competing actively to poach each other's customers, the market will fail to be workably competitive. More generally, if the leading suppliers are colluding—either expressly or tacitly—the market is not workably competitive.

Shapiro WDT at 10–11 (emphasis in original).

According to the Services' economists, the presence or absence of ''workable'' or ''effective'' competition in the present case must be determined by recognizing that the noninteractive services are ''aggregators,'' that is, they aggregate sound recordings they have licensed from record companies in the upstream market and then provide access to such licensed sound recordings to listeners in the downstream market. In such a market, ''workable competition'' is present, according to the Services' economists, if ''aggregators can offer attractive packages without the products of particular suppliers and to the extent to which these aggregators can steer their customers toward or away from particular suppliers.'' Shapiro WDT at 11. This ability to steer toward or away from certain suppliers is an example of price competition, according to Dr. Katz. *See* Katz WDT ¶ 32 (''[C]ompetition arises *only* when buyers have the ability to substitute the offerings of one seller for those of another. It is this possibility of substitution that drives sellers to offer higher quality and lower prices in order to attract buyers to themselves rather than their rivals. Conversely, when buyers lack the ability to substitute among the offerings of different sellers, there is no competition among sellers to attract customers.'') (emphasis in original).

The Services assert that the interactive service agreements that SoundExchange proffers as appropriate benchmarks are not the product of such an ''effectively competitive'' market. In support of this assertion, the Services advance several arguments.

First, the Services maintain that there is a fundamental difference between interactive and noninteractive services that precludes the former from serving as an ''effectively competitive'' benchmark for the latter. That fundamental distinction arises, they aver, from the fact that a *sine qua non* of on-demand services is that *each downstream listener* chooses the artists, albums, and tracks to which he or she listens, as well as the timing and frequency of each play. For this reason, on-demand interactive services must always be in a position to play any sound recording a listener might demand, and the on-demand services therefore lack the ability to steer performances away from higher-priced labels and toward lower-cost providers. *See* Shapiro WRT at 23; *see also* Katz WDT ¶ 17 (describing buyer choice as the ''essence of competition'' and opining that ''[t]he creation of a rate-determination process and its willing-buyer/willing-seller standard can best be reconciled with economic principles and common sense by interpreting willing buyers as those who have meaningful choices among competing sellers, rather than facing a single, all-or-nothing offer from a monopolist.'').

Second, the Services note that a lack of effective competition in the upstream interactive market is confirmed by the testimony of numerous SoundExchange witnesses, who conceded that the licenses between record labels and on-demand services are the product of a market devoid of any price competition between record companies to obtain additional plays on on-demand services. *See* 4/28/15 Tr. 415–16 (Kooker) (Sony has ''never cut [its] price responding to a competitor's proposal or for more

[95] That proposition is questionable in light of other evidence of what euphemistically could be called ''strategic behavior'' by Apple and one of the major record companies. *See* IHM Ex. 3517 ([REDACTED] email from [REDACTED] to [REDACTED]) (''[REDACTED].'') (emphasis added).

[96] *See* J. M. Clark, *Toward a Concept of Workable Competition,* 30 a.m. Econ. Rev. 241–56 (1940); Jesse Markham, *An Alternative Approach to the Concept of Workable Competition,* 40 a.m. Econ. Rev. 349, 349 (1950) (treating ''effective competition'' and ''workable competition'' as synonymous).

plays.''); 4/30/15 Tr. 1097–99 (A. Harrison) (Universal has never lowered a proposed rate as a consequence of finding out that another Major was offering a lower rate, and, more broadly, Universal does not take any actions to compete with Sony or Warner with respect to services); 5/7/15 Tr. 2485–86 (Wilcox) (Warner has never offered a lower rate to an interactive service for more plays).

Third, the Services' economists concluded that the reason for the absence of price competition in the upstream interactive market is that the repertoires of each Major are ''complements'' for each other. As Dr. Shapiro opined:

> In the parlance of economics, the ''must have'' suppliers are complements, not substitutes, because buyers need each of them and cannot substitute one for another. . . . This concept is well known in economics. When two essential inputs must be used together, they are often referred to as ''Cournot Complements.'' The evidence . . . shows that the repertoires of the major record companies are Cournot Complements for interactive services.
>
> * * * * *
>
> The evidence shows clearly that the major interactive services ''must have'' the music of each major record company to be commercially viable. The repertoires of the major record companies are not substitutes for each other in the eyes of either interactive services or the record companies themselves. This means that there is no true ''buyer choice'' in this market. Thus, the market for licensing recorded music to interactive services is not workably competitive. . . .

Shapiro WRT at 15.

Fourth, the Services note that SoundExchange's economic expert, Dr. Rubinfeld, did not perform any separate analysis to determine whether the proffered interactive benchmark reflected the dynamics of a competitive market. Rather, he assumed, *i.e.,* he took ''for granted,'' that his proffered interactive benchmark market was sufficiently competitive. 5/5/15 Tr. 1922 (Rubinfeld).

Fifth, the Services rely upon numerous statements in several documents from SoundExchange's own principal advocates in the present case that had been submitted to the Federal Trade Commission (FTC) on behalf of Universal seeking approval of Universal's then-proposed merger with EMI—subsequently approved by the FTC and later consummated.[97] These documents, according to the Services, reveal that Universal and its advocates asserted to the FTC that the proposed merger would not lessen competition *because the market for interactive services was already not competitive.* Specifically, the Services point to statements to the FTC by or on behalf of Universal:

> [REDACTED]
>
> PAN Ex. 5349 at 1–2 (Universal).
>
> [REDACTED]
>
> PAN Ex. 5349 at 17 (Universal).
>
> [REDACTED]
>
> PAN Ex. 5025 at 2, 18 (Pomerantz).
>
> [REDACTED]
>
> NAB Ex. 4129 at 41–2 (Rubinfeld).
>
> [REDACTED]
>
> PAN Ex. 5025 at 18, 21 (Pomerantz); *see* NAB Ex. 4129 (Rubinfeld) ([REDACTED]); 5/5/15 Tr. 1956–58, 1946–47 (Rubinfeld) (*quoting* PAN Ex. 5345 (June 22 letter to the FTC) (''[REDACTED].'').
>
> [REDACTED]
>
> PAN Ex. 5349 at 17 (Universal) (emphasis added); *see* PAN Ex. 5025 at 16 ([REDACTED]).

Additionally, iHeart's economic experts, Drs. Fischel and Lichtman, relied upon a [REDACTED] document submitted to the FTC in connection with the Universal/EMI merger, contrasting the ''must have'' nature of the interactive service market with the more competitive noninteractive service market: ''[REDACTED]'' IHM Ex. 3054 ¶41 n.70 (Fischel/Lichtman WRT) (*quoting* SNDEX 0266588–665) (emphasis added).

Sixth, according to the Services, the foregoing points demonstrate that Dr. Rubinfeld's proffered interactive benchmark market not only fails to be competitive, but also is *even worse than a market controlled by a single monopoly supplier.* Shapiro WRT at 18; *see also* Katz WDT ¶¶ 41–43 (By logic first identified by Antoine Cournot in 1838, firms offering complementary products tend to set higher prices than would even a monopoly seller of the same products, illustrating that suppliers of complements do not compete with one another.); PAN Ex. 5349 at 19 (Universal White Paper to FTC explaining that ''[REDACTED]'').

Seventh, the Services note that the Majors structure their contracts with the interactive services to *avoid* any price competition with the other labels and to *prevent* the on-demand services from attempting to steer users away from their repertoires. *See* 4/28/15 Tr. 441–42 (Kooker); 4/30/15 Tr. 1142 (Aaron Harrison); 5/7/15 Tr. 2473 (Wilcox). Even more particularly, the Services note that the Majors' agreements with the leading interactive services contain provisions that effectively prevent the services from favoring the artists or repertoires of one label over another. These provisions apply variously to playlists, artist or album features, editorial content, home-page placements, advertisements, album recommendations, and/or other ways the interactive services may promote particular content to their users. *See* 4/28/15 Tr. 455–56 (Kooker); 4/30/15 Tr. 1144–45 (Harrison); 6/2/15 Tr. 7202–05 (Harrison); 5/7/15 Tr. 2487–88, 2490–93 (Wilcox).

The Services disagree with SoundExchange's assertion that downstream competition causes Dr. Rubinfeld's interactive benchmark to reflect ''effective competition.'' In fact, Dr. Katz asserts that SoundExchange's conclusion is 180 degrees wrong:

> [W]hen you have a highly competitive downstream industry, there's going to be a smaller markup of [retail] price over cost because the competitive pressures are going to tend to drive [retail] price to cost. So what that means is . . . for any . . . license fees set by the record companies, we have a highly competitive downstream market. There's going to be a smaller markup. That then makes it profitable, more profitable to set a higher price upstream. So, actually, *the more intense the competition downstream, the greater the incentive to charge a high price upstream* because you don't have to worry about so-called double marginalization.[98]

5/11/15 Tr. 2819 (Katz) (emphasis added).

The Services take Dr. Talley and SoundExchange to task for failing to do any empirical work to confirm whether and to what extent piracy and other downstream alternative music delivery competitors may have affected upstream interactive rates. The NAB notes that Dr. Talley admitted that he had performed no empirical analysis to ascertain whether or to what degree ''downstream competition is, in fact, impacting the upstream negotiations'' in the interactive market. 5/27/15 Tr. 6092–93 (Talley); *see id.* at 6058 (''I haven't done an empirical analysis of that market. . . .''). Dr. Tally further admitted that he had not studied either the downstream interactive service market or the upstream market in which the record companies license interactive services. *Id.* at 6080–83. Finally,

[97] Professor Rubinfeld acted as economic advisor to UMG and EMI in relation to that transaction, and Mr. Pomerantz, SoundExchange's lead counsel in this proceeding, acted as UMG's counsel. 5/5/15 Tr. 1942–43; 1950–51 (Rubinfeld); PAN Ex. 5345 at 1.

[98] ''Double marginalization'' occurs when the upstream supplier has upstream market power and its buyer, the downstream seller, has downstream market power. In that situation, ''the price of the input is marked up twice: By the upstream firm and, in terms of the final product price, by the downstream firm.'' W. Kip Viscusi, *et al. Economics of Regulation and Antitrust* 239 (2005). In the absence of downstream market power on the part of the upstream buyers/downstream sellers, the upstream firms with market power can capture the full benefit of single marginalization, *i.e.,* of price above marginal cost.

although Dr. Talley made certain suppositions regarding the elasticity of demand flowing from the downstream market into the upstream market, the Services note that Dr. Talley admitted that he had not attempted to calculate any elasticity of demand whatsoever, because ''within the ambit of how I was retained as an expert, I did not view that as part of my charge.'' 5/27/15 Tr. 6093 (Talley).

The Services also note that their own experts, contrary to SoundExchange's assertions, had not acknowledged that piracy and other forms of downstream competition had or would reduce upstream interactive rates to an ''effectively competitive'' level. Rather, as the NAB notes, for example, Dr. Katz testified that even if piracy imposes some constraint, ''that doesn't render the market effectively competitive . . . it may be pressure on the monopoly price, but, nonetheless, it's a monopoly price.'' 5/11/15 Tr. 2823 (Katz). As Dr. Katz further explained, the merger submissions made by Universal argued that the merger would lead to lower prices because it would remove the Cournot complements pricing effect between UMG and EMI, and that would not have been true if prices had already been squeezed by piracy to near the competitive level:

> [T]he parties were saying, if we're allowed to merge, we would find that it would increase our profits to lower our price. So clearly, piracy had not pushed them down to such a low price that going lower would reduce their profit. They actually say, going lower would raise our profits. And what that's telling you is, along with the fact that the other majors are must have[s] as well, is [that] they were actually concerned they were pricing above the monopoly level.

5/11/15 Tr. 2825 (Katz) (citing PAN Ex. 5025 at 22).

Additionally, the NAB, again through Dr. Katz, notes that identifying a hypothetical increase in the elasticity of demand in the upstream market arising from competition in the downstream market is not the same as identifying a competitive price in the upstream market. Thus, the Services assert that, although Dr. Katz testified that piracy and other forms of downstream competition could have ''some sort of an effect, and I believe it's in a downward direction,'' 5/11/15 Tr. 2973 (Katz), he was not opining how far such competition might have pushed down the price. They point out that, when Dr. Katz noted the hypothetical possibility that downstream competition could push upstream prices down to competitive levels, he was not suggesting that such a hypothetical circumstance exists in the interactive market. Rather, he was simply saying something is ''conceivable, if you're talking about hypotheticals'' or ''possible,'' which does not imply that it is likely, or in any way true in this case. *See* 5/11/15 Tr. 2976–78 (Katz).

The Judges find that the impact of piracy and other downstream competitors (such as YouTube) does not serve to promote ''effective competition'' in any of the relevant upstream markets, including the upstream market for sound recordings licensed for use by interactive subscription services. SoundExchange, through the testimony of Dr. Talley, did note persuasively that in theory these downstream competitors would depress the upstream price. SoundExchange also correctly noted that Drs. Katz and Shapiro concurred with that theoretical point. However, a close reading of the testimony of Drs. Talley, Katz, and Shapiro reveals *that none of them concluded that the impact of such downstream competition would necessarily depress any upstream price to a level that would offset the upward pricing effect of complementary oligopoly.* Rather, Dr. Talley and SoundExchange invoke the vague idea that any monopoly effects—after assuming the upstream impact of downstream competition—would be ''benign'' or ''pedantic,'' and Drs. Katz and Shapiro acknowledged only the *hypothetical* possibility that downstream competition in some circumstance could eliminate the anticompetitive power of upstream monopolists or complementary oligopolists.

In the present case, though, the Judges are not left with mere hypotheticals regarding whether the anticompetitive elements of the interactive market are ''benign'' or ''pedantic.'' Nor are the Judges hamstrung, as SoundExchange suggests, by the alleged absence of ''bright line'' demarcations as to when effective competition is present and when it is not. Rather, the Judges were presented with hard and persuasive evidence that competitive steering has reduced royalty rates in the noninteractive market and would do so in the hypothetical market as well. This evidence of steering (provided by Pandora and iHeart) demonstrates a measurable range of adjustment to the prices that would be set in a market for those streaming services if the services could inject price competition via steering. Thus, the rate set in Dr. Rubinfeld's upstream interactive benchmark market should be adjusted to reflect such price competition, so that it is usable as an ''effectively competitive'' rate in the segment of the market to which that benchmark applies: The noninteractive subscription market.[99]

The evidence of a range of potential steering adjustments also rebuts SoundExchange's argument that the concept of ''effective'' or ''workable'' competition is ''fuzzy'' and that no ''bright line'' can be drawn between effectively competitive and non-competitive rates. The Judges find that this ''line'' needs to be drawn on a case-by-case basis, from the evidence and testimony adduced at the hearing. Here, the range of steering adjustments from direct noninteractive licenses has been introduced in evidence, steering experiments have confirmed the reasonableness of such an endeavor and expert testimony has explained how steering is a mechanism by which to offset the complementary oligopoly power of the Majors (while not reducing their firm-specific and copyright-specific market power).

The Services dismiss the idea that the record companies' negotiations with interactive services are evidence of an effectively competitive market. The Judges agree with the Services criticism of this assertion. As Dr. Shapiro explained, the mere existence of such negotiations is uninformative as to whether the rates negotiated between the interactive services and the Majors are competitive. Pandora PFF ¶ 237 (and citations to the record therein). Moreover, the Services note that Dr. Rubinfeld conceded that the existence of such negotiations is not evidence of a competitive market, because even monopolists negotiate with their customers. *See* 5/28/15 Tr. 6487–88 (Rubinfeld) (''Q. Do firms with monopoly power ever bargain with their customers? A. Yes. Q. Do firms with monopoly power ever make concessions or change their bargaining position in response to positions taken by buyers with which they are dealing? A. Yes.''). Pandora further notes that, when questioned on this issue by the Judges, Dr. Rubinfeld conceded that ''the fact

[99] It appears that SoundExchange may be making an implicit argument that the rates in its interactive benchmark market have been so reduced by downstream competition that all supranormal profits have been eliminated. However, SoundExchange did not produce evidence sufficient to show record company profits overall to support such an argument. Also, as the Judges have previously noted, and note again in this determination, the rate-setting process under section 114(f)(2)(B) is not intended to preserve any parties' profits. Moreover, if the Judges were to go down that evidentiary road and base their rate decision on profits and reasonable rates of return, the process would in essence become a public-utility style proceeding and, as noted elsewhere in this determination, no party has suggested that section 114(f)(2)(B) proceedings could be conducted in such a manner.

that they're in negotiations, *per se,* doesn't mean the market is competitive. . . .'' 5/5/15Tr. 1861–63 (Rubinfeld).

On this issue, the Judges also agree with Dr. Katz, who noted that negotiations over price can occur between a monopolist and its customers in order to facilitate price discrimination and *increase monopoly profits* rather than to concede to more competitive prices. Specifically, Dr. Katz testified:

> Bargaining with your customers and having some of the give and take can even be a form of price discrimination in a way to get additional monopoly profits, so the mere fact that your customer asks for something and you say, okay, I will give that to you, particularly if that is going to help you get more money, the fact that you do that doesn't show you lack monopoly power. It shows you are economically rational.

5/26/15 Tr. 5715–16 (Katz).

The Judges reject SoundExchange's argument that evidence of its negotiations with interactive services demonstrates that the interactive market is effectively competitive. As the Judges pointed out in their *Commencement Notice* in this proceeding, price discrimination is a feature of markets such as sound recording markets, where the marginal physical cost of licensing a sound recording is essentially zero, and is also a relatively common feature in many markets. 79 FR 412, 413 (January 3, 2014).

Further, the Judges cannot ignore the testimony from several record company witnesses, discussed in this determination, in which they acknowledged that they never attempted to meet their competitors' pricing when negotiating with interactive services. Thus, the existence of the negotiations noted by SoundExchange cannot override this more specific testimony.

The Judges were presented with substantial, unrebutted evidence that the interactive services market is *not* effectively competitive. The Services conclude from this that the interactive services benchmarks are wholly uninformative with regard to the rates that would be negotiated in an *effectively competitive* noninteractive market. *See* Shapiro WRT at 47 (explaining that Professor Rubinfeld is requesting that the Judges ''replicate and extend the excessive royalty rates from interactive services market—where competition is manifestly not working—into the market for the licensing . . . to statutory webcasters. . . .''). The Judges disagree.

The Services' own evidence demonstrates persuasively that competitive steering has reduced royalty rates in the noninteractive market and would do so in the hypothetical market as well. This evidence of steering (provided by Pandora and iHeart) demonstrates a measurable range of adjustment to the prices that would be set in a market for those streaming services if the services could inject price competition via steering. Thus, the rate set in Dr. Rubinfeld's upstream interactive benchmark market can and should be adjusted to reflect such price competition, in order to render it is usable as an ''effectively competitive'' rate in the segment of the market to which that benchmark applies—the noninteractive subscription market.[100]

The evidence of a range of potential steering adjustments also rebuts SoundExchange's argument that the concept of ''effective'' or ''workable'' competition is ''fuzzy'' and that no ''bright line'' can be drawn between effectively competitive and non-competitive rates. The Judges find that this ''line'' needs to be drawn on a case-by-case basis, from the evidence and testimony adduced at the hearing. Here, the range of steering adjustments from direct noninteractive licenses has been introduced in evidence, steering experiments have confirmed the reasonableness of such an endeavor, and expert testimony has explained how steering is a mechanism by which to offset the complementary oligopoly power of the Majors (while not reducing their firm-specific and copyright-specific market power).

b. Dr. Rubinfeld's Interactive Benchmark Is Applicable Only to the Subscription Market

The Judges find that the interactive benchmark proposed by SoundExchange (adjusted as discussed in the previous section) is informative—but only to a particular segment of the noninteractive marketplace. The foundational aspect of Dr. Rubinfeld's interactive benchmark is his assumed equality between two ratios: (1) Subscription revenues to royalties in the *interactive* market; and (2) subscription revenues to royalties in the *noninteractive* market. The Services claim, however, that Dr. Rubinfeld provided *no economic basis* for this ''assumption.'' For example, the NAB asserts that Dr. Rubinfeld admitted that he was only ''follow[ing] past practices'' of Dr. Michael Pelcovits, an economic witness for SoundExchange in *Web II* and *Web III.* Rubinfeld CWDT ¶ 207 n.124, 5/6/15 Tr. 2026–27 (Rubinfeld). This criticism was echoed by Pandora's economic expert, Dr. Shapiro, who testified ''there is simply no plausible economic rationale that would support the use of Professor Rubinfeld's interactivity adjustment.'' PAN Ex. 5023 at 29–30 (Shapiro WRT).

However, Dr. Rubinfeld's oral testimony, and the testimony of the Services' economic experts, indicated that an economic principle indeed underlies his assumed equivalency in these ratios. More particularly, Dr. Rubinfeld acknowledged that his ''ratio equivalency'' was intended to create a rate whereby every marginal increase in subscription revenue would result in the same increase in royalty revenue, whether that marginal increase in subscription occurred in the interactive market or the noninteractive market. 5/5/15 Tr. 1767 (Rubinfeld). This result, Dr. Rubinfeld agreed, reflected an application of rational profit maximizing behavior by a willing seller, as explained in colloquy with the Judges:

> [THE JUDGES]
>
> [T]hat's an application . . . of a fundamental economic process of profit maximization. . . . [The record companies] would want to make sure that the marginal return that they could get in each sector would be equal, because if the marginal return was greater in the interactive space than the noninteractive . . . you would want to continue to pour resources, recordings in this case, into the [interactive] space until that marginal return was equivalent to the return in the noninteractive space. Would that be correct?
>
> [DR. RUBINFELD]
>
> It would. You said that just the way I would like to have said it when I was teaching that subject. Yes, I agree with that.

5/7/15 Tr. 2325 (Rubinfeld); *see* Rubinfeld CWRT ¶ 172 (''All else equal, the interactivity adjustment sets statutory rates that represent the same fraction of subscription prices as paid by the on-demand services. . . .'').

Thus, Dr. Rubinfeld's ''ratio equivalency,'' assumes a 1:1 ''opportunity cost'' for record companies, whereby, on the margin, a dollar of revenue spent on a subscription to a noninteractive service is a lost opportunity for royalties from

[100] SoundExchange may be implying that the rates in its interactive benchmark market have been so reduced by downstream competition that all supranormal profits have been eliminated. However, SoundExchange did not produce evidence sufficient to show record company profits overall to support such an argument. Also, as the Judges have previously noted, and note again in this determination, the rate-setting process under section 114(f)(2)(B) is not intended to preserve any parties' profits. Moreover, if the Judges were to base their rate decision on profits and reasonable rates of return, the process would in essence become a public-utility style proceeding and, as noted elsewhere in this determination, no party has suggested that section 114(f)(2)(B) proceedings could or should be conducted in such a manner.

a dollar to be spent on a subscription to an interactive service. Accordingly, and contrary to the Services' criticism, Dr. Rubinfeld's ''ratio equivalency'' *does* possess an underlying economic rationale.

However, the unwarranted assumptions lurking behind Dr. Rubinfeld's economic rationale were noted by the Services' economic expert witnesses. For example, Dr. Lichtman, an economic expert for iHeart, testified:

> [Dr. Rubinfeld] assum[es], I think, a perfect substitution . . . assumptions about substitution, competition how all of these markets interrelate. . . . [I]t's intuitive. I understand why he was drawn to it. It's so nice to say, yes, roughly these will all be the same, revenue to royalty, revenue to royalty.

5/16/15 Tr. 4043–44 (Lichtman).

Dr. Rubinfeld's ''ratio equivalency''—as a means toward profit maximization—was more than a theoretical abstraction. The desire of the record companies to achieve such pricing parity across markets was confirmed by a senior Warner executive who testified on behalf of SoundExchange:

> Our goal, *aspirationally and in actual results,* has been a [REDACTED] percent rev[enue] share in this area generally. . . . So we've been kind of struggling, if you will, to pull these business models up to what we think is *the level of consideration that we find appropriate for essentially all of these music models, which is the* [REDACTED] *range.* So it was a combination of trying to be realistic and make major progress towards *our ultimate goal.*

6/3/15 Tr. 7406 (Wilcox) (emphasis added).

Mere assumptions as between interactive and noninteractive services regarding substitution, competition, market interrelationships and the like are inadequate, and thus limit the applicable scope of Dr. Rubinfeld's ''ratio equivalency'' approach. The unsupported and unrealistic assumptions in the ''ratio equivalency'' approach are considered below.

As Dr. Lichtman noted, the ''ratio equivalency'' in Dr. Rubinfeld's model makes assumptions regarding substitution, and how these markets interrelate. 5/6/15 Tr. 4043–44 (Lichtman). That is, the ''ratio equivalency'' approach assumes that the listeners who willingly pay for a subscription to a service have a WTP equal to the WTP of those who use ad-supported (free-to-the-listener) services. However, the record evidence is overwhelming that there is a sharp dichotomy between listeners who have a positive WTP and therefore may pay a subscription fee each month for a streaming service and those listeners who have a WTP of zero.

The most persuasive evidence on this point is found in the results of the conjoint survey conducted by a SoundExchange witness, Dr. McFadden. Dr. McFadden performed his conjoint survey to determine the WTP of consumers who were provided with a menu of bundled features that reflected bundles that existed in the marketplace. His findings revealed the dichotomy regarding the WTP of consumers of noninteractive services:

> I find that consumers of streaming services divide between those who are willing to pay for these services (and the extra features they offer) and those who are averse to paying for music streaming services. . . .

McFadden WDT ¶ 10 (SX Ex. 15) (emphasis added).

This dichotomy was examined in detail by another economist, Dr. Steven Peterson, who was a joint witness for the NAB and Pandora. Dr. Peterson noted a critical bimodality in Dr. McFadden's data (consistent with Dr. McFadden's finding) that reflected two classes of listeners; those who would pay a positive sum for various features available in a noninteractive service and those who refused to pay any money for any features. As Dr. Peterson explained, SoundExchange and Dr. Rubinfeld rely on the average WTP among the survey participants (to confirm Dr. Rubinfeld's interactivity adjustment), but that average obscured the clear bimodality of Dr. McFadden's results:

> Dr. McFadden presents only the estimated average willingness to pay for each feature addressed in his survey. However, it is possible to estimate each survey participant's willingness to pay for the features addressed in the survey. Based on the information for individual respondents, Dr. McFadden notes that there is a group of users who are averse to paying for music streaming services. . . . Thus, Dr. McFadden's results are consistent with the record labels' documents that indicate many consumers have a low willingness to pay for subscription streaming services. . . . Moreover, the distribution is bimodal, meaning it has two peaks. . . . [T]he average willingness to pay for a service with no ads masks the fact that there is a bimodal distribution . . . of preferences over the willingness to pay for a service with no advertisements and that the peaks occur so that consumers at the peaks have divergent preferences (*i.e.,* would respond in opposite ways) regarding a service with or without advertisements.

NAB Ex. 4013 at 32–34 (Peterson CWRT) (emphasis added; footnotes omitted).

This point is consistent with Dr. McFadden's own testimony, in which he stated: ''*Most users* regard their use of [streaming] services as *free* in the sense that they require no out-of-pocket expenses to listen to music.'' McFadden WDT ¶ 56 (emphasis added). Dr. McFadden then testified that his own survey data confirmed ''a group of consumers who place a high value on no out-of-pocket expenses . . . who are likely to remain [on] or adopt free plans.'' *Id.*

The Judges cannot disregard this bimodal chasm. Moreover, the record is replete with evidence corroborating this point. For example, testimony from industry witnesses underscored the unwillingness of a substantial percentage of listeners to pay any price to listen to noninteractive services. A Sony executive testifying on behalf of SoundExchange stated: ''It's challenging to convince a consumer to open their [*sic*] wallet and pay for something that is similar to something that is available to them for free. . . .'' 4/28/15 Tr. 376–77 (Kooker). Even when the Majors provide incentives and disincentives to services in the form of royalty reductions and increases, they are unable to induce more than a minority of listeners to convert from a ''free'' service to a paid subscription service. One of the most successful interactive services, Spotify, has only been able to induce approximately [REDACTED]% of its listeners to pay for a subscription streaming service. *Id.* at 404–05; *see id.* at 430 (Mr. Kooker acknowledging no evidence of a meaningful group of users willing to pay to subscribe to Pandora beyond those who currently subscribe).

Another industry witness, Aaron Harrison of Universal, acknowledged that he had no data to support a conclusion that there is ''some meaningful group of users who would be willing to pay to subscribe to Pandora beyond those who already have. . . .'' 4/30/15 Tr. 1115 (A. Harrison). This was consistent with a broader aspect of Mr. Harrison's testimony, in which he noted, ''the music-buying public has never been a huge market. . . .'' *Id.* at 990.

Pandora's Chief Financial Officer similarly testified that ''approximately an 80 percent slice of the market . . . is unwilling to spend significant money on music,'' as reflected in ''numerous studies'' [that] show that about half of Americans will never spend another dollar and another . . . 35 percent will spend . . . $15 per year.'' 5/13/15 Tr. 3553–54, 3356–57 (Herring). This portion of the dichotomized market comprises the core of Pandora's customers: ''[T]hat's the group that we target . . . people that aren't going to be able to be monetized through a $10 a month subscription or even a $5 a month subscription but want a free lean-

back experience.'' *Id.* at 3554. Accordingly, Mr. Herring noted that 95% of Pandora's customers listen through the ad-supported free-to-the-listener, and only 5% are subscribers, which he understood to reflect ''user preference'' for ''free sources,'' rather than a ''bias'' on the part of Pandora toward ''growing market share.'' 5/13 Tr. 3435–36 (Herring).

Further supporting this dichotomy from the record company perspective, an internal Warner strategy document noted that ''[a]d-supported services have proven to primarily be additive and to be targeting a different demographic than paid services.'' IHM Ex. 3118 at 11; *see* 5/7/15 Tr. 2405–06 (Wilcox) (noting that Pandora weaned listeners from terrestrial radio whose listening, therefore, had not previously been responsible for revenues that could be monetized into upstream royalties).

Expert testimony further confirmed this dichotomy. One of SoundExchange's own witnesses, Dr. David Blackburn, acknowledged that, at one end of the spectrum, consumers were willing to pay a lot of money, and at the other end of the spectrum are people who are unwilling to pay anything for music. 5/4/15 Tr. 1679 (Blackburn). An expert survey witness for Pandora, Larry Rosin, surveyed consumers and found that, annually, *for any sort of music, physical or digital,* 45% of respondents paid zero; 21% spent between $1 and $30, and 18% spent between $31 and $60. Further, when asked if they would pay for a Pandora subscription if the free-to-the-listener service was discontinued, 54% said it was ''not at all likely'' that they would pay for a subscription, and 25% said it was ''not very likely'' that they would pay for a subscription. Rosin WRT Figures 2 and 9 (PAN Ex. 5021); *see* 5/14/15 Tr. 3727 (Rosin). Mr. Rosin concluded from his survey that ''the majority of people are essentially . . . seeking free services.'' *Id.* at 3742.

Despite the overwhelming evidence of this dichotomy in WTP, Dr. Rubinfeld's model is based solely on the subscription platform. Thus, it is not reasonable to conclude that the ratio of subscription rates to royalties in the interactive market is relevant to the opportunity cost to a record company of listeners who opt instead for ad-supported noninteractive listening. Rather, ad-supported (free-to-the-listener) internet webcasting appeals to a different segment of the market, compared to subscription internet webcasting, and therefore the two products differentiated by this attribute (''ads and free'' vs. ''no ads and subscription fee'') cannot be compared to perform a 1:1 measure of opportunity costs as is the case in Dr. Rubinfeld's ''ratio equivalency'' model.

Even SoundExchange acknowledges, ''directly licensed interactive services . . . allow users to *select* their programming . . . whereas . . . statutory services can [only] . . . *influence* what they hear. SX PFF ¶ 278 (emphases added). As a SoundExchange economic expert witness acknowledged, the consumer who values sound recordings highly is apt to have an interest in particular sound recordings, and will be more willing to pay for a subscription that allows him or her more ''functionality,'' including the ability to select songs on demand. By contrast, the more casual listener, with a number of free alternatives such as terrestrial radio, lacks the same desire to select a particular song at a particular time. *See* 5/4/15 Tr. 1677, 1679 (Blackburn) (distinguishing ''music aficionados'' who ''are willing to spend a lot of money on music'' and ''additional functionality'' from ''people who are unwilling to pay anything for music.''

This undisputed distinction drives in part the bimodal nature of the distribution between listeners with a positive WTP for streaming and those with a zero WTP.

c. The Irrelevance of SoundExchange's ''Convergence'' Argument

The Services dispute the assertion that the increased overlap among the features of the statutory and non-statutory services constitutes a convergence that is meaningful in this rate setting proceeding. In support of this position, the Services make several specific arguments.

i. Fundamental Differences in the Services

The Services note a fundamental difference between interactive services and noninteractive services. They suggest a ''bright line'' difference between statutory services and non-statutory services that legally prevents convergence with regard to the most critical distinction, *i.e.,* the inability of listeners to statutory noninteractive services to choose the exact song or playlist of songs to which they will listen, as they would if accessing their own music collections. 5/13/15 Tr. 3445–46 (Herring) (noting this ''bright line'' between statutory and non-statutory service); 5/7/15 Tr. 2304–05 (Rubinfeld) (none of Pandora's features ''enhance the Pandora users' ability to select a particular song for listening at the time he or she wants to listen to it.''); *see also* 5/15/15 Tr. 3397–98 (Lichtman) (''on-demand . . . [t]hat's the key thing that makes the services different, not the little features that have been added. . . .''); Fischel/Lichtman WRT ¶ 11 (''Clearly, the most important difference between interactive and noninteractive services is . . . on-demand functionality. . . .'').[101]

In addition to the above ''bright line'' difference, statutory licensees are subject to the various other limits imposed by the DMCA performance complement. 5/27/15 Tr. 6136–37 (Fleming-Wood) (''[P]andora adhere[s] to the performance complement for sound recordings. . .''); *see* 17 U.S.C. 114(j)(13). Specifically, statutory services cannot offer to their listeners a pre-designated song; an entire album; more than four songs by the same artist or three songs from the same album in any given three-hour period; caching for off-line playback; a listener-created playlist played at the listener's discretion; the rewinding or fast-forwarding of songs; and a preview of upcoming songs. 5/6/15 Tr. 2016–18; 2049; 2088–89 (Rubinfeld).

Additional differences highlighted by the participants in this proceeding include:

- Pandora's ''thumbs up/thumbs down'' feature, which does not provide a listener with the ability to select the actual artist or song that is played. 5/13/15 Tr. 3446–47 (Herring).
- The increased use of mobile devices, which does not address the lack of convergence between the essential functionalities of the two services. 5/7/15 Tr. 2304–05 (Rubinfeld); 4/28/15 Tr. 432–33 (Kooker).
- Spotify's mobile Shuffle service, which is not a noninteractive service but rather has numerous on-demand features. *See* IHM Ex. 3371 ¶ 14 (Fischel & Lichtman SWRT).

ii. Convergence Does Not Create Relevant Competition

The Services also take issue with the notion that functional convergence is probative of competition relevant to this proceeding. Specifically, the Services argue:

- The ''convergence theory'' focuses entirely on competition between services in the downstream consumer market, and therefore offers no insight into the lack of competition in the interactive upstream market that SoundExchange seeks to use as its benchmark market. Shapiro WRT at 46–

[101] This criticism relates to the distinction between a listener's ability to ''select'' a song and a listener's more limited ability to ''influence'' the song that is played, as emphasized *supra,* note 76.

47; 5/18/15 Tr. 4469–71; 4474–75 (Shapiro).

• The alleged convergence in the downstream market does not address the question of whether the upstream market is effectively competitive. Shapiro WRT at 46.

• Dr. Rubinfeld failed to consider: (1) Substitution patterns among the various modes of music consumption; and (2) market shares in the downstream market. PAN Ex. 5022 at 10 (Shapiro WDT).

• Attempts by on-demand services to offer some radio-like functionality do not demonstrate competition between interactive and noninteractive services in the upstream market, but rather indicate only that on-demand services seek to ''cross- over'' and enter the ''lean-back'' market. 5/13/15 Tr. 3555–57 (Herring).

• The fact that some consumers want both lean-back and lean-forward functionality does not mean that each type of service is competing with the other. IHM RPFF ¶ 296 (and record citations therein).

• When Pandora imposed listening caps in 2013 and 2014, it lost listeners to other noninteractive services, not to interactive services, indicating that the competition did not crossover into the interactive market. Fischel/Lichtman WRT ¶¶ 17–18 and Exs. A & B.

• Statutory noninteractive services compete in the market for radio listening, which is distinct from the interactive market, and about 80% of music consumption in the United States occurs via ''lean-back'' radio-listening experience. Fleming-Wood WDT ¶ 14 n.2; 5/27/15 Tr. 6138 (Fleming-Wood); 5/13/15 Tr. 3397–99 (Herring); Pandora Ex. 5016 ¶ 9 and Figure 2 (Herring AWRT) (showing 76.2% of consumers listen to lean-back services); *see* Shapiro WRT at 9 & Figure 2; 5/18/15 Tr. 4478–79 (Shapiro) (terrestrial radio, noninteractive webcasting and satellite radio comprise 63% of time spent listening to music, and interactive services account for 7%).

iii. The Supposed ''Interactive'' Features Made Available by the Noninteractive Services Do Not Demonstrate Convergence

The Services claim that SoundExchange misrepresents the nature of their offerings in a manner that falsely implies a convergence of features available on noninteractive services with features available on an interactive service. The Services make the following points.

• The experiment that Mr. Kooker performed failed to demonstrate the purported convergence between interactive and noninteractive services. The services note that, on cross-examination, Mr. Kooker admitted to a number of acts that increased the chances of the desired artist playing during his experiment: (1) He created a new account for the experiment, meaning Pandora had no information on what tracks or types of music the creator liked other than the ''seed'' artist (unlike the typical Pandora listener who has created many stations, used the thumbs-up/thumbs-down button, skipped tracks, and provided Pandora a host of information on his/her tastes above and beyond the first ''seed'' artist); (2) he indicated that the new account user was a 25-year-old female, a demographic which Mr. Kooker admitted was specifically chosen because it was ''the typical demographic, from Sony's experience, that would be looking for pop hit type of playlists'' (and who would then be more likely to receive those playlists); and (3) he skipped songs until he had listened to five songs, even though he acknowledged that such activity could influence Pandora's playlist algorithms. *See* 5/29/15 Tr. 6589–92 (Kooker).

• iHeart's on-demand video service represents a very minor element of total listenership for iHeart's service. Fischel/Lichtman WRT ¶ 11 n.14.

• ''Pandora Premieres'' is not a statutory feature and does not operate pursuant to the statutory license. 5/15/15 Tr. 3444 (Herring); *see* 5/6/15 Tr. 2006 (Rubinfeld).

• Even though noninteractive services compete with interactive services ''for music listening generally,'' it is ''marginal,'' *i.e.,* at that line between 80 percent [lean back] and 20 percent [lean in],'' and the ''core businesses are very different. . . . They're not substitutes for each other.'' 5/13/15 Tr. 3397–99 (Herring).

The Judges find that there is significant evidence of functional convergence (up to the limits prescribed by the DMCA) between interactive and noninteractive services. Further, the Judges find that downstream competition exists between such services, based on the evidence relied upon by SoundExchange.

However, such convergence and competition are swamped by the overwhelming evidence of the dichotomy regarding the WTP among listeners. Therefore, Dr. Rubinfeld's subscription-based benchmark approach does not demonstrate how convergence and competition affect the relative royalties in the ad-supported, free-to-the listener market. The Judges note, though, that such convergence in the subscription market is suggested by the fact that the subscription-based rate derived by Dr. Rubinfeld from 2014 data, $0.002376, is proximate to Dr. Shapiro's high-end proposed rate for the subscription market of 0.00215. When Dr. Rubinfeld's proposed rate is adjusted downward to reflect an effectively competitive market (as calculated in the Rate Conclusion section), the two rates are even more proximate. Those two benchmark subscription rates therefore indicate that competition and convergence indeed do cause interactive and noninteractive royalty rates to be similar in the subscription market.

Thus, the impact of functional convergence and downstream competition is relevant only in the subscription market. Therefore, once Dr. Rubinfeld's benchmark is limited to the subscription market, the Judges find that SoundExchange's emphasis on the functional convergence of, and downstream competition between, interactive and noninteractive services is pertinent.

Another important change in opportunity cost arises when the upstream purchaser (the noninteractive webcaster in the present context) has the ability to: (1) Purchase a substitute input and ''bypass'' the input from the complementary oligopolists or monopolist; and/or (2) the ability to ''use proportionately less'' of the input of the complementary oligopolists or monopolist. In the present case, both Pandora and iHeart have demonstrated that, by steering,[102] a noninteractive service can: (1) Partially ''bypass'' one or more Majors and substitute an increased proportion of songs from Indies or other Majors; and (2) thereby reduce their ''proportion'' of purchases from higher priced Majors up to a certain level.

Another important adjustment necessary to render Dr. Rubinfeld's ''ratio equivalency'' useful is to make certain that the outcome does not simply maintain or import supranormal prices that are the consequence of the absence of effective competition. The need to adjust for undue market power dates back to *Web I,* in which the CARP stated:

> Perhaps . . . a showing that the record companies themselves, or even the Majors, could exert oligopolistic power would tempt the panel to *import a device* . . . to alleviate the market power problem.

Web I CARP Decision at 23 (emphasis added).

Additionally, Dr. Rubinfeld's model treats the complementary oligopoly

[102] The concept of ''steering'' is discussed at length in connection with Pandora's rate proposal.

pricing in the input supplier's market as its potential opportunity cost. Thus, his ''ratio equivalency'' will simply sustain whatever complementary oligopoly price distortions are present in the interactive marketplace. In the present case, the ability of noninteractive services to steer away from higher priced recordings and toward lower priced recordings (or threaten to do so) serves as a buffer against the supranormal pricing that arises from the impact of complementary oligopoly pricing that was well-documented and admitted in the filings with the Federal Trade Commission (FTC) by Universal, its economic expert and its counsel in connection with the Universal-EMI merger. Thus, the Judges must (to borrow language from the CARP decision in *Web I*) ''import a device''—a steering adjustment derived from Pandora's benchmark, as discussed at length *infra*—to lower Dr. Rubinfeld's interactive subscription benchmark to reflect the effect of price competition and thus excise the complementary oligopoly power and reflect an effectively competitive noninteractive subscription market. This adjustment is not unlike the adjustments the Judges make to proposed benchmarks in proceedings under § 114, in that the adjustment is made to align the benchmark rate with the statutory rate.

4. Other Critiques of Dr. Rubinfeld's Interactive Benchmark

a. Dr. Rubinfeld's Use of Revenues Instead of Service Profits

According to Dr. Katz, the ''ratio equality'' assumption is also contrary to a fundamental economic principle. The buyer, *i.e.,* the noninteractive service, will determine its valuation based on the *profits* it expects to realize from using the input, *i.e.,* the sound recording, not merely the *revenue* it may earn. Of course, the buyer's consideration of profits necessitates the buyer's consideration of ''cost,'' since, broadly stated, profits equal revenues less costs. Katz AWRT ¶¶ 50–51, 70–71; 5/11/15 Tr. 2861 (Katz). Utilizing Pandora's non-license fee costs as an example (other noninteractive services' cost data were not readily available), and assuming that the non-licensing costs of interactive services were the same, Dr. Katz concluded in rebuttal that Dr. Rubinfeld's interactivity adjustment would increase to 7.9 to equalize the ratio of profits per play to royalties per play across the two markets. Katz AWRT ¶¶ 74–76 and Tables 6 and 7; 5/11/15 Tr. 2870–73 (Katz); 5/12/15 Tr. 3123–25 (Katz).[103]

The Judges reject this criticism as it pertains to the narrow segment of the market to which the Judges apply the interactive benchmark. When the segment of the market at issue consists of willing buyers/licensees who are providing access through *subscription*-based listening to listeners who have a WTP for either interactive or noninteractive services that are close substitutes, then Dr. Rubinfeld's ''ratio equivalency'' is reasonably based on revenues. Dr. Katz's critique of the revenue-based approach notes that Dr. Rubinfeld failed to factor into his analysis how profit, or lack thereof, to be realized by the noninteractive service would affect the royalty it would agree to pay in the hypothetical market.

However, in the segment of the marketplace described above, a ''willing seller'' would not be concerned with the service's calculus of its own profits. If those profits were too low to pay a royalty as a percentage of revenue equal to the royalties paid by the interactive services, the ''willing seller'' simply would not supply the noninteractive service in that hypothetical subscription marketplace. That decision by the ''willing seller'' may foreclose one or more services from participation in the subscription market, but, as the Judges noted in the *Web II,* they are not obliged to set the statutory rate at a level that permits a noninteractive service to realize any particular profit in the market.[104] 72 *FR* at 24088 n. 8.

b. Failure To Adjust for Supposed ''Noninteractive'' Services Prohibited by the DMCA

Dr. Katz further criticized Dr. Rubinfeld's attempt to rely on the equivalence of the aforementioned ratios because Dr. Rubinfeld's noninteractive numerator [*C*] is calculated from revenue received by services that were not actually ''noninteractive,'' but rather offered functionality that rendered them non-DMCA compliant and hence ''interactive.'' 5/16/15 Tr. 2042–50 (Rubinfeld) (Rhapsody unRadio offered on-demand plays, caching, and unlimited skips, and two other services; Slacker Radio Plus and MixRadio Plus, offered caching as well as unlimited skips). Thus, Dr. Katz, argues, the numerator [*C*] should have been adjusted downward to reflect an additional interactivity adjustment, which, *ceteris paribus,* would have reduced the noninteractive royalty rate proposed by Dr. Rubinfeld.

Dr. Katz correctly notes that the numerator in Dr. Rubinfeld's so-called ''noninteractive'' ratio contains revenues from services that are not DMCA-compliant. Dr. Rubinfeld should have made a further interactivity adjustment to reflect whatever marginal value was attributable to the additional functionality of his stand-ins for the services that he used as proxies for truly DMCA compliant services. However, the Judges find that, given the degree of convergence among all services in terms of functionality, as discussed *supra,* as it pertains to this subset of the noninteractive market in which listeners subscribe, the marginal additions to functionality that Dr. Rubinfeld may have improperly captured in his ''noninteractive'' revenue numerator do not disqualify the use of that benchmark in this subscription market context.[105]

c. Failure To Rely on the Advertising-Based Noninteractive Model That Predominates in the Market

An important and fundamental problem with Dr. Rubinfeld's analysis, according to Dr. Katz, lies in Dr. Rubinfeld's failure to acknowledge in his benchmark analysis that the advertising-based revenue model, rather than the subscription-based revenue model, is the dominant business model for noninteractive services. Katz AWRT ¶ 53 (quoting Rubinfeld CWDT ¶ 170 (stating that Dr. Rubinfeld's ''analysis does not explicitly account for 'free' ad-supported services.''). Katz AWRT ¶ 55.

This criticism was also leveled by one of iHeart's economic experts, who testified, ''certainly there is no basis to assume that subscribers are a reasonable proxy for all listeners to noninteractive services,'' given that subscribers account

[103] Dr. Katz did not claim that his own cost estimates or assumed equivalencies across the two markets were necessarily accurate. Rather, he emphasized that his cost-based/profit-based adjustment was premised on his estimates showed the invalidity of Dr. Rubinfeld's decision simply to ''assume[ ] the costs were zero.'' 5/12/15 Tr. 3123–24 (Katz).

[104] Even in the ad-supported market, the Judges are not setting a rate in order to provide a service with any level of profits or revenues.

[105] The Judges find that such differences in functionality are of relatively low importance *in the subscription market* in light of the evidence of downstream functional convergence. In this regard, it is noteworthy that even Pandora's expert Dr. Shapiro (the only Service expert to propose a separate subscription rate) has proposed a rate quite similar to the rate proposed by Dr. Rubinfeld based on a purely subscription-based model (Those rates are even closer to each other after an ''effectively competitive'' steering adjustment is applied to Dr. Rubinfeld's proposed subscription rate). If there was truly a material issue as to how WTP, convergence and functionality gradations impacted royalty rates in the noninteractive subscription market, the Judges would have expected to see a much wider gulf between the SoundExchange and Pandora subscription-based proposals.

for only four percent of Pandora's listenership and zero percent of iHeart's. Fischel/Lichtman WRT ¶ 55; 5/15/15Tr. at 3989–90 (Lichtman).[106]

Dr. Katz also criticized Dr. Rubinfeld's attempted rebuttal of this criticism. Dr. Rubinfeld, in rebuttal, noted that he had estimated a 1:1.01 ratio of *advertising-only* revenue to royalties in the interactive service market, which he concluded was confirmatory of SoundExchange's proposed rates as determined by the interactive *subscription* revenue to royalty ratio. Rubinfeld CWRT ¶¶ 161–169.

According to Dr. Katz, it is incorrect to compare only the revenues of the ad-supported tiers of the two types of services. Rather, the proper approach, according to Dr. Katz, would be to compare the *overall revenue* (ad-supported *and* subscription) per play as between the interactive and noninteractive services. Otherwise, gross disparities in average revenue per play (resulting from the number of plays in each model (ad-based or subscription) and in revenue per play in each such model) would be camouflaged. 5/11/15 Tr. 2854–57 (Katz).

When such an overall revenue approach was applied by Dr. Katz to the actual service data, he found that the ratio of interactive service revenue to noninteractive service revenue per play was not 1:1, but rather 3.96:1. Katz AWRT ¶ 58, Table 2. This adjustment alone would have the effect of reducing the proposed rate derived by Dr. Rubinfeld from $0.002668 to $0.001347, approximately a 50% reduction. Katz AWRT ¶ 59, Table 3. In similar fashion, iHeart's experts compared overall per play (or performance) data for Spotify and Pandora and calculated an interactivity adjustment of 3.2, Fischel/Lichtman WRT ¶ 69, also reducing the rate below the rate implied by the 1.01 adjustment calculated by Dr. Rubinfeld when he utilized advertising revenue alone in his rebuttal testimony.

As already noted, the Judges acknowledge the validity of this criticism by limiting Dr. Rubinfeld's noninteractive benchmark analysis to the segment of the market in which listeners are *subscribers* to noninteractive services. Accordingly, there is no reason to apply this criticism further to reduce the interactive benchmark in the segment where it is otherwise applicable.

d. The Alleged Circularity of Dr. Rubinfeld's Methodology

Pandora's economic expert, Dr. Shapiro, levies another overall criticism of Dr. Rubinfeld's interactive benchmark, characterizing it as ''circular'' and thus ''uninformative.'' Dr. Shapiro noted that Dr. Rubinfeld asserted that the royalty rates contained in the interactive benchmark agreements ''can be expected to reflect the incremental value of the granted functionality over-and-above what can be achieved with the statutory rights.'' Rubinfeld CWDT ¶ 145. Thus, according to Dr. Shapiro, backing out the incremental value to make an interactivity adjustment would simply return the analysis to the subscription rates and royalties that are predicated on the existing statutory rates. Therefore, Dr. Shapiro criticizes Dr. Rubinfeld's entire interactive benchmarking exercise as circular, revealing nothing about the rate that would be set absent the statutory rate. Shapiro WRT at 28–29; 5/8/15 Tr. 2723–24 (Shapiro); *accord,* 5/5/15 Tr. at 4047–48 (Lichtman) (iHeart's' economic expert noting that the noninteractive service revenue figure that is the numerator in Dr. Rubinfeld's noninteractive ratio is (and must be) dependent upon the statutory rates that serve as an input cost).

The Judges need to consider this criticism in tandem with the Services' prior criticism that the so-called ''noninteractive'' webcasters selected by Dr. Rubinfeld actually offered non-DMCA compliant features as well. Consequently, when Dr. Rubinfeld backs out the interactive value of these non-DMCA compliant services (by comparing the ratio of interactive to noninteractive subscription prices) he is not simply returning to the existing statutory rates, as Dr. Shapiro asserted, because the royalty rates for those non-DMCA compliant services (as the Services argue) are not merely predicated on the prior statutory rates. Simply put, the Services cannot have it both ways. If Dr. Rubinfeld's ''noninteractive'' services have some features that render them imperfect benchmarks, then the Judges must consider whether and how to weigh those imperfections. But those imperfections also cut in the other direction, and indicate that the royalty rates negotiated by those services reflect market forces in the subscription sector, rather than merely the statutory rates for DMCA-compliant noninteractive services.

e. Assumed Equivalence of Demand Elasticities in the Interactive and Noninteractive Markets

Dr. Katz notes that Dr. Rubinfeld at one point conceded that the ''elasticities of demand'' by the interactive services and the noninteractive services would differ *inter se.* However, Dr. Rubinfeld failed to address or account for this difference. Moreover, according to Dr. Katz, Dr. Rubinfeld later equivocated as to whether, in his methodology, he was assuming an equal elasticity of demand for both types of services. Katz AWRT ¶ 47; *compare* 5/16/15 Tr. 2029–34 *with* NAB Ex. 4233.

Given that the Judges have dichotomized between the subscription and the ad-supported (free-to-the-listener) markets, the Judges do not believe that there are any significant uncertainties regarding the approximate equivalence of the elasticities between the interactive and noninteractive upstream markets for the right to acquire licenses to play sound recordings for subscribers.[107] As Dr. Rubinfeld testified, when the downstream subscription market is competitive, the ''Hicks/Marshall relationship'' [108] provides that if the elasticities in the downstream market are the same then, *ceteris paribus,* pursuant to the Lerner Equation the mark-up of price over cost will be the same in both the upstream and downstream subscription markets, thereby supporting Dr. Rubinfeld's ''ratio equivalency'' in the subscription market. 5/28/15 Tr. 6310–11 (Rubinfeld).

[106] Dr. Rubinfeld declined to use advertising-only interactive services as benchmarks in his original WDT. He noted that interactive services use ad-supported (''free-to-the listener'') alternatives as tools to convert listeners into paid subscribers (the so-called ''freemium'' model), thereby distorting (through ''upsell incentives'') the reliability of ad-supported interactive service agreements as benchmarks. Rubinfeld CWDT ¶¶ 126, 128; *see also* Rubinfeld CWRT at 39, n128 (no ''apples to apples'' comparison could be made between noninteractive services, on the one hand, and, on the other, interactive services that offered an ad-supported (free-to-the listener) service using obtrusive advertising as a tool to convert listeners to subscription services.). However, in his 11th hour supplementation to his WDT, Dr. Rubinfeld attempted to analyze certain ad-supported services, contained in section ''III.E'' of his CWDT, that he classified as more like statutory noninteractive services. The Judges' analysis of SoundExchange's arguments relating to these so-called ''III.E'' licenses is set forth in section IV.B.4.*l*.ii, *infra.*

[107] In fact, when the dichotomy in WTP is applied, a discussion of overall differences in elasticities is beside the point. Elasticity measures percentage change in quantity demanded divided by percentage change in price. For the ad-supported services, the listeners have already demonstrated an unwillingness to pay for internet webcasting. Economically, their demand curve is far below the demand curve for subscription listeners (reflecting the differences in WTP). It is the difference in location of the demand curve, not just the difference in elasticities that is important. In the subscriber market though, the price-elasticity of the listeners vs. the noninteractive listeners is of some relevance.

[108] *See infra,* note 109.

In the present case, because: (1) The WTP downstream is positive (which it is by definition in the subscription market); *and* (2) the products are converging in terms of functionality; *and* (3) an interactivity adjustment is applied to reflect the critical limits of convergence (no on-demand plays on statutory services), it was not unreasonable for Dr. Rubinfeld to conclude that the elasticities of demand would be approximately the same in both the interactive and noninteractive subscription markets.[109] However, although this likely approximate equivalence in downstream elasticities would tend to equalize the upstream impact on the derived demand of the noninteractive services, it would not be the only factor affecting the upstream market, *i.e.,* the market for which the Judges are setting rates. More particularly, the inability of listeners to statutory services to select a particular song combined with the noninteractive services' ability to (competitively) steer music toward or way from record companies, serve to distinguish the hypothetical noninteractive subscription rate from the benchmark interactive subscription rate proposed by Dr. Rubinfeld.

f. Failure To Use a Mix of All Interactive Revenues (Advertising and Subscription) in the Ratios

The Services argue that Dr. Rubinfeld, rather than isolating subscription revenue ratios from ad-supported ratios, should have determined the value of his interactivity adjustment by comparing *all* of the actual revenue in both markets (*i.e.,* a mix of subscription and advertising revenue. *See* Katz AWRT ¶¶ 58–59 NAB PFF ¶ 368. The Judges would find that argument meritorious if they were to attempt to apply Dr. Rubinfeld's ''ratio equivalency'' outside of the subscription market. The criticism is inapposite, however, given the Judges' application of Dr. Rubinfeld's methodology only to subscription services. In the subscription market where a positive WTP is self-evident from the presence of subscribers, convergence and downstream competition are particularly relevant. Record companies would want to equalize marginal returns across the interactive and noninteractive spaces, which would be accomplished by focusing on subscription revenues. Thus, given the Judges' finding that the market is segmented by a dichotomized WTP, this criticism is simply not relevant to the Judges' determination.

g. Dr. McFadden's Survey Results Are Unnecessary To Confirm the Value of Dr. Rubinfeld's Interactivity Adjustment, Based on the Limited Applicability of Dr. Rubinfeld's Benchmark

The Services offered numerous criticisms of Dr. McFadden's conjoint survey, which was intended by SoundExchange to confirm Dr. Rubinfeld's interactivity adjustment. *See, e.g.,* Peterson Corrected WRT ¶ 110 (survey measures potential subscribers' WTP rather than actual subscription prices); 4/29/15 Tr. 924, 926, 929–33, 936, 938 (McFadden) (survey does not measure value of certain features); 5/22/15 Tr. 5562–63, 5572–73, 5579–80, 5588–89 (Hauser) (survey contains confusing feature descriptions); *id.* at 5570–71 (survey had a high participant attrition rate, especially among teenagers); IHM Ex. 3124 ¶ 12 (Hauser WRT) (survey participants were confused by incentive alignment language). The Services asserted that Dr. McFadden's survey would have supported a rate much lower than the benchmark rate proposed by Dr. Rubinfeld had he corrected for Dr. McFadden's purported errors. Fischel/Lichtman WRT ¶ 75 and IHM Ex. 3060 (Fischel/Lichtman WRT, Ex. E.).

The Judges note initially that, in this narrow context of this subscription market, Dr. Rubinfeld's methodology for calculating the interactivity adjustment is not inappropriate. Dr. Rubinfeld reasonably determined the concept of a ''ratio equivalency'' between revenues and subscription royalties in a market with both: (1) A WTP sufficient to generate subscriptions in each market; and (2) a downstream convergence of features as between the two markets, except for the nonconvergence arising from the statutory restrictions on noninteractive services.[110] Thus, Dr. McFadden's attempt to confirm Dr. Rubinfeld's 2.0 interactivity adjustment is unnecessary.[111] Consequently, the Judges need not address the Services' criticisms of Dr. McFadden's conjoint survey.

h. Dr. Rubinfeld's Equalization of the Number of Plays in the Interactive and Noninteractive Markets Was Appropriate

Dr. Katz asserts that Dr. Rubinfeld underestimated the number of ''skips'' for which an interactive service is not required to pay a royalty under the typical interactive service contracts with record companies. By contrast, a statutory service must pay a royalty for all plays, including such ''skips.'' (SoundExchange requests that the Judges continue this requirement. *See* SoundExchange Proposed Rates and Terms, Attach. A at 2–3.). Dr. Rubinfeld utilized an adjustment factor of 1.1 for skips, but, according to Dr. Katz, actual data revealed in discovery demonstrated that the adjustment factor should have been 1.2, a 9.1% increase in the adjustment that would further lower the rate proposed by SoundExchange. Katz AWRT ¶¶ 101–102

The Judges find that Dr. Rubinfeld accurately adjusted for the number of plays across the interactive and noninteractive spaces. The criticism leveled by Dr. Katz focused only on the number of ''skips.'' However, Dr. Rubinfeld made a further adjustment for the fact that interactive services typically paid royalties for pre-1972 recordings, whereas the noninteractive services did not. This fact required an increase in the noninteractive royalty rate relative to the interactive royalty rate (*i.e.,* a smaller interactivity adjustment in the denominator [*D*] in the ratios discussed in section I.A.1.c, *supra*).

For example, assume there were 100 plays in each market and in each market 10 of those plays were pre-1972 recordings. If the royalty rate (assumedly) was 0.3 cents in each market, then the interactive average rate would be 0.3 cents. However, in the noninteractive market, where no royalty was paid on the 10 pre-1972 recordings, the average royalty rate was only 0.27 cents.[112]

Thus, to equalize the markets on a per-play basis, the noninteractive average rate must be increased. That increase made the downward interactivity adjustment smaller, when it was combined with the fact that—on the other side of the coin—the noninteractive services were required to

[109] Dr. Shapiro acknowledged that the Hicks/Marshall relationship would serve to import the downstream elasticities into the upstream market (the ''derived demand'' effect), unless the price effects of those downstream elasticities were swamped by other factors. *See* 5/20/15 Tr. 5044–45 (Shapiro). The principal ''swamping factor'' is the unwillingness of a substantial segment of streaming listeners to pay a positive price to listen to noninteractive services. Since, by definition, subscribers have a positive WTP, that ''swamping factor'' does not come into play if the analysis is limited to the market for subscription services.

[110] Also by way of repetition (and emphasis), the existence of a sharp dichotomy between listeners with a positive WTP for streamed music and those who have essentially a zero WTP for streamed music precludes an extension of this ''ratio equivalency'' beyond the subscription market.

[111] Of course, Dr. McFadden's conjoint survey and his findings regarding the bimodal nature of listeners' WTP are relevant to this determination, and have been considered in this determination.

[112] (90 royalty bearing songs × 0.3 cents) + (10 pre-1972 songs × 0 cents) = (0.27 cents + 0 cents) = 0.27 cents.

pay royalties for skips as though they were plays, unlike the typical interactive service.

i. Incorrectly Weighting Average Royalties by Revenue Instead of by Play

Another defect in Dr. Rubinfeld's approach, according to Dr. Katz, was Dr. Rubinfeld's decision to compute his average per-performance royalty by weighting that average according to the revenue per play earned by a service. *See* Rubinfeld CWDT ¶ 203; 5/5/15 Tr. 1824 (Rubinfeld). According to Dr. Katz, weighting the per-play average by service *revenue,* as done by Dr. Rubinfeld, created an upward bias compared to the revenue actually earned by on-demand services that comprised Dr. Rubinfeld's benchmarks. Katz AWRT ¶¶ 42–44, 162; 5/11/15 Tr. 2830–34; 2837–40 (Katz).

Dr. Katz maintained that the more realistic approach would have been to weight the individual on-demand services in the benchmark market by *the number of plays per service,* not by the revenue per service. Applying actual data, Dr. Katz demonstrated that using Dr. Rubinfeld's revenue weighting approach would have implied that in the period considered by Dr. Rubinfeld, the on-demand services would have received $112.2 million more (42% more) in revenues than they actually received. Katz AWRT ¶ 162.

The Judges find this criticism irrelevant as applied to the subscription market. In the interactive sphere, record company agreements with interactive services are configured pursuant to the ''freemium'' model, designed to convert ''free'' listeners into paying subscribers, who generate user revenue. *See* 5/7/15 Tr. 2401–02 (Wilcox); 5/13/15 Tr. 3509 (Herring). In the subscription market where the positive WTP and functional convergence engenders strong competition for paying listeners, a willing seller in the subscription market seeks to maximize subscriber revenue and focuses on average revenue per user (ARPU), not revenue per *play. See, e.g.,* 4/28/15 Tr. 374 (Kooker); 4/30/15 Tr. 970 (A. Harrison); *see also supra,* section IV.B.2.c.

j. The Number of Adjustments Does Not Disqualify Dr. Rubinfeld's Interactive Benchmark

One of the economic experts for iHeart, Dr. Lichtman, asserted that the sheer number of adjustments, as discussed *supra,* needed ''to draw any analogy'' between the interactive and noninteractive markets is so ''overwhelming'' that the result is a ''mess'' and not reliable. 5/15/15 Tr. 4053–54.

The Judges reject the notion that there may be some quantum of adjustments to proposed benchmarks that disqualifies them from consideration. Some variant of a ''three strikes and you're out'' approach seems decidedly devoid of legal or economic reasoning. The Judges are more concerned with the importance, or weight, of any given criticism of a benchmark than they are with the number of potential adjustments. Trivial or measurable adjustments may be relatively great in number, yet pale in comparison to one or two critical assumptions that might necessitate the qualification or rejection of a benchmark.

This determination is evidence of that point. Dr. Rubinfeld's benchmark fails to account for the fact that a large cohort of the listening public simply will not pay for streamed music. Thus, his subscription benchmark fails to capture the very market of listeners who flock to ad-supported (free-to-the-listener) noninteractive services. That single qualification circumscribes the usefulness of Dr. Rubinfeld's benchmark. One other criticism of his benchmark, *viz.,* its failure to capture an ''effectively competitive'' market, permits an adjustment within the subscription market rate and does not require the Judges to reject the use of Dr. Rubinfeld's benchmark in the noninteractive *subscription* market.

k. SoundExchange's Proposed Annual Rate Increases From 2016–2020 are Not Supported by the Evidence

The Services object to annual increases in the royalties as arbitrary and incompatible with the willing buyer-willing seller standard, for the following reasons.

First, the Services contend that there is no basis to assume, without supporting theory or evidence, that rates would necessarily increase during the next rate period. In that regard, the Services note that Professor Rubinfeld admitted that there is no ''theoretical reason why we would expect prices just to go up.'' 5/5/15 Tr. 1761 (Rubinfeld).

Second, he acknowledged the absence of any basis for his self-described '''empirical judgment' where we think rates are likely to be going for competing products.'' *Id.* Moreover, as Dr. Rubinfeld, testified, his proposed escalating rates are not based on anticipated inflation, anticipated increases in music industry inputs, or the consumer price index. 5/6/15 Tr. 2226 (Rubinfeld).

Third, none of the benchmarks on which SoundExchange relied contained annual rate escalators. Moreover, out of all the potential benchmarks that SoundExchange examined, only one has an escalating rate provision. *Id.* at 2227–28. That lone agreement with an escalating rate provision—the iHeart/Warner Agreement—was the subject of substantial criticism and ultimate rejection by Dr. Rubinfeld, as inappropriate for use as a benchmark in the current proceeding. *Id.* at 2229.

Fourth, the record evidence indicates that rates in SoundExchange's own proposed benchmark market, interactive streaming services, have *decreased* in recent years. Rubinfeld WDT, Ex. SX 0017, ¶ 140; 5/8/15 Tr. 2736–37 (Shapiro); 5/15/15 Tr. 4142 (Lichtman); 5/19/15 Tr. 4611 (Shapiro). Further, Dr. Rubinfeld testified that he ''actually saw . . . decreases in the noninteractive rate'' in the data he reviewed. 5/6/15 Tr. 2231 (Rubinfeld). Thus, if there were to be annual rate changes, the Services argue, the record supports a decrease in webcasting rates during the upcoming rate period.

The Services do note Dr. Rubinfeld's assertion that interactive and noninteractive services are converging, *id.* at 2225–2226, but they respond by arguing that this purported (and dubious) convergence does not support the conclusion that the Judges should impose on noninteractive webcasters what Dr. Rubinfeld himself characterized as a ''serious increase'' during the rate period. *Id.* at 2223. Moreover, Dr. Rubinfeld admitted that his proposed annual increases were not due to past convergence, but to his ''anticipation that the technology will create even more convergence going forward.'' 5/5/15 Tr. 1829 (Rubinfeld). He admitted that this ''anticipation'' was ''not based on hard data,'' and he conceded that ''I can't prove to you for sure where we're going to be because we are talking about the future.'' *Id.* 1829–30.

For the foregoing reasons, the Services conclude that SoundExchange's interactive benchmark does not provide a basis to set the statutory rates for commercial webcasters in this proceeding.

The Judges find that SoundExchange has failed to make a sufficient factual showing that would support the linear $0.00008 annual rate increase proposed by Dr. Rubinfeld. The Judges find it dispositive that Dr. Rubinfeld acknowledged that his opinion in this regard was neither based on theory nor on empirical analysis. Further, the fact that some agreements in the benchmark markets have annual escalators and some do not renders those agreements unhelpful, absent some explanation as to the bases for the inclusion or exclusion of such escalators.

Additionally, market forces in the future may cause rates to move in either direction, or to stay constant, and the record does not suggest a basis for a credible prediction. So too is the record devoid of any sufficient predictive evidence as to whether there will be further convergence and/or competition between interactive and noninteractive services or, if so, what impact that might have on the rates. That is, the record does not indicate why convergence would not occur through a reduction in interactive rates, rather than through (in whole or in part) an increase in noninteractive rates. In sum, the record does not contain a sufficient basis to adopt any prediction about the future direction of noninteractive rates.

l. Dr. Rubinfeld's Analysis of Noninteractive Agreements Does Not Corroborate His Interactive Benchmark

The Services oppose SoundExchange's use of agreements with Apple and several interactive services for what Dr. Rubinfeld described as noninteractive offerings, and argue that if the Judges consider the agreements, a proper analysis corroborates their own rate proposals and not SoundExchange's. *See, e.g.,* Pandora PFF ¶ 344; Shapiro SWRT at 12–16 & Table 1.

For the reasons set forth below, the Judges will not consider these agreements in establishing or corroborating a willing-buyer, willing-seller royalty rate.

i. Apple Agreements

The Services contend that Dr. Rubinfeld's analysis of the Apple agreements is deeply flawed and unreliable for several reasons. First, the Services argue that Dr. Rubinfeld improperly allocates [REDACTED] and other compensation to the licenses for the iTunes Radio service rather than to other licensed services that Apple provides. *See, e.g.,* Fischel/Lichtman SWRT ¶ 36. Second, the services argue that Dr. Rubinfeld should have analyzed the parties' *ex ante* expectations, rather than *ex post* performance, in determining what a willing buyer and seller would agree to. *See, e.g.,* 5/19/15 Tr. at 4526 (Shapiro). Finally, the services critique other adjustments that Dr. Rubinfeld makes (or fails to make) to the headline rates in the Apple agreements to account for non-statutory functionality in Apple's service.

The Judges credit Dr. Shapiro's observation that Dr. Rubinfeld's conclusion that Apple was willing to pay substantially in excess of the statutory license rate for what is essentially a statutory service ''just doesn't make any sense.'' 5/19/15 Tr. at 4526 (Shapiro). Economists for both licensors and licensees agreed that the statutory rate effectively sets a ceiling on rates for statutory services, since a service can always fall back on the statutory rate if it is unable to negotiate an equal or lower rate with the copyright owner. *See, e.g., id.;* 5/27/15 Tr. at 6025–26 (Talley). The fact that Dr. Rubinfeld concludes that the effective rates under the Apple agreements are substantially higher than the statutory rates strongly suggests that something is amiss in his analysis.

One possible reason Dr. Rubinfeld's analysis finds effective rates under the Apple agreements that exceed the statutory rates is that he attributes compensation to the iTunes Radio service that should have been attributed to other services licensed by Apple. The license agreements for the iTunes Radio service between Apple, on one hand, and Sony and Warner, respectively, on the other, are one part of a complex business relationship between Apple and the record companies, covering a number of different services. At or near the time that Apple entered into its iTunes Radio agreements with Sony and Warner, the parties amended some of their existing agreements for other services, and specified that some compensation that Apple was to have paid out under other agreements would be characterized as payments for the iTunes Radio service. Shapiro SWRT at 4; SX Ex. 2072 ¶ 2 (Amendment [REDACTED] to Apple/Warner Sound Recording cloud Service Agreement); Ex. 2073 ¶ 2 ([REDACTED] Amendment to Amended and Restated Apple/Sony Digital Music and Video Download Sales Agreement).

SoundExchange argues that the Judges are bound by the parties' characterization of these payments as unambiguously expressed in their agreements. SoundExchange Reply PFF ¶ 487. If the Judges were resolving a contract dispute between the parties, SoundExchange's argument might have merit. However, the Judges' task is to determine the economic significance of the compensation that changed hands between the parties, and the contracts are but one (albeit vitally important) piece of evidence of that economic significance. Where, as here, a transaction is part of a complex, interlocking business relationship, it is appropriate—even necessary—for the Judges to consider other evidence and analysis to determine the true economic value of the transaction. *See* Fischel/Lichtman SWRT ¶ 31. This is particularly true when one party is agnostic as to how certain payments should be characterized, and the other party has a strong incentive to characterize the payments in a particular way to influence the course of a future rate proceeding.

That additional evidence is lacking here. The Services raise sufficient doubt as to the characterization of the compensation flowing from Apple to Warner and Sony to persuade the Judges that they cannot rely on Dr. Rubinfeld's analysis of the Apple agreements. There is insufficient evidence in the record to support SoundExchange's analysis and use of the Apple agreements.[113]

The uncertainty resulting from a lack of evidence cuts both ways. The Judges will not consider the licensee services' alternative analyses that seek to demonstrate that the Apple agreements support their rate proposals. *See, e.g.,* Pandora PFF ¶ 344; Shapiro SWRT at 12–16 & Table 1.

ii. Other Noninteractive Agreements

The Services urge the Judges to reject Dr. Rubinfeld's analysis of four additional agreements for allegedly noninteractive services: Beats Music's The Sentence; Spotify's ''Shuffle'' service; Rhapsody's ''Unradio''; and Nokia's ''MixRadio.'' The Services argue that each service has features that exceed what a service operating under the statutory license would be permitted to offer. The Judges agree, and find that, as with the Apple agreements, there is insufficient record evidence to support a useful analysis of these four agreements.

(A) Extra-Statutory Functionality

(1) Beats ''The Sentence''

The Sentence was a free (to the user) feature offered by Beats Music (Beats) as a means of encouraging users to pay for Beats' subscription service.[114] Rubinfeld CWRT ¶ 179. It allowed users to generate a playlist by providing contextual inputs such as location, mood, setting and genre. It was subject to limited functionality, such as limited skips, no use of off-line or cached content, and no rewind feature. *Id.* ¶ 179–180. Dr. Rubinfeld describes The Sentence as ''effectively a noninteractive service involving functionality that is closely comparable to other statutory services.'' *Id.* ¶ 180.

The Services contend the record demonstrates that The Sentence includes extra-statutory functionality.

[113] In light of this determination, the Judges need not reach the licensee services other arguments concerning the Apple agreements.

[114] Beats was acquired by Apple and, as of December 1, 2015, no longer exists as a separate service.

Specifically, the record company agreements with Beats [REDACTED]. Fischel/Lichtman SWRT ¶ 11. This additional functionality would be expected to push the royalty rates up. *See id.* ([REDACTED] adjusted rates upward expressly to account for additional functionality that [REDACTED]'') (quoting IHM Ex. 3543 at 8 (1/1/2014 Email from [REDACTED] to [REDACTED] and [REDACTED])). Dr. Rubinfeld does not account for extra-statutory functionality in his analysis of Beats' license agreements.

(2) Spotify ''Shuffle''

Spotify's Shuffle service is a free-to-the-consumer streaming service that permits the user to select a certain number of songs (a minimum of 20 songs or a single album) and hear only those songs in a random order. Fischel/Lichtman SWRT ¶ 14. The ability to select specific songs and be assured that only those songs will be played distinguishes Shuffle from noninteractive services. The increased degree of interactivity would be taken into account in setting royalty rates. *Id.* Dr. Rubinfeld does not account for this functionality in his analysis of Spotify's agreements with the record companies.

(3) Rhapsody ''Unradio''

Rhapsody's Unradio service offers users personalized playlists based on the users' favorite artists or songs. It is a paid subscription service, with a 14-day free (ad-supported) trial period. Rubinfeld CWRT ¶ 196. Unlike statutory services, Unradio permits unlimited skips and permits users to play up to 25 favorites and seed tracks on an on-demand basis. Fischel/Lichtman SWRT ¶ 9. Again, this is extra-statutory functionality that would be expected to affect the royalty rate, and that Dr. Rubinfeld did not account for in his analysis.

(4) Nokia ''MixRadio''

Mobile phone manufacturer Nokia bundled MixRadio, a free-to-consumer streaming service, with its handsets.[115] MixRadio provides customized, ad-free noninteractive streaming. Unlike statutory services, MixRadio permits users to play radio stations that are cached on their mobile phones. Rubinfeld CWRT ¶ 199. In addition, MixRadio permits users to share music with non-subscribers. Fischel/Lichtman SWRT ¶ 12.

MixRadio thus has significant extra-statutory functionality. Dr. Rubinfeld does not account for this in his analysis.

(B) Lack of Analysis of Business Context

Like the Apple agreements, the record companies' agreements with Beats, Spotify, Rhapsody and Nokia, respectively, are part of broader economic relationships that include other services. *Id.* ¶ 30. Beats, Spotify and Rhapsody each license content from the record companies for their respective subscription services. Nokia at one time licensed music that it offered for unlimited download (bundled with its mobile phones). As discussed in connection with Apple, the Judges must consider evidence and analysis of context to determine the true economic value of a transaction when that transaction is part of a complex business relationship. Dr. Rubinfeld does not analyze that context.

(C) Conclusion Regarding Corroborative Agreements

Because Dr. Rubinfeld failed to account for extra-statutory functionality, and failed to analyze the broader context of these services within the business relationship between the service providers and the record companies, the Judges determine that they cannot rely on the analyses of these agreements to corroborate SoundExchange's interactive benchmark analysis.

5. Conclusion Regarding SoundExchange's Interactive Benchmark Per-Play Proposal

For these reasons, the Judges find that Dr. Rubinfeld's interactive benchmark is only applicable when:

- Revenues in both markets are derived from subscription revenues and are thus reflective of buyers with a positive WTP for streamed music;
- functional convergence and downstream competition for potential listeners indicate a sufficiently high cross-elasticity of demand as between interactive and noninteractive services, provided the noninteractive subscription rate is reduced to reflect the absence of the added value of interactivity; and
- a steering adjustment is made to eliminate the complementary oligopoly effect and thereby provide for an effectively competitive market price.[116]

The rate derived from this analysis is set forth in the Rates Conclusion, *infra.*

C. GEO's Rate Proposals

In this *Web IV* proceeding, the Judges had the opportunity to hear directly from a singer-songwriter who produces and markets his own music. Mr. George Johnson, dba GEO Music, filed a Petition to Participate in the proceeding. He filed all the necessary papers and testified on both direct and rebuttal, as well as delivering an opening statement and closing argument.

Mr. Johnson eloquently stated the plight of the singer-songwriter-artist who is self-published and self-produced. He also proposed an overarching reform to the way in which rights owners of music—written,

[115] The service is now simply ''MixRadio,'' as a result of Microsoft's acquisition of Nokia, and subsequent sale of the MixRadio service to Line Corporation.

[116] The Judges find as well that Dr. Rubinfeld's interactivity analysis failed to cure all of the defects that the Judges found to exist in the similar interactivity analysis proffered by Dr. Pelcovits and rejected by the Judges in the *Web III Remand.* First, and of greatest importance, Dr. Rubinfeld's interactivity model fails to take account of, or adequately adjust for, the dominant ad-supported (free-to-the-listener) segment of the noninteractive market. *See Web III Remand,* 79 FR at 23118. This defect has even greater resonance in this proceeding, given the abundant evidence, discussed *supra,* that the vast majority of listeners do not have a positive WTP for access to sound recordings on streaming services. However, the Judges have ''ring-fenced'' this defect by limiting the applicability of Dr. Rubinfeld's analysis to the noninteractive *subscription* market. Second, the Judges also criticized Dr. Pelcovits in the *Web III Remand* for failing to analyze agreements between the interactive services and independent labels. *Id.* As discussed *supra,* Dr. Rubinfeld looked at certain independent deals, but only made an adjustment on the assumption that Indies' royalties would be lower by the absence of the value of [REDACTED] found in some of the Majors' agreements with interactive services. Third, the Judges also criticized Dr. Pelcovits in the *Web III Remand* for failing to adjust for the downward trend in rates in the interactive benchmark market. *Id.* Both Dr. Pelcovits and Dr. Rubinfeld used periods ending during the year in which the proceeding started (2009 and 2014 respectively). Dr. Pelcovits used an 18-month period, while Dr. Rubinfeld used a 12-month period. *Compare id. with* Rubinfeld CWDT ¶ 32. However, Dr. Rubinfeld acknowledged—but failed to account for—the continuing downward trend in his interactive benchmark rates. Instead, he merely assumed that the interactive and noninteractive rates would converge through *an increase in noninteractive rates* in the hypothetical market and a *decrease in rates in the interactive market.* Again, such an assumption may be reasonable in the subscription market, where convergence in functionality appears to exist (as nonetheless limited by the DMCA performance complement). Again, the Judges' decision to ''ring-fence'' a subscription rate eliminates any improper use of this assumed convergence in the ad-supported (free-to-the listener) noninteractive market. Finally, in the *Web III Remand,* the Judges also observed that the value of Dr. Pelcovits' benchmark analysis was ''diminished by [the] lack of sufficient data'' relating to the number of noninteractive performances per subscriber. *Id.* Dr. Rubinfeld essentially avoided this problem by not accounting for differences in the number of performances made by subscribers to interactive and noninteractive services, respectively. Again, the Judges find that because a willing seller in the streaming subscription markets would seek to equalize Average Revenue per User (ARPU) (through Dr. Rubinfeld's ratio equivalency approach) this issue as well has been adequately addressed by the Judges through their ''ring-fencing'' of Dr. Rubinfeld's benchmark analysis to the subscription market only.

published, performed, recorded, broadcast—would be paid for their artistic creations. However, the current law thoroughly segments both the copyrights and the licensing mechanisms. The rights and their treatment have evolved over time, barely keeping pace with the technology that uses them. Further, part of the music royalty process, *i.e.,* royalties for use of published ''musical works'' is managed by a U.S. District Court in New York, with statutory admonition to the court not to consider the effect of the rates set by the Judges. *See* 17 U.S.C. 114(i). The complete picture urged by Mr. Johnson can only come into focus with a new copyright law.

Nonetheless, by comparing an artist's revenues from physical phonorecords to the current ten-thousandths of a cent ''per spin'' calculations for digital performances, Mr. Johnson highlighted very effectively one of the paramount factors complicating this proceeding. The music makers, the music recorders, and the music ''consumers''—both broadcasters and listeners—are struggling with how to address and ''monetize'' the change of the music product paradigm from an ownership model (purchase of physical recordings) to an access model (log in to Internet services and use as much or as little control as one wants to direct the music programming).

GEO makes three separate rate proposals.

1. GEO Proposal 1

GEO proposes that royalty rates for nonsubscription webcasting be the greater of a per-performance rate and a percentage revenue rate:

Year	Per-performance rate	Percentage of revenue
2016	$0.10	70
2017	0.12	68
2018	0.14	66
2019	0.16	64
2020	0.18	62

Introductory Memorandum to the Amended Testimony and Written Direct Statement of George D. Johnson at 4 (Jan. 13, 2015).

GEO proposes that royalty rates for subscription webcast streams be the greater of a per-performance rate and a percentage revenue rate:

Year	Per-performance rate	Percentage of revenue
2016	$0.22	70
2017	0.24	68
2018	0.26	66
2019	0.28	64
2020	0.30	62

Id.

2. GEO Proposal 2

As an alternative, GEO proposes a combination of a one-time fee (described as a ''cloud locker'' fee) and a ''usage'' fee that is the greater of a per-performance royalty and a percentage of revenue. As with Proposal 1, GEO proposes separate rates for subscription and nonsubscription webcast streams.

GEO's proposed nonsubscription rates are:

Year	Copyright cloud locker—one time fee	Per-performance rate	Percentage of revenue
2016	$0.50	$0.01	70
2017	0.55	0.02	68
2018	0.60	0.03	66
2019	0.65	0.04	64
2020	0.70	0.05	62

Id. at 5.

GEO's proposed subscription rates are:

Year	Copyright cloud locker—one time fee	Per-performance rate	Percentage of revenue
2016	$0.50	$0.10	70
2017	0.55	0.12	68
2018	0.60	0.14	66
2019	0.65	0.16	64
2020	0.70	0.18	62

Id.

3. GEO Proposal 3

As a third alternative, GEO Proposal 3 consists of a one-time ''cloud locker'' fee and a per-performance rate. Proposal 3, which GEO describes as being derived from the inflation-adjusted cost of a record album in 1964, would apply to both subscription and nonsubscription web streams. *Id.* at 6–7.

Year	Copyright cloud locker—one time fee	Per-Performance rate
2016	$0.50	$0.01
2017	1.00	0.02
2018	1.50	0.03
2019	2.00	0.04
2020	2.50	0.05

Id. at 6.

4. Judges' Conclusions With Respect to GEO's Rate Proposals

GEO requests that the Judges adopt either Proposal 3 or Proposal 2, ''or in between.'' *Id.* at 23.[117] As discussed above, the Judges conclude that the evidence in the record before us does not support a greater-of rate structure or a percentage-of-revenue rate in the current proceeding. GEO provided no evidence to change that holding.

[117] *See also id.* at 5 (''the Per-Performance Rate and Copyright Cloud Locker One-Time Fee Rate are what GEO is proposing'').

Likewise, the Judges find no persuasive evidence to support a ''cloud locker'' fee of the type that GEO (and only GEO) proposes. Mr. Johnson presented no expert testimony to support a ''cloud locker'' rate, nor did he provide any evidence that such a rate structure even exists in the market. What he did provide is his statement: ''The streamer's economic model leaves out one crucial element—the customer, and the bundled copyright cloud locker or 'streaming account' forces payment for all music copyrights up-front, one time, like all other products.'' *Id.* at 5–6. The rates the Judges adopt must be based on substantial evidence in the record. As Mr. Johnson is the only participant to propose a cloud locker rate and he provided no evidence to support such a rate, the Judges find that there is insufficient evidence in the record to support a cloud locker rate.

Therefore, the Judges are left with Mr. Johnson's proposed per-performance rates. The per-performance rates he proposes range from a low of $0.01 per stream ((2016 in Proposal 2 (nonsubscription) and Proposal 3) to $0.30 per stream (2020 Subscription). As with the cloud locker proposal, Mr. Johnson provides no evidence, other than his personal view, that such rates are reasonable, or reflect what a willing buyer and a willing seller would agree to.[118] In the absence of such evidence, the Judges cannot adopt Mr. Johnson's proposed per-performance rates.

D. Pandora Rate Proposal

1. Proposed Royalties

Pandora is a noninteractive licensee, and it represents itself as ''the leading Internet Radio Service in the United States.'' PAN Ex. 5002 ¶ 5 (Fleming-Wood WDT). Like SoundExchange, Pandora proposes a greater-of rate structure. Commercial webcasters would pay the greater of 25% of revenue from eligible transmissions and a range of per-performance royalty rates. Pandora proposes separate ranges of royalty rates for subscription and nonsubscription (advertisement supported) commercial webcasting as follows:

LOW END OF PROPOSED RANGE [119]

A royalty equal to the greater of (i) or (ii) below:

Year	Per-performance (nonsubscription)	Per-performance (subscription)
(i) Per-Play Rate:		
2016	$0.00110	$0.00215
2017	0.00112	0.00218
2018	0.00114	0.00222
2019	0.00116	0.00226
2020	0.00118	0.00230
(ii) 25% of Revenue from Eligible Transmissions		

HIGH END OF PROPOSED RANGE

A royalty equal to the greater of (i) or (ii) below:

Year	Per-performance (nonsubscription)	Per-performance (subscription)
(i) Per-Play Rate:		
2016	$0.00120	$0.00224
2017	0.00123	0.00228
2018	0.00125	0.00232
2019	0.00127	0.00236
2020	0.00129	0.00240
(ii) 25% of Revenue from Eligible Transmissions		

Pandora's Second Amended Proposed Rates and Terms at 2–3.

2. Pandora's Noninteractive Benchmark

Pandora relies upon the Pandora/Merlin Agreement to support its rate proposal. On June 16, 2014, Pandora and Merlin entered into the Pandora/Merlin Agreement, which established terms and conditions under which Merlin granted Pandora the right to perform of all the sound recordings in the catalogs of those Merlin record companies that would ultimately decide to opt-in to the Pandora/Merlin Agreement. PAN Ex. 5014; Shapiro WDT at 23, 26; PAN Ex. 5007 ¶ 24 (Herring WDT).

a. Merlin

Merlin is a global rights agency that represents and collectively negotiates on behalf of thousands of independent

[118] *See, e.g., id.* at 7 (''[w]hoever says that songs are too expensive in this rate hearing at $.00 are nothing more than con-men since they expect American music creators to work literally for $.00 per-song when a song really costs $5 dollars [sic] per song using government low-end inflation calculations and a real world 1964 benchmark.''). To establish his proposed cloud locker rate, Mr. Johnson requests that the Judges adopt as a benchmark a 2-cent mechanical (section 115) license rate for musical works in effect in 1909, which Mr. Johnson would then adjust for inflation and round to 50 cents per song). *Id.* at 7–8. Mr. Johnson also estimates that a Beatles record purchased for $5 in 1964 would have cost, after adjusting for inflation, $38 in 2014. *Id.* at 6. Since the Judges decline to adopt a cloud locker rate, they need not decide whether the mechanical rate in effect in 1909, adjusted for inflation, would be a suitable benchmark for Section 114 and 112 rates for 2016–2020. Interestingly, the Beatles released two albums in 1964, ''Beatles for Sale'' and ''A Hard Day's Night,'' both of which are still (or again) available, in vinyl, on Amazon.com for prices generally ranging from $15 to $20. *See* beatlesbible.com, referenced on Dec. 14, 2015; Amazon.com, referenced Dec. 14, 2015.

[119] The low and high ends of the proposed range correspond to levels of overspinning (or ''steering'') of Merlin-member tracks under Pandora's benchmark agreement. The issue of steering and the rate calculations derived from steering are described elsewhere in this determination.

record companies in the United States and 38 other countries. Van Arman WDT at 10; 6/1/15 Tr. 6865 (Lexton); *see also* 5/18/15 Tr. 4204 (Herring). Merlin's members include numerous prominent independent labels, which produce commercially and critically successful music. *See* Pandora PFF ¶¶ 123–126 (and record citations therein).

These independent record companies negotiate with digital services collectively through Merlin in order to obtain more favorable terms and transaction cost savings than they otherwise could achieve on an individual basis. Van Arman WDT at 10; 4/28/15 Tr. 626–7 (Van Arman); 6/1/15 Tr. 6856–7 (Lexton). Pandora notes that one of the Majors has acknowledged that Merlin is a ''virtual [ ] major.'' PAN Ex. 5349 at 9 (''[REDACTED]); 5/5/15 Tr. 1969:19–23, 1975:8–1977:4 (Rubinfeld).

Merlin established a procedure for its members to either opt-in or opt-out of the Pandora/Merlin Agreement (most members could [REDACTED], whereas a small number of members reserved the right to [REDACTED]). Members who were represented by independent distributors (*i.e.,* distributors unaffiliated with the Majors) delegated the decision as to whether to opt-in to these distributors. In total, [REDACTED] of approximately [REDACTED] members, covering approximately [REDACTED] tracks—opted in to the Pandora/Merlin Agreement. 5/18/15 Tr. 4221, 4235 (Herring); 6/1/15 Tr. 6870 (Lexton).

Pandora notes that, by statute, the opting-in Merlin members could have declined to enter into the Pandora/Merlin Agreement and thus remained bound in 2014 and 2015 by the statutory rates that incorporated the Pureplay settlement rates. *See* PAN Ex. 5014 ¶ 1(r); Herring WDT ¶ 25.[120]

b. Key Provisions of the Pandora/Merlin Agreement.

According to Pandora, the key terms of the Pandora/Merlin Agreement are those that set forth the rate structure, royalty payments, and steering provisions:

Rate Structure and Royalty Payments

• The agreement employs a greater-of royalty structure, with Pandora paying the greater of a per-play prong and a percent-of-revenue prong. The percent-of-revenue prong specifies 25% of Pandora's revenue, prorated based on the share of performances on Pandora accounted for by the Merlin Labels.

• The 2014 ''headline'' per-play rates are $0.[REDACTED] for each ad-supported performance and $0.[REDACTED] for each subscription performance. The 2015 ''headline'' per-play rates are $0.[REDACTED] for each ad-supported performance and $0.[REDACTED] for each subscription performance. PAN Ex. 5014 ¶ 3(a); Herring WDT ¶ 26; Shapiro WDT at 26.[121]

Steering Provisions

Steering is the term Pandora uses to describe a licensee's ''ability to control the mix of music that's played on the service in response to differences in royalty rates charged by different record companies.'' 5/8/15 Tr. 2683–4 (Shapiro). Just as the ''ratio equality'' is foundational to SoundExchange's rate proposal, the concept of ''steering'' is foundational to Pandora's rate proposal. Shapiro WDT at 27 (''This reduced per-play rate in exchange for increased plays is the central piece of the Merlin Agreement.'').

According to Pandora, steering and the concomitant discounting terms are feasible in the noninteractive market because Pandora has *now* tested and proven its ability to modify its playlist-selecting algorithms to rely more or less heavily on the music of particular record companies so that it can steer its listeners toward or away from the music from any one record company, thereby permitting ''workable competition'' to emerge in the relevant, noninteractive webcasting market. 5/19/15 Tr. 4557 (Shapiro). By contrast, Pandora notes, no evidence of such a steering capability existed at the time of the *Web II* or *Web III* proceedings. Shapiro WDT at 16.

Pursuant to the Pandora/Merlin Agreement, the ''headline'' per-play rates can be reduced by steering as follows.

FOR PANDORA'S AD-SUPPORTED NONSUBSCRIPTION SERVICE

2014	
Headline Rate ..... $0.[REDACTED]	Steered Rate. $0.[REDACTED].
2015	
Headline Rate ..... $ 0.[REDACTED]	Steered Rate. $0.[REDACTED].

FOR PANDORA'S SUBSCRIPTION SERVICE

2014	
Headline Rate ..... $0.[REDACTED]	Steered Rate. $0.[REDACTED].
2015	
Headline Rate ..... $0.[REDACTED]	Steered Rate. $0.[REDACTED].

Thus, Pandora claims that steering reduced the headline rates for its ad-supported, nonsubscription service by [REDACTED]% in 2014 and would reduce those headline rates by [REDACTED]% in 2015. Moreover, Pandora claims that steering reduced the headline rates for its subscription service by [REDACTED]% in 2014 and would reduce that headline rate by [REDACTED]% in 2015. PAN Ex. 5014 ¶ 4; Herring WDT ¶ 27; Herring AWRT ¶ 48; Shapiro WDT at 27.

The calculation of these effective steered rates is explained in paragraph 4 of the Pandora/Merlin Agreement, which sets forth the following provisions for calculating the rates resulting from steering, using the 2014 ad-supported headline rate of $0.[REDACTED] as an example.

Pandora promises to increase ''quantity'' (spins) by at least [REDACTED]% in the aggregate above Merlin's ''Natural Performance Rate.'' [122] However, Pandora will not pay a ''price'' equal to the $0.[REDACTED] headline rate for these additional spins. Instead, in exchange for its promise to play at least [REDACTED] % additional spins, Pandora will receive a ''discount'' on the price paid for [REDACTED].

That discount is calculated as [REDACTED]. PAN Ex. 5014 ¶ 4(a)–(c).

In support of a statutory rate based on the steering aspects of the Pandora/Merlin Agreement, Pandora advances several arguments. First, Pandora maintains that steering embodies ''price competition at work,'' and therefore reflects an ''effectively competitive'' market. 5/19/15 Tr. 4561–64 (Shapiro). Effective competition results from the power to steer because, according to Dr. Shapiro, a streaming service that possesses an ability to ''steer'' towards certain recordings, and away from others, will have ''much more

[120] The statutory Pureplay settlement rates for 2014 and 2015, respectively, are 13¢ and 14¢ per 100 plays for advertising-supported services (or 25% of revenue, whichever is greater), and 23¢ and 25¢ per 100 plays, respectively, for subscription services in 2014 and 2015. *Notification of Agreements Under the Webcaster Settlement Act of* 2009, 74 FR 34796, 34799 (July 17, 2009).

[121] There is no separate fee in the agreement for ephemeral copies of the recordings; such copies are covered under and included within the performance fees above. PAN Ex. 5014 ¶ 3(d); Herring WDT ¶ 26.

[122] The Pandora/Merlin Agreement defines ''Natural Performance Rate'' as [REDACTED]. PAN Ex. 5014 ¶ 1(k). More specifically, Pandora promised an *aggregate* increase of Merlin-label spins of at least [REDACTED]%, while promising to [REDACTED] to increase the spins of individual Merlin member labels by at least that amount. *Id.* ¶ 4(a).

bargaining power and be able to negotiate a lower royalty rate.'' Shapiro WRT at 19.

In theoretical terms, a service's ability to steer increases its price elasticity of demand, reducing the extent to which a licensor can mark up its price over marginal cost. 5/19/15 Tr. 4561–64 (Shapiro); 5/8/15 Tr. 2725–27 (Shapiro); Pandora PFF ¶¶ 147–148, 152–157 (and record citations therein). The relationship among elasticity, price and costs as a basis to measure market power is described by the Lerner Equation (or Lerner Index)—a fundamental economic pricing rule. Shapiro WDT at 5. In mathematical terms, the Lerner Equation [123] can be expressed as:

$$\frac{P - MC}{P} = \frac{1}{n}$$

Second, Pandora asserts that steering is not only theoretical and a contractual commitment, it is occurring under the Pandora/Merlin Agreement. Specifically, Pandora is actually steering [REDACTED]% above Merlin's ''natural performance rate'' of sound recordings, greater than the [REDACTED]% it has contractually committed to steer—evidencing that Pandora's steering behavior is motivated by ''price differences,'' not merely by the contractual ''steering commitment.'' Shapiro WRT at 41; *see* 5/18/15 Tr. 4229 (Herring); Herring AWRT ¶ 50.

Dr. Shapiro noted that when steering is possible, the mere *threat* (explicit or implicit) by the service to divert performances from one record company to another gives the service negotiating leverage.'' Shapiro WRT at 20 (emphasis added). In such a market, he opines, ''[a] record company facing a webcaster with considerable ability to steer customers away from its music has a strong incentive to discount its music to increase the number of performances of its music made by that webcaster.'' Shapiro WDT at 9–10. Thus, according to Pandora, the ability to steer creates price competition that can obviate the need for any actual steering in the hypothetical market. Shapiro WDT at 9 (''The net result in a workably competitive market may well be relatively little actual steering . . . .'').

Pandora avers that the Pandora/Merlin Agreement's steering provisions reflect these competitive forces, *i.e.,* a supplier offering a lower price in an attempt to gain volume. Shapiro WDT at 27 (''This reduced per-play rate in exchange for increased plays is the central piece of the Merlin Agreement. This feature plainly demonstrates that the Merlin Agreement is embracing the workings of a competitive market.''); Shapiro WRT at 19; *see* 5/19/15 Tr. 4574–5 (Shapiro).

According to Pandora, from the ''willing buyer'' perspective, the ability to steer provides Pandora with the ''competitive incentive to play directly-licensed tracks more heavily than [it] would otherwise.'' Herring AWRT ¶ 48. On the other side of the transaction, according to Pandora, the record shows that for a ''willing seller,'' *i.e.,* a Merlin member who opted-in, this steering-based agreement, constituted a ''good competitive move,'' taken in the record company's ''self-interest.'' 4/28/15 Tr. 610–11 (Van Arman).

Pandora further avers that its ''overspinning'' of Merlin tracks by [REDACTED]% has not resulted in any negative feedback from Pandora listeners or any negative financial impact. 5/18/15 Tr. 4229–33 (Herring) (explaining that Pandora increased plays of Merlin tracks, on an aggregate basis, by approximately [REDACTED]% in 2014, but this change in the mix of spins did not cause any increase in ''complaints about song quality from Pandora listeners).

c. Pandora's Steering Experiments

In support of its assertion that the effects of potential steering can be pervasive in the noninteractive market, Pandora relies in part on its own internal ''steering experiments.'' More particularly, in 2014, at Dr. Shapiro's direction, Pandora conducted a set of steering experiments to test its ability to overspin recordings owned by each of the Majors.

The 2014 steering experiments were conducted by Pandora's in-house ''Science Team'' which has primary responsibility for designing and analyzing ''controlled experiments.'' PAN Ex. 5020 ¶ 7 (McBride WDT). Pandora witness Dr. Stephen McBride is a member of Pandora's Science Team, which performs research and analyses to measure the effectiveness of features offered by Pandora. McBride WDT ¶¶ 1, 5. The Science Team is composed of 15 individuals, 13 of whom hold doctorate degrees in computer science, engineering, statistics, or economics from leading academic institutions. *Id.* ¶ 5.

Pandora's controlled experiments (including the steering experiments) consist of comparisons between randomly selected groups of listeners, one group receiving a manipulated experience (the ''treated'' group) and the other group receiving the standard Pandora experience (the ''control'' group). *Id.* These experiments are randomized, controlled, and blind. *Id.*[124]

Pandora initiated the steering experiments because: (1) It had the general technological capability to perform more of one record company's sound recordings and/or fewer of another record company's sound recordings; and (2) it recognized that, as a noninteractive service it has the economic incentive to ''steer'' its performances toward music owned by a particular record company if that music is available at a lower royalty rate. Shapiro WRT at 22–25. Therefore, Pandora decided to determine through its steering experiments whether and to what extent it could use this technological ability to steer performances *without negatively affecting listenership.* Herring WDT ¶¶ 22, 31–32; McBride WDT ¶¶ 12–22; Shapiro WDT at 27; Shapiro WRT at 22–25.

Thus, from June 4, 2014, to September 3, 2014 (13 weeks), Dr. McBride and his colleagues at Pandora conducted a series of steering experiments in order to answer two questions: (1) Whether increases or decreases in performances of sound recordings owned by a particular record company would have a measurable impact on a key listener metric (average hours listened per registered user; and (2) whether Pandora's engineers could precisely manipulate the share of music played according to the record company that owns the recordings. McBride WDT ¶¶ 7, 12, 15.

The Steering Experiments consisted of a group of 12 experiments. Each experiment involved a combination of one of three target ownership groups

[123] The Lerner Equation states that there is an inverse relationship between the firm's margin (the gap between price and marginal cost) and the firm's elasticity of demand. That is, the increase in a buyer's (licensee's) own elasticity of demand (n) reduces the price (P) paid by the licensee over the licensor's marginal cost (MC) pursuant to the Lerner Equation. Thus, an increase in own-elasticity n (holding MC constant) reduces the value of each side of the equation. See generally Edwin Mansfield and Gary Yohe, Microeconomics 376 (11th ed. 2004) (''Economists often use the Lerner Index . . . to measure monopoly power or market power.''). [NB: The formula for the Lerner Equation appeared in a footnote in the determination as issued to the parties and the public, but it appears here in the body of the publication because of **Federal Register** drafting requirements.]

[124] ''Randomized'' means listeners are assigned randomly to either the ''treated'' group or the ''control'' group, to ensure valid causal inference. *Id.* at n.1. ''Controlled'' means the outcome is a comparison between those receiving the exposure and those not receiving the exposure, to account for the ''placebo effect.'' *Id.* ''Blind'' means experimental subjects are unaware of their participation in an experiment and, therefore, are also unaware of whether they have been assigned to the treatment group or the control group. *Id.*

(UMG, Sony or WMG) and a target ''deflection'' in share of spins (treatment group) as compared to spins that would occur according to the standard Pandora music recommendation results (control group). McBride WDT ¶ 15.[125] The spin share deflections (the ''steering'') were: −30%, −15%, +15%, and +30% for each of the three ownership groups manipulated. *Id.* The experimental subjects of the Steering Experiments were all Pandora listeners, each of whom was randomly assigned to one of the 12 treatment groups, to the single control group, or were included in the portion of listeners excluded from all experiments. McBride WDT ¶ 16.

The experiments demonstrated that Pandora was able to steer −15% or +15% for all three Majors without causing a statistically significant change in listening behavior. McBride WDT ¶ 21. However, Pandora was unable to steer −30% or + 30% for Universal or Sony without creating a statistically significant change in listening behavior. *Id.*

d. Additional Terms in the Pandora/Merlin Agreement [126]

The Pandora/Merlin Agreement contains the following additional terms that are specifically addressed by Dr. Shapiro in his benchmark analysis:

- [REDACTED]: Pandora also agreed to provide the Merlin members who opted in with a [REDACTED] in the event Pandora [REDACTED]. PAN Ex. 5014 ¶ 3(e); Herring WDT ¶ 26; Shapiro WDT at 28–29. This provision has not been triggered, 6/1/15 Tr. 6897 (Lexton), and Merlin's negotiators understood it was unlikely ever to be triggered. *Id.* at 6956–57; PAN Ex. 5110.
- *Compensable Performances:* Performances of [REDACTED] are non-compensable. All other performances are subject to a fee. 5/18/15 Tr. 4227 (Herring). Certain tracks designated as [REDACTED] are compensable at only [REDACTED] the headline rates. 5/18/15 Tr. 4227 (Herring).
- [REDACTED]: The Merlin members who opt-in are [REDACTED] to receive a specified [REDACTED]. PAN Ex. 5014 ¶ 5; Herring WDT ¶ 29.
- *Ancillary Promotional Benefits:* Additional non-pecuniary promotional benefits for Merlin, including [REDACTED]. *See* PAN Ex. 5014 ¶¶ 6–11.

See Herring WDT ¶ 30; Shapiro WDT at 29.

e. Pandora's Conclusion Regarding the Benchmark Status of the Pandora/Merlin Agreement

Based on the foregoing, Pandora asserts that the Pandora/Merlin Agreement is the best benchmark in this proceeding because

- it constitutes a competitive and arms-length direct license between a noninteractive webcaster and thousands of record companies;
- it concerns the same rights as are covered by the statutory license;
- it covers the same type of products at issue in this proceeding—public performances of sound recordings on noninteractive Internet radio; and
- it involves the same ''willing sellers'' (record companies that own sound recording copyrights) and a ''willing buyer'' (Pandora) that exist in the hypothetical market.

PAN Exs. 5014–5015; Shapiro WDT at 24–25; *see also* 5/28/15 Tr. 6323–24 (Rubinfeld) (agreeing that the Pandora/Merlin Agreement satisfied each such criterion).

3. Pandora's Calculation of Royalty Rates Implied by Its Proposed Benchmark

Pandora and its economic expert, Dr. Shapiro, did not simply apply the steering-adjusted rates implied by the Pandora/Merlin Agreement, but rather also considered potential further adjustments that might be required for an ''apples-to-apples'' comparison of the terms in the Pandora/Merlin Agreement with the statutory terms applicable to noninteractive licenses. *See* Shapiro WDT at 20–21, 23–37, Appendix D (''Analysis of Merlin Agreement'').

a. Potential Additional Adjustments

The three principal aspects of the Merlin Agreement that Dr. Shapiro considered for potential additional adjustments were:

1. Differences in the determination of which performances are compensable as compared to the statutory license (*i.e.,* consistent treatment of [REDACTED] and [REDACTED]);

2. additional financial terms of the Pandora/Merlin Agreement, including [REDACTED]; and

3. non-pecuniary terms in the Pandora/Merlin Agreement.

5/19/15 Tr. 4592–93 (Shapiro); Shapiro WDT Appendix D at D–1–D–9; s*ee* Shapiro WDT at 30.

i. Adjustment for Royalty Bearing Plays ([REDACTED])

This adjustment is required, according to Dr. Shapiro, because, on the one hand, the Pandora/Merlin Agreement treats [REDACTED] as non-compensable and the performance of [REDACTED] as compensable, but the statutory licenses takes the opposite tack on both issues—treating [REDACTED] as compensable and the performance of [REDACTED] as non-compensable. *Id.* To adjust for both of these factors Dr. Shapiro took the following steps.

First, he calculated the total payment Pandora expected to make to the opting-in Merlin members for all sound recordings under the Pandora/Merlin Agreement.

Second, he divided that total payment by the number of performances of Merlin Label recordings that would be compensable under the statutory license (as currently defined). Shapiro WDT at 30–31; Appendix D.

Dr. Shapiro describes this calculation as yielding a per-play rate that the Pandora/Merlin Agreement would establish if Pandora and Merlin had negotiated an agreement with a fixed per-play rate that treated [REDACTED] as compensable and performances of [REDACTED] as non-compensable. *Id.* To make the point more clearly, Dr. Shapiro offered the following example:

	Calculation	Value
Pandora Performances of Merlin Music	[a]	1,000,000
Number of [REDACTED]	[b]	200,000
Number of [REDACTED]	[c]	100,000
Compensable Performances Under Merlin License	[d] = [a] − [b]	800,000
Payment Per Compensable Play Under Merlin License	[e]	$0.00125
Total Royalty Payment Under Merlin License	[f] = [d] × [e]	$1,000

[125] The Steering Experiments operated through Pandora's ''A/B Framework,'' by which the Science Team intentionally changes one aspect of the Pandora experience for a sample group of listeners (the ''B'' group, or treated group) and then compares the effects to groups of listeners who did not experience the change (the ''A'' group, or control group). McBride WDT ¶¶ 7–8 and 16.

[126] Dr. Shapiro's decision as to whether and to what extent to adjust his benchmark to reflect such additional terms is considered elsewhere in this determination.

	Calculation	Value
Compensable Performances Under Statutory License	[g] = [a] − [c]	900,000
Effective Per-Play Rate Under Statutory License	[h] = [f] ÷ [g]	$0.00111

Shapiro WDT at 30–31; 5/19/15 Tr. 4589–92 (Shapiro); *see id.*at 4594 (noting that $0.[REDACTED] rate was ''an illustrative example,'' and ''not a rate proposal'').[127]

ii. Potential Adjustments for Additional Financial Terms

The Pandora/Merlin Agreement contains additional financial terms not permitted in the statutory license. Dr. Shapiro attempted to determine whether it was appropriate to increase his proposed rate to reflect values for these items. Dr. Shapiro ultimately found no basis to increase his proposed rates to reflect these items. Shapiro WDT at 28–29 (Appendix D); *see* 5/19/15 Tr. 4592–93 (Shapiro). Broadly, Dr. Shapiro found no value in these additional terms because neither Pandora nor Merlin had calculated or even estimated any value attributable to these items. More particularly, Dr. Shapiro analyzed these additional financial terms in the following manner.

(A) The [REDACTED] Provision

Dr. Shapiro assigned no separate value to Merlin's contractual right to receive [REDACTED]. According to Dr. Shapiro, he made no adjustment to his proposed rate to reflect this term because Pandora's financial projections did not show that Pandora would [REDACTED] in 2014 or 2015. *Id.* at 4689–90.

(B) The [REDACTED]

Dr. Shapiro also assigned no separate value to the [REDACTED] that provided Merlin with [REDACTED]. He testified that he declined to add a separate value for [REDACTED] because:

> [The] rate proposal is based on payments that Pandora is making and will be making to Merlin where the guarantee is binding. So the insurance is coming in. And those payments are included and, of course, raise the amounts of money that Pandora is paying and, therefore, they raise the rate that's in my proposal, so it includes that.

Id. at 4696.

[127] Dr. Shapiro also made a small adjustment in his effective royalty rate calculation to reflect that certain tracks [REDACTED]. PAN Ex. 5014 (1)(c) and 3(c) . Dr. Shapiro assumed that [REDACTED] would represent [REDACTED]% of Merlin tracks overall. Shapiro WDT at App. D–7.

iii. Potential Adjustments for Non-Pecuniary Terms

The Pandora/Merlin Agreement also contains non-pecuniary financial terms that are not permitted in the statutory license. Dr. Shapiro attempted to determine whether it was appropriate to increase his proposed rate to reflect any values for these items. Shapiro WDT at 29–31; Appendix D at D–10–19 (''Non-Pecuniary Terms in the Merlin Agreement''); *see* 5/19/15 Tr. 4595–98 (Shapiro).

(A) [REDACTED] on Pandora

Dr. Shapiro did make an adjustment to increase his calculated ''steered'' rate by 0.0002¢ (*i.e.,* $0.000002) per-performance to reflect [REDACTED] made available by Pandora to Merlin in [REDACTED] of the Pandora/Merlin Agreement. Shapiro WDT at 31; Shapiro WDT at 31; Appendix D at D–11 to D–12.

(B) [REDACTED]

Pursuant to the Pandora/Merlin Agreement, Pandora agreed to allow each Merlin member that had opted-in to [REDACTED]. PAN Ex. 5014 § 7. Dr. Shapiro did not make an adjustment to increase the value his benchmark for this non-statutory benefit, because Pandora personnel told him that ''[REDACTED] are mutually beneficial to the Merlin Labels and to Pandora.'' Shapiro WDT at D–12. With regard to the benefit to Pandora, Dr. Shapiro was informed by Pandora personnel that ''Pandora considers that [REDACTED] strengthen artist engagement with Pandora and thereby drive incremental listening and listeners to the service, build brand loyalty, and enhance listener retention.'' *Id.; see* Westergren WDT ¶ 38. Accordingly, Dr. Shapiro could not determine that the value of such [REDACTED] was greater to the Merlin members than to Pandora, and, consequently, he concluded that no adjustment to the effective royalty rate was necessary. Shapiro WDT at D–13.

(C) [REDACTED]

Each Merlin member that opted-in to the agreement could elect to [REDACTED]. PAN Ex. 5014 (Pandora/Merlin Agreement § 8).

According to Dr. Shapiro, [REDACTED] are mutually beneficial to the opting-in Merlin members and to Pandora. Shapiro WDT at D–13. Dr. Shapiro took note that Pandora believed the presence of [REDACTED] might be ''accretive to the listener experience'' as well as a form of advertising, and that Pandora was in fact planning controlled tests to measure listener responses and solicit listener feedback in order to determine the appropriate nature and frequency of [REDACTED] on [REDACTED] stations.'' *Id.* In light of the mutually beneficial nature of bumpers, Pandora personnel informed Dr. Shapiro that, even without a contractual obligation to do so, Pandora offered [REDACTED], gratis, along with Pandora Premieres tracks. Shapiro WDT at D–13 & n.26.

In light of the foregoing, Dr. Shapiro could not conclude that the [REDACTED] provision on balance created more value for Merlin than for Pandora, and therefore he made no adjustment to his proposed effective royalty rate on that basis.

(D) Access to Pandora Metrics

Pursuant to the Pandora/Merlin Agreement, opting-in Merlin members will receive [REDACTED] metrics regarding [REDACTED]. PAN Ex. 5014 § 9 (Pandora/Merlin Agreement) see also Shapiro WDT at D–14 & n.29); Herring WDT ¶ 30.

However, Dr. Shapiro noted that, at the time he prepared his testimony, Pandora was also developing a service called the Artist Marketing Platform (''AMP''), expected to launch in October 2014, through which Pandora proposed to provide these same metrics to all artists, not only to artists on the labels of Merlin members. Pandora did not plan to charge for AMP. Shapiro WDT at D–14 & n.30; *see* Herring WDT ¶ 30.

Since Pandora stated that it intended to make its AMP available to all artists at no charge, Dr. Shapiro concluded that no adjustment to the effective royalty rate was necessary to account for the Pandora Metrics to which Merlin Labels would have access. Shapiro WDT at D–14.

(E) [REDACTED]

Under the Agreement, Pandora, [REDACTED], may create a [REDACTED]. PAN Ex. 5014 § 10 (Pandora/Merlin Agreement); *see also* Shapiro WDT at D–14, D–15 & n.31.

Pandora personnel explained to Dr. Shapiro that such [REDACTED] were potentially mutually beneficial to the Merlin members and to Pandora. *Id.* at

n.32. The Merlin members benefit from [REDACTED], generating benefits to the Merlin members in the form of enhanced royalties and discovery of their other artists. *Id.* For Pandora, these [REDACTED] offer another context for engaging listeners and, by increasing the number of Merlin member plays on Pandora, these [REDACTED] work in tandem with the steering provisions in the Pandora/Merlin Agreement.

By way of comparison, Dr. Shapiro noted that Pandora is working with another entity to [REDACTED] that will feature specific artists. *Id.* at n.34; *see* Herring WDT ¶ 30 n.11. Pandora personnel informed Dr. Shapiro that neither Pandora nor the entity [REDACTED] is [REDACTED], which suggested to Dr. Shapiro that such [REDACTED] create ''mutual and roughly equalized benefits for both Pandora and the [REDACTED] creator.'' Shapiro WDT at D–15.

For these reasons, Dr. Shapiro concluded that no adjustment to the effective royalty rate was necessary to account for the [REDACTED] provision in the Merlin Agreement. *Id.* at D–15 to D–16.

(F) Pandora Presents and Pandora Premieres Events

Pursuant to the Pandora/Merlin Agreement, opting-in Merlin members receive [REDACTED] in ''Pandora Presents'' and ''Pandora Premieres'' events. PAN Ex. 5014 § 11 (Pandora/Merlin Agreement). Dr. Shapiro considered these two types of events separately.

(1) Pandora Presents

Pandora Presents is a program launched in December 2011, through which artists perform live before an audience of fans that Pandora identifies and invites without charge. Fleming-Wood WDT ¶ 29. Each of these events is designed for and sponsored by an advertiser. Pandora essentially plays the role of a concert producer and promoter, choosing artists to feature in Pandora Presents events that will best speak to the target audience of the sponsoring advertiser. *Id.* Pandora identifies and matches advertisers and artists that appeal to a particular demographic, then books a location for the event and markets the event to Pandora listeners with a demonstrated interest in the featured artist. Pandora [REDACTED]. Pandora [REDACTED]; sometimes Pandora [REDACTED]. Shapiro WDT D–17 n.43.

There have been between [REDACTED] Pandora Presents events per year featuring artists on Merlin labels. *Id.* Pandora estimates that Merlin member artists [REDACTED]. *Id.*

Pandora acknowledges that Pandora Presents generates promotional benefits for the featured artists. However, Pandora also understands that Pandora Presents also generates marketing benefits for Pandora with respect to advertisers, listeners, artists, and labels. *Id.* More particularly, Pandora not only views the program as a marketing platform that adds value for Pandora's service, but Pandora has also required that Pandora Presents events [REDACTED]. Fleming-Wood WDT ¶ 29 & n.5; *see* Westergren WDT ¶ 38. Pandora Presents events thus generate additional advertising revenue for Pandora as well as promotion of the Pandora brand with Pandora listeners. Over the long run, Pandora considers that Pandora Presents events lead to increased listener satisfaction and retention, and thus to greater advertising and subscription revenue. *Id.*

Because of the foregoing, Dr. Shapiro likened Pandora's role in coordinating Pandora Presents events to that of an independent concert producer and promoter. Therefore, Dr. Shapiro concluded that the [REDACTED] Pandora Presents events, on balance, did not call for any adjustment to the effective royalty rate he had calculated. Shapiro WDT at D–17.

(2) Pandora Premieres

Pandora Premieres is a program through which Pandora promotes albums in the week prior to their release. Fleming-Wood WDT ¶ 30. Pandora sends an email inviting certain listeners (selected based on their listening tastes and profiles) to listen to a new album during the week prior to its release date. *Id.; see also* Shapiro WDT at D–17 n.45. When selecting albums to feature on Pandora Premieres, Pandora reviews albums and artists proposed by the record companies to ensure ''a good fit with the program'' and to ''generate a high volume of listening.'' Fleming-Wood WDT ¶ 30. Pandora provides these selected Pandora Premieres listeners with ''click-to-buy functionality.'' *Id.* at n.46.

Pandora requires the labels to waive royalties for the one-week period that an album is on Pandora Premieres. Shapiro WDT at D–18. Pandora personnel informed Dr. Shapiro that Pandora has never charged labels for their participation in Pandora Premieres and has no plans to do so. *Id.* at D–18 n.49.

Pandora Premieres features two to five albums per week, or about 150 albums annually. Fleming-Wood WDT ¶ 30. Pandora personnel informed Dr. Shapiro that approximately [REDACTED] percent of these albums are by artists whose labels are Merlin members and Pandora estimates that participation by artists whose labels are Merlin members will [REDACTED] to [REDACTED] percent. Shapiro WDT at D–18 nn.51, 52. Pandora also estimates that the number of Merlin label albums featured on Pandora Premieres will [REDACTED] from around [REDACTED] per year to around [REDACTED] per year. *Id.* at n.53.

Dr. Shapiro acknowledges that Pandora Premieres generates promotional benefits for the featured artists and their labels, but that benefit is offset by (and evident from) the fact that labels waive royalties for the one-week period that an album is on Pandora Premieres. Shapiro WDT at D–18. Pandora also receives significant benefits from Pandora Premieres, because it offers a benefit to Pandora listeners, who receive an early opportunity to listen to entire new albums from artists they like and to buy the music. Fleming-Wood WDT ¶ 30.

On balance, therefore, Dr. Shapiro concluded that Pandora Premieres generates significant benefits both to the artists and label, on the one hand, and to Pandora as well. Because the program is mutually beneficial, and because Pandora [REDACTED], Dr. Shapiro concluded that the [REDACTED] in Pandora Premieres does not call for an adjustment to the effective royalty rate he had calculated. Shapiro WDT at D–19.[128]

iv. Adjustments Over the 2016–2020 Period

Dr. Shapiro adjusted his proposed rates higher to reflect anticipated inflation over the 2016–2020 statutory period. Shapiro WDT at 35. However, at the hearing, Dr. Shapiro testified that he would have preferred not to predict future inflation, but rather to include a statutory term requiring the rates to be adjusted annually to reflect actual inflation. 5/19/15 Tr. 4608–10 (Shapiro). Dr. Shapiro did not make any other adjustments to reflect anticipated or predicted changes over the statutory

[128] Dr. Shapiro also considered two factors enumerated in the statutory willing buyer/willing seller formulation—Pandora's potential role in promoting or substituting for other Merlin label revenue streams, and Pandora and Merlin's ''relative contribution.'' He concluded that, as rational economic actors with access to information regarding such factors, the parties would attempt to make sure that such elements were ''fully baked in'' and ''automatically included'' in the negotiated rates. 5/19/15 Tr. 4605–06 (Shapiro). Given this fact, Dr. Shapiro made no further adjustments to the rates he derived from the Pandora/Merlin Agreement.

period. His adjusted rates are set forth in the table below: [129]

EFFECTIVE PER-PLAY ROYALTY RATES AFTER ADJUSTMENTS

[2016 Through 2020 (¢)]

	Inflation rate * (%)	Advertising-supported	Subscription	Blended [130]
30% Steering:				
2016	2.20	0.1105	0.2146	0.1225
2017	1.73	0.1124	0.2183	0.1246
2018	1.74	0.1144	0.2221	0.1268
2019	1.76	0.1164	0.2260	0.1290
2020	1.78	0.1185	0.2300	0.1313
12.5% Steering:				
2016	2.20	0.1205	0.2238	0.1324
2017	1.73	0.1226	0.2276	0.1347
2018	1.74	0.1247	0.2316	0.1370
2019	1.76	0.1269	0.2357	0.1394
2020	1.78	0.1291	0.2399	0.1419

* The inflation rate reported for 2016 accounts for expected inflation from the mid-point of the period Q4 2014 through 2015 (May 2015) to the midpoint of 2016 (August 2016). The other inflation rates account for annual expected inflation to the mid-point (August) of each calendar year listed.

Dr. Shapiro explained why he proposed two alternative rates: ''[The rate selected] depends on how much steering Pandora is doing. If they do more steering, that lowers the rate they're going to be paying, in fact, and so then that lowers the corresponding statutory rate derived from the Merlin Agreement.'' 5/19/15 Tr. 4603–04 (Shapiro).

b. Pandora's Proposed Greater-of Rate Structure Including a 25% of Revenue Prong

In addition to the proposed per-play rates, Dr. Shapiro's rate proposal employs a greater-of structure, with the second prong set at ''25 percent of the revenue attributable to the licensed music,'' as such revenue is defined in the regulations proposed by Pandora. Shapiro WDT at 20 & n.30; 5/19/15 Tr. 4608:16–23 (Shapiro). This is the same greater-of rate structure adopted by the parties to the Pandora/Merlin Agreement. PAN Ex. 5014 ¶ 3(a). According to Dr. Shapiro, a greater-of formula with a ''percent-of-revenue'' prong is proper for the following reasons.

> [T]he Merlin Agreement . . . specifies that Pandora's royalty payments to the participating Merlin Labels . . . will be at least 25 percent of its revenue attributable to the music of those labels. These agreements show that, as a practical matter, royalties for recorded music can indeed be based on webcaster revenues, at least in the case of Pandora. Furthermore, webcasters and many other types of music users pay royalties to music publishers and composers, through ASCAP and BMI that are set as a percentage of revenue. For example, the ASCAP rate court recently established a royalty rate for Pandora of 1.85 percent of revenue for the period 2011–2015 for its performance of musical compositions in the ASCAP repertoire. This indicates to me that webcasting revenues can serve as a practical basis for royalty payments.
>
> Shapiro WDT at 23.[131]

c. Pandora's Proposed Application of the Pandora/Merlin Rates to the Majors

Pandora avers that the effective rates established by the Pandora/Merlin Agreement are not only representative of the rates that *Indies* would receive as willing sellers in the hypothetical marketplace, but are also representative of the rates that the *Majors* would receive in the hypothetical marketplace. Pandora's explanation as to why this extrapolation is warranted is based on its distinction between greater revenue derived from a higher number of plays as opposed to greater revenue from a higher per-play rate. As Dr. Shapiro opined, Majors have a higher share of the overall plays on Pandora than the Merlin Labels do, and thus they receive more in royalty income because that ''occurs automatically under a per-play rate structure or a percent-of-revenue structure with payments prorated according to label share.'' Shapiro WDT at 37–38. The relevant question for purposes of rate-setting, therefore, according to Dr. Shapiro, ''is whether the repertoires of the [Majors] would command a higher rate *per play* or a higher percent-of-revenue than the Merlin Labels in a workably competitive market.'' *Id.*

Pandora answers this question in the negative, for two reasons. First, according to Dr. Shapiro, the empirical evidence demonstrates that there is no greater promotional effect on the sale of songs from the Majors (as compared to the Indies) from performances on Pandora to support an upward adjustment to the Merlin benchmark. 5/19/15 Tr. 4623–64 (Shapiro). Second, Pandora has the same ability to steer toward and away from the repertoires of each of the Majors, just as it has done with the Merlin Labels. *See* 5/19/15 Tr. 4624–30 (Shapiro); Shapiro WDT Appendix F at F–6.[132]

To bolster this argument, Pandora notes that Dr. Rubinfeld's analysis vis-à-vis his own interactive benchmark reveals that Merlin receives essentially the same level of monetary consideration as the Majors in the interactive market. Pandora concluded therefore that the effective rates derived from the Pandora/Merlin Agreement

[129] The rates in the table differ from the rates proposed by Pandora because the proposed rates are rounded.

[130] Dr. Shapiro blended the ad-supported and subscription rates to create his ''blended'' rate. However, Pandora does not propose that the Judges adopt such a ''blended'' rate.

[131] Dr. Shapiro assigned no separate value to the 25% of revenue prong for adjustment of the per-play prong, because he understood that the per-play prong would result in a payment by Pandora to Merlin of approximately [REDACTED]% of revenue attributable to Merlin, thus not triggering the lower 25% prong. 5/19/15 Tr. 4683–4 (Shapiro). Further, because Dr. Shapiro included a second prong incorporating the 25% of revenue royalty payment, he concluded that it would be ''double counting or just nonsensical'' to add the value of that prong into the per-play prong. *Id.* at 4686.

[132] Dr. Shapiro's conclusion that noninteractive services can steer away from the Majors as well as the Indies is based upon Pandora's ''steering experiments.''

indeed can serve as benchmarks for the rates to be paid by the Majors. *See* Pandora PFF ¶¶ 158–163 (and citations to the record therein).

4. SoundExchange's Criticisms of the Pandora Rate Proposal

SoundExchange opposes the use of the Pandora/Merlin Agreement as a benchmark in this proceeding. Its opposition is based upon several principal arguments.

a. The Pandora/Merlin Agreement Creates New Rights and New Obligations That Are Unavailable Under the Statutory License

SoundExchange asserts that the Pandora/Merlin Agreement does not cover the *same rights* that are available under the statutory license and also creates *new obligations* that are *unavailable* under the statutory license. Specifically, SoundExchange avers that the Pandora/Merlin Agreement contains the following extra-statutory rights and duties:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- [REDACTED].

See PAN Ex. 5014, §§ 1(c)(v), § 2(c) and 13; *see generally* SX PFF ¶¶ 559–562 (and record citations therein).

Given these differences between the Pandora/Merlin Agreement and the statutory license, SoundExchange concludes that the former at best is but a weak benchmark for the latter. *See* SX PFF ¶ 558 (quoting *SDARS II,* 78 FR at 23064 (Apr. 17, 2013)) (Additional considerations and rights granted in [a proposed benchmark] that are beyond those contained in the Section 114 license weaken the [benchmark's] ''comparability as a benchmark.'').

b. Dr. Shapiro Failed Adequately To Value the Non-Statutory Consideration and Thus Wrongly Failed To Increase His Benchmark

According to SoundExchange, not only is the Pandora/Merlin Agreement a deficient benchmark, Dr. Shapiro also wrongly failed to increase the value of that benchmark to reflect the value of the non-statutory consideration in the Pandora/Merlin Agreement. SoundExchange asserts that Dr. Shapiro instead focused only on the lack of value attributed *by Pandora* to these other forms of consideration. *See* Shapiro WDT App. D at 1; 5/19/15 Tr. 4670 (Shapiro). However, SoundExchange notes that Dr. Shapiro acknowledged on cross-examination that he thought it would be important to know Merlin's expectations as to value in order to do a ''proper analysis'' of the value of the Pandora/Merlin Agreement.'' *Id.* at 467–71. Moreover, SoundExchange notes that the value analysis undertaken by Dr. Shapiro is not based on Pandora's expectations that existed *before* the execution of the Pandora/Merlin Agreement, but rather on the valuation evidence he obtained from Pandora *after* the Pandora/Merlin Agreement had been executed. *Id.* at 4669.

SoundExchange asserts that, had Dr. Shapiro considered the value placed on these extra-statutory elements of consideration by Merlin and its members, the total value of the consideration would have at least equaled the existing Pureplay statutory settlement rates for 2014 and 2015. In support of this point, SoundExchange relies in substantial measure on the testimony of one of Merlin's two chief negotiators of the Pandora/Merlin Agreement, Charlie Lexton, Merlin's Head of Business Affairs and General Counsel. SX Ex. 13 ¶ 1 (Lexton WRT). Mr. Lexton testified that, in Merlin's view, the consideration provided to Merlin members by the Pandora/Merlin Agreement was, ''at worst, no lower than the compensation under the existing statutory rate paid by Pandora.'' *Id.* at 17.

More particularly, SoundExchange relies on the following evidence and testimony with regard to items of extra-statutory consideration.

i. The [REDACTED] Provision and Merlin's [REDACTED]

According to SoundExchange, the evidence shows that Merlin and its members placed a value on the [REDACTED] provision, because Merlin obtained this provision through its negotiations with Pandora. 6/1/15 Tr. 6894–95 (Lexton). Specifically, Merlin had initially asked for [REDACTED], which Pandora refused to provide, leading to this [REDACTED] provision as an alternative to [REDACTED]. *Id.* Further, Mr. Lexton testified that Merlin ''definitely'' would not have entered into the Pandora/Merlin Agreement if the [REDACTED] provision had not been part of the agreement. *Id.* at 6898–99.

Mr. Lexton said that this provision was important because Merlin believed, after considering [REDACTED], that there was a reasonable chance that [REDACTED] provision would be triggered, particularly during Pandora's fourth quarter of 2014. 6/1/15 Tr. 6896–98 (Lexton). Mr. Lexton further noted that Pandora offered Merlin the [REDACTED] the Pandora/Merlin Agreement as a counterproposal to Merlin's proposal to [REDACTED]. SX Ex. 310 at 1; 6/1/15 Tr. 6986 (Lexton). In the same vein, Mr. Van Arman, co-founder and co-owner of the Indie record company (and Merlin member) Secretly Group, testified that the presence of the [REDACTED] provision was one of the reasons his labels opted-in to the Pandora/Merlin Agreement. 6/2/15 Tr. 7172 (Van Arman).

ii. The [REDACTED] Provision

The Pandora/Merlin Agreement obliges Pandora to [REDACTED] to the opting-in Merlin members. PAN Ex. 5014 § 5. These [REDACTED] are not available under the statutory license and are not replicated in Pandora's rate proposal. SoundExchange notes that Mr. Lexton testified that Merlin would not have entered into the Pandora/Merlin Agreement if it had not contained these [REDACTED] commitments. 6/1/15 Tr. 6906 (Lexton). SoundExchange also notes that Pandora itself viewed the [REDACTED] as a valuable [REDACTED] provision. *See* SX Ex. 310 at 2 (a contemporaneous Pandora negotiating document, in which Mr. Herring wrote: ''[REDACTED]'').

iii. Advertising/Promotional Benefits

Mr. Lexton testified that Merlin would not have entered into the Pandora/Merlin Agreement if it had not included the advertising and promotion benefits ultimately embodied in the agreement. 6/1/15 Tr. 6909 (Lexton). According to Mr. Lexton, these benefits clearly were of value to Merlin's members. *Id.* at 6880. He explained that these advertising and promotion provisions ''provided considerable value that could not be replicated by the statutory license.'' SX Ex. 13 ¶ 43 (Lexton WRT).

In like fashion, Simon Wheeler, Director of Digital for another Merlin member, Beggar's Group, testified that one of his company's motivations for opting-in to the Pandora/Merlin Agreement was that it afforded Beggar's Group the ability to ''tap into'' these promotional opportunities that were unavailable under the statutory license. SX Ex. 31 ¶ 23 (Wheeler WRT).

SoundExchange also notes that Mr. Herring, one of Pandora's negotiators, likewise recognized that these promotional tools had potential value to Merlin, and, indeed, he acknowledged his awareness that ''Merlin believed that [these provisions] added value.'' 5/18/15 Tr. 4275–76 (Herring). He further acknowledged his awareness that Merlin had ''sold'' the promotional

benefits of the Pandora/Merlin Agreement ''pretty strongly'' to its members. *Id.* at 4279; *see* SX Ex. 2237 at 1.

iv. Access to Data

When Pandora first proposed a direct license to Merlin, Pandora offered Merlin and its members access to Pandora's internal data. SX Ex. 104 at 5. The right to such access was embodied in the final Pandora/Merlin Agreement. PAN Ex. 5014 § 9. Mr. Lexton testified that licensors do not have access to this type of data under the statutory license. Lexton WRT ¶ 40.

Both Pandora and Merlin acknowledged that such data are valuable to record labels generally. Westergren WDT at 16–17; SX Ex. 1736 at 5; 6/2/15 Tr. 7157 (Van Arman); *see* 6/1/15 Tr. 7099–7100, 7106–07 (Simon Wheeler) (Access to data is something Beggar's Group ''expect[s] of [its] major direct licenses'' and is ''a part of every negotiation.'').

SoundExchange also criticizes the usefulness of the Pandora/Merlin Agreement as a benchmark for more general reasons:

c. The Pandora/Merlin Agreement Is Unrepresentative of the Larger Market

SoundExchange asserts that the Pandora/Merlin Agreement pertains only to record companies that represent less than [REDACTED]% of Pandora's performances and therefore cannot represent what the record companies—including all three Majors—comprising Pandora's other [REDACTED]% of performances, would negotiate for in the hypothetical marketplace. SX RPFF ¶ 753; SX PFF ¶ 507 (both relying on Shapiro WDT at 76). SoundExchange also avers that the Pandora/Merlin Agreement is not sufficiently probative of the rates that Indies would agree to voluntarily because the bulk of the Indies who opted-in [REDACTED]. 6/1/15 Tr. 6860, 6865–66 (Lexton). SoundExchange also notes that roughly 30% of the Merlin labels that opted-in do not regularly operate in the United States. 6/1/15 Tr. 6863–64 (Lexton). Additionally, Mr. Lexton estimates that of the [REDACTED] or so Merlin members that opted-in directly (rather than through distributors or aggregators), approximately [REDACTED] have been affirmatively rejected by Pandora for inclusion in the Merlin license, based on Pandora's [REDACTED]. *Id.* at 6871.

d. The Pandora/Merlin Agreement Applies Only to a Single Webcaster With Substantial Market Power

SoundExchange notes that the Pandora/Merlin Agreement applies to only one licensee, Pandora, and the terms of that license were not replicated in any other contract with any other licensee. SoundExchange finds this point relevant because of Pandora's ''significant competitive strengths'' among webcasters, including its 77.6% share of internet radio listening. PAN Ex. 5012 at 11. According to SoundExchange, this large market share afforded Pandora with market power that was a meaningful factor in the negotiations of the license with Pandora. *See* SX Ex.19 at 6, 24–27 (Talley WRT) (noting that Dr. Shapiro failed to perform any analysis of meaningful allocations of buyer-side power, including, for instance, whether Pandora's unique position in the market affected the terms of the Merlin license.).

e. The Pandora/Merlin Agreement Was ''Experimental''

SoundExchange asserts that the Pandora/Merlin Agreement was merely an ''experimental'' modification of the restrictions created by the sound recording performance complement. SX PFF ¶¶ 576–580 (and record citations therein). At the hearing, Merlin characterized the Pandora/Merlin Agreement as ''experimental.'' SX Ex. 13 ¶ 27 (Lexton WRT) (describing the license as ''an exercise in *experimenting* with direct licensing derived from the existing statutory rates''); *see id.* ¶ 25 (''Due to the fact Pandora offered us so many additional benefits and other added value that is not required by their statutory license, we understood this as an opportunity for *experimentation* given and within the constraints imposed by Pandora's existing statutory rates.''); Wheeler WDT ¶ 9 (''We knew from the start that this was a short-term *experiment.* . . .'') (emphases added).

f. No Major Has Accepted a Similar Direct License With Pandora

SoundExchange emphasizes the absence of what might otherwise be an important piece of evidence: No major record company has agreed to a direct license with Pandora or any other webcaster on the same rates and terms of the Merlin license. SoundExchange notes that this is unsurprising, in that Pandora's C.F.O. Mr. Herring, acknowledged that Pandora regularly had conversations with the Majors, but did not replicate the terms of the Pandora/Merlin Agreement. 5/18/15 Tr. 4203 (Herring). In fact, Mr. Herring recognized that Pandora would have been unable to negotiate the same terms with the Majors and would have to offer the Majors better terms. 5/18/15 Tr. 4253 (Herring) (acknowledging that he ''expected [to] . . . have to give more favorable economic terms to a major record company than you would have to give to an independent record company.'').

To drive home this point, SoundExchange contrasts the absence of evidence of any agreement between a Major and Pandora with the record evidence of the iHeart/Warner Agreement. SoundExchange notes that, pursuant to the iHeart/Warner Agreement, SX Ex.33, per-play rates (*i.e.,* even before any potential inclusion of the value of other consideration) range from $0.[REDACTED] to $0.[REDACTED] over the [REDACTED] period, greater than the rates in the Pandora/Merlin Agreement.[133] From this evidentiary distinction, SoundExchange concludes that the Services have not demonstrated that the rates in licenses between noninteractive services and Majors would match the lower rates in the Pandora/Merlin Agreement. SX PFF ¶ 654; *see also id.* ¶ 656 (asserting iHeart/Warner Agreement ''confirm[s] that major record companies receive more consideration than independent record companies when negotiating directly for licenses covering noninteractive services.'').

g. The Steering Provisions in the Pandora/Merlin Agreement Are Not Useful in Setting the Statutory Rate

SoundExchange rejects Pandora's foundational assumption that the steering provisions of the Pandora/Merlin Agreement can be used to determine the statutory rate. SoundExchange's rejection of steering as a relevant benchmarking tool is based on several factors:

i. Steering Allegedly Creates ''First Mover'' Advantages That Cannot Be Replicated for All Licensees

SoundExchange argues that as a matter of simple arithmetic a webcaster cannot commit to steer to every record company or label, because there is only a total of 100% subject to steering. As one of its economic experts noted:

[133] SoundExchange also notes that [REDACTED]'s licenses with [REDACTED], [REDACTED], and independent record companies for its [REDACTED] service likewise demonstrate that the major record companies receive considerably more consideration than independent record companies. SX PFF ¶ 655, and Section XI.A therein (and record citations therein).

[A]n affirmative obligation to steer just can't be implemented on a market-wide basis. It's just not possible for a service to say I'm going to steer listenership towards each label that I contract with.

5/27/15 Tr. 6070 (Talley).

Similarly, SoundExchange notes that an iHeart executive, Mr. Cutler, recognized the impossibility of promising steering to all record companies: ''Certainly, the share has to—its math has to add up to—a hundred, so if someone goes from 20 to 30, the rest of the pool must—those ten points must come from somewhere else.'' 6/2/15 Tr. 7239 (Cutler).

Thus, as Dr. Rubinfeld noted, the steering provisions provided Merlin with ''first mover'' advantages. Rubinfeld CWRT ¶ 70. SoundExchange concludes therefore that Pandora cannot escape from this ''quandary'' by discarding the [steering commitment], yet retaining the [discounted rates] from the Pandora/Merlin Agreement. According to SoundExchange, discarding the [steering commitment] would separate the rate in the agreement from the specific bargained-for consideration that Merlin obtained in exchange for that rate. SX RPFF ¶ 764.

ii. Revenue From Steering Is a Valuable Benefit Not Available Under the Statutory License

SoundExchange asserts that the steering provision provides Merlin with a financial advantage that cannot be duplicated under the statutory scheme. Therefore, SoundExchange avers, Pandora's proposed benchmark must be adjusted upward to reflect that this non-statutory value, like all non-statutory consideration, permitted a reduction in the benchmark royalty rate. *See* SX PFF ¶¶ 701–708 (and citations to the record therein).

iii. Pandora Has Not Provided Support for Its Claim That a ''Threat'' of Steering Will Lead to Lower Rates

SoundExchange challenges Dr. Shapiro's assertion that, in the hypothetical market, the ability of a noninteractive service to steer among record companies would necessarily create a ''threat'' of steering that would cause rates to decline to an effectively or workably competitive level. SoundExchange asserts that the record is bereft of *any* benchmark agreement that reflects a ''threat of steering,'' let alone that a ''threat of steering'' had allowed a noninteractive service to obtain a lower rate. *See* SX PFF ¶¶ 609, 709.

iv. Pandora Did Not Test Steering Under ''Real-World'' Conditions

SoundExchange argues that Pandora failed to test steering under real-world conditions, because there is no evidence that listeners were ever aware that steering was occurring. More particularly, SoundExchange points out that Pandora has yet to experience any potential negative listener reaction that may arise if and when competitors advertise that Pandora has modified its algorithm in a manner that contradicts its long-standing claim to play ''only the music listeners want'' [134] in order to save money on royalty rates. *See* 5/19/15 Tr. 4775 (Shapiro) (admitting that Pandora did not test how people would react to learning ''that Pandora was factoring in royalty rates [in] how they constructed the playlist.''). Indeed, Dr. Shapiro ''worried about'' the question whether a competitor could use such an advertisement to ''magnify'' a negative reaction to steering. *Id.* at 4635–36. Because successful steering in the real world depends on consumer reactions, SoundExchange concludes that Pandora has failed to demonstrate a credible threat of steering.

Additionally, SoundExchange notes that Pandora has been unable to generate as much ''real world'' steering as it intended under the Pandora/Merlin Agreement. Specifically, the evidence actually shows that Pandora has not achieved the [REDACTED]% steering target for most Merlin labels. 5/19/15 Tr. 4676–16 (Shapiro). Dr. Shapiro also admitted that, as of November 2014, Pandora had been unable to achieve the [REDACTED]% target for ''a good number'' of record labels. *Id.* Moreover, for [REDACTED]% of Merlin labels, Pandora's steering has been negative. SX Ex. 2310.

From these facts, SoundExchange concludes that Pandora has failed to provide sufficient real world evidence regarding its ability to steer, demonstrating a disconnect between the theoretical case it has presented and the realities it faces in the marketplace.

v. A Record Company Could Rebuff a Steering Proposal by Withholding Its Entire Repertoire

SoundExchange argues that a record company could respond to a steering threat by refusing to license 100% of its repertoire to Pandora. In support of this position, SoundExchange quotes Dr. Shapiro, who acknowledged that ''a record company with market power'' could use that power to disable a webcaster's threat of steering. 5/19/15 Tr. 4576–77 (Shapiro). Dr. Talley similarly noted that, ''in the hypothetical market where there is no background statutory rate . . . a label might say, okay, if you're going to [steer against us], we may just walk away. . . .'' 5/27/15 Tr. 6074 (Talley); *see also* 5/1/15 Tr. 1429 (Harleston) (''If a service were to say we're just not going to play your records because it costs too much, the reality is we can go—we have other choices. We could lean into other services.'').

SoundExchange finds support for this position because the Services' economic experts declined to conclude that the Majors were not ''must haves'' for noninteractive service. *See* 5/11/15 Tr. 2989–90 (Katz) (''Q. Is it fair to say that you . . . believe that the [M]ajors are must-haves for customized services such as Pandora? A. I would say I believe that's a possibility, yes.''); 5/19/15 Tr. 4582 (Shapiro) (Dr. Shapiro testified that he was ''offering no opinion whether the [M]ajors are must-have for Pandora.'').

vi. Record Companies Can Utilize Contract Clauses To Thwart Steering

SoundExchange asserts that it can contract around a noninteractive service's proposal or threat to steer by insisting upon a specific anti-steering clause or a more general ''Most Favored Nation'' (MFN) clause.[135] *See* SX Ex. 25 ¶¶ 14–19 (A. Harrison WRT) (''UMG has long recognized in our negotiations with interactive services that they have the ability to steer users away from UMG music through the music they feature and recommend through the service thereby decreasing our plays on the service and the revenue that flows to UMG and its artists. . . . We therefore have negotiated for protections against such steering. . . . [I]f we did not have these commitments the interactive services could effectively steer users toward other record labels artists and sound recordings through the music they highlight.''); *accord,* 4/28/15 Tr. 455–56 (Kooker); 4/30/15 Tr. 1144–45 (Harrison); 6/2/15 Tr. 7202–05 (Harrison); 5/7/15 Tr. 2487–88, 2490–93 (Wilcox) (all acknowledging on behalf of major record companies that anti-steering provisions are commonly used

[134] Timothy Westergren, Pandora's founder, had publicly stated that Pandora's recommendations would ''be based on the genome, they will never be based on somebody buying the space.'' SX Ex. 2369 at 1. In fact, Mr. Westergren explained in 2013 that ''[t]he only thing that drives what song [Pandora] play[s] next for a listener is trying to deliver the best possible listening experience for that individual.'' *Id.* at 3.

[135] ''In general, an MFN clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor.'' *U.S.* v. *Apple, Inc.,* 791 F.3d 290, 304 (2d Cir. 2015).

in their agreements with the on-demand services).

Several such anti-steering contract clauses were in evidence in the proceeding:

• The agreement between [REDACTED] and [REDACTED] contains an anti-steering clause that prevents [REDACTED] from steering towards lower-priced music, including on playlists, if that steering would result in lowering [REDACTED]'s share of total plays to a level that is less than [REDACTED]'s market share. SX Ex. 37; *see also* 6/2/15 Tr. 7202–06 (Harrison);

• The agreement between [REDACTED] and [REDACTED] contains an anti-steering provision to prevent [REDACTED] from steering listeners away from [REDACTED] content and towards that of another label. 4/30/15 Tr. 1145 (Aaron Harrison);

• Mr. Harrison testified that [REDACTED]; 6/2/15 Tr. 7206 (Aaron Harrison); *see* Harrison WRT ¶¶ 15–16; SX Ex. 36 ¶ 7;

• The agreement between [REDACTED] and [REDACTED] prohibits [REDACTED] from promoting another label's repertoire if it would then exceed its market share, unless Spotify offers the same increase in market share to [REDACTED]. SX Ex. 80 at 25537–38; *see* 4/28/15 Tr. 455–56 (Kooker). The practical effect of the clause is to prohibit [REDACTED] from increasing another label's promotional opportunities above its market share if that would lower [REDACTED]'s promotional opportunities to below its market share. 4/28/15 Tr. 456 (Kooker);

• The agreement between [REDACTED] and [REDACTED] contains an anti-steering provision that guarantees [REDACTED] will get [REDACTED] equivalent to its market share [REDACTED]. The provision further provides that if any other record company receives an ''uplift'' over its Soundscan market share, [REDACTED] will receive the same ''uplift.'' SX Ex. 343 at 20; SX Ex. 1814 at 26; SX Ex. 346 at 5; *see* 5/7/15 Tr. 2490–93 (Wilcox).

More broadly, as noted above, SoundExchange asserts that, as in the interactive market, the Majors could insist upon a general MFN clause in each contract with a service, which would ensure that each Major gets the benefit of the rates and terms set forth in the service's contracts with the other Majors. *See* 4/28/15 Tr. 449–450, 542 (Kooker); 4/30/15 Tr. 1142 (Harrison); 5/7/15 Tr. 2473 (Wilcox). Several such MFN contract clauses were in evidence in the proceeding:

• The agreement between [REDACTED] and [REDACTED] contains an MFN provision providing that if [REDACTED] enters into an agreement with another major record label that provides more favorable terms for that label regarding specified key provisions (including [REDACTED]), then [REDACTED] must notify [REDACTED] of those more favorable terms and give [REDACTED] the option to avail itself of those terms. SX Ex. 80 at 25542–43; PAN Ex. 5091; *see also* 4/28/15 Tr. 447–50 (Kooker);

• The agreement between [REDACTED] and [REDACTED] contains an MFN providing that if [REDACTED] grants another label more favorable financial terms, then [REDACTED] must also offer those terms to [REDACTED]. SX Ex. 36; *see also* 4/30/15 Tr. 1142–44 (Harrison) (''[REDACTED]'');

• The agreement between [REDACTED] and [REDACTED] contains the equivalent of an MFN provision (an ''equal treatment'' clause) by which [REDACTED] warrants that it has not provided [REDACTED] to another label. In the event that [REDACTED] has violated this warranty, the [REDACTED] clause permits [REDACTED] to receive an immediate [REDACTED] to match the superior terms. SX Ex. 343; *see also* 5/7/15 Tr. 2474–79 (Wilcox).

vii. Record Companies Could Thwart Steering by Requiring Up-Front Lump Sum Royalties

SoundExchange notes that, as Dr. Katz candidly acknowledged, a record company could neutralize a steering threat by seeking a lump sum payment instead of per-play rates. 5/11/15 Tr. 3015–6, 3019–20 (Katz).[136]

h. Merlin's Economic Interests Were Not Fully Aligned With Those of Its Members

SoundExchange addresses what it suggests may be conflicts of interest as between Merlin and its distributor/aggregator-members, on the one hand, and the Merlin label members, on the other. First, Merlin and the distributors/aggregators typically receive [REDACTED] from members only if that member has opted-in. Second, Pandora paid Merlin a license fee directly that would vary, up to $375,000 (but in any event no less than $250,000), depending upon the Merlin members [REDACTED]. SX Ex. 13 ¶ 56 (Lexton WRT). Thus, SoundExchange avers that Merlin had economic incentives to complete the Pandora/Merlin Agreement and to urge its members to opt-in—incentives that were not necessarily consistent with the interests of its members.

[136] The dynamic economic effect of an up-front lump-sum royalty payment is discussed elsewhere in this determination.

i. Pandora Has Been Unable To Perform Its Contractual Obligations

SoundExchange avers that, even assuming the Pandora/Merlin Agreement otherwise had merit as a potential benchmark, Pandora has been unable to perform its contractual obligations. In this regard, SoundExchange notes the following problems that have hindered Pandora's ability to perform its contractual duties.

• Staffing and capacity constraints;

• lack of reporting and payments,

• a low fraction of labels who are receiving payments pursuant to deal;

• a low participation in the [REDACTED] program; and

• a low percentage of labels receiving steering at or above [REDACTED]%.

SX Ex.1748 at 2 ; SX Ex. 2310.

SoundExchange further notes that Mr. Herring candidly acknowledged that Pandora had waited until after it executed the Pandora/Merlin Agreement to determine the actual cost to Pandora of performing its contractual duties. 5/18/15 Tr. 4280 (Herring). Afterward, Pandora's Chief Scientist estimated that Pandora would incur an annual cost of $[REDACTED] for the ''initial build'' and $[REDACTED] annually in ''ongoing support maintenance.'' *Id.* at 4282; SX Ex. 1706 at 1. Pandora calculated internally that, just to provide the opting-in Merlin members with the contractually promised access to data, Pandora would incur $[REDACTED] in initial costs and $[REDACTED] in ongoing annual costs. *Id.* at 20. Similarly, Pandora would need to spend almost [REDACTED] dollars in initial costs and $[REDACTED] in annual costs to [REDACTED], two of the advertising benefits contained in the Pandora/Merlin Agreement. *Id.*

SoundExchange notes that these implementation issues have ''impacted negatively'' the willingness of Merlin members who opted-in to consider entering into this license in any future period. For example, Mr. Van Arman testified that, [REDACTED] 6/5/15 Tr. 7158 (Van Arman); *see also* 6/1/15 Tr. 7104–10 (Simon Wheeler) (detailing implementation issues and concluding [REDACTED].

5. Judges' Conclusions Regarding Pandora's Benchmark Evidence

For the reasons set forth below, the Judges find that the noninteractive benchmark proposed by Pandora is informative as to the rates they shall set in this proceeding for a particular segment of the noninteractive marketplace. That is, the Pandora benchmark is probative of *the two distinct royalty rates* that a

noninteractive service would pay *to Indies* in the: (1) Ad-supported (free-to-the-listener) market; and (2) the subscription market, respectively.

Pandora's proposed benchmark is premised principally on the provisions of the Pandora/Merlin Agreement. SoundExchange raises two principal challenges to Pandora's benchmark: (1) The ability, *vel non,* of a noninteractive service to ''steer'' or credibly ''threaten'' to steer in the hypothetical market; and (2) the potential value of other (non-steering) elements of consideration Pandora provided to Merlin that might offset the lower stated rates, thus leaving the effective rate unchanged from the nonprecedential statutory Pureplay Settlement rate.

In light of the importance of these two issues, the Judges first analyze these two contentious points, followed by a discussion of SoundExchange's other objections to Pandora's benchmark proposal.

a. ''Steering'' as a Mechanism for Achieving Effective Competition in the Hypothetical Market

i. Could a noninteractive service steer and credibly threaten to steer in the hypothetical market?

SoundExchange argues that steering creates merely a ''first mover'' advantage for those licensors who are able to enter into steering arrangements before their competitors are able to obtain such advantages. This argument is seductively simple: In its essence, it is based on the elementary proposition that no noninteractive service can steer more than 100% of its sound recordings. To take a simple example, assume there are three Majors, U, S, and W, and one Indie, M. Assume the *ex ante* steering allocation of plays was 40% for U, 30% for S, 20% for W and 10% for M, and all plays were priced at $0.0020. Now, the noninteractive service strikes a deal with M to increase plays of M's sound recordings by 50% over the *ex ante* percentage, in exchange for, say, a 10% reduction in per-play rates to only M. Then, M's noninteractive market share increases by 50% from 10% to 15% (while its per-play rate declines by only 10%, resulting in more revenue for M *ex post* steering). As a ''first mover,'' M thus benefits.

However, the noninteractive licensee cannot promise all three other licensors, U, S, and W, the same 50% increase in plays via steering in the same contract period. If it did, U would realize a market share increase from 40% to 60%; S would realize a market share increase from 30% to 45%; and W would realize a market share increase from 20% to 30%. All four licensors, including M, would thus be promised 60% + 45% + 30% + 15% = 150%.

SoundExchange's point is that, by definition, it is mathematically impossible for a noninteractive licensor to allocate more than 100% of its plays. Thus, SoundExchange concludes, steering can only work in a non-statutory setting and, even then, never for all licensors. *See* 5/28/15 Tr. 6301 (Rubinfeld); *see also* 5/27/15 Tr. 6070 (Talley) (''[I]t's almost like a Lake Wobegon effect, that not everyone can be above average, not everyone can receive steering.'').

This argument of course, in the static sense, is mathematically correct. But, in the dynamic sense, is it *economically* correct? Dr. Shapiro, for Pandora, responded to this argument in the following colloquy with the Judges regarding the ''threat'' of steering:

> [THE JUDGES]
> Let's . . . take . . . the market we're dealing with here [and] address the first-mover criticism . . . that well, sure, you can steer to . . . record company A . . . but you can't steer to all of them because you can't play more than 100 percent of the music. Is it . . . the threat of steering that pushes everybody . . . towards their original percentages to avoid being that odd man out who was the holdout for the higher price?
> [DR. SHAPIRO]
> That's exactly—yes, absolutely. The competitive outcome is when each of the record companies is at a rate where they're . . . not disadvantaged relative to the other guys . . . . This notion that you can't steer, the 100% thing, it's kind of offensive to an antitrust economist . . . because it's basically saying . . . price competition is some horrible thing.

5/19/15 Tr. 4561–63 (Shapiro); *see* Shapiro WDT at 9 (noting that the ''net result'' of steering ''in a workably competitive market may well be relatively little actual steering.''). Dr. Shapiro further notes that, in the absence of steering, ''[y]ou would be basically going to the rate that a cartel or monopolist would set.'' 5/19/15 Tr. 4575 (Shapiro).

The Judges find that steering in the hypothetical noninteractive market would serve to mitigate the effect of complementary oligopoly on the prices paid by the noninteractive services and therefore move the market toward effective, or workable, competition. Steering is synonymous with price competition in this market, and the nature of price competition is to cause prices to be lower than in the absence of competition, through the ever-present ''threat'' that competing sellers will undercut each other in order to sell more goods or services.

This process does not result, as some record industry witnesses suggested, in a ''race to the *bottom.''*[137] Rather, it typifies a ''race'' to a workably or effectively competitive price. On the *licensees'* side of the market (the buyers' side), the limit on the demand for lower rates through steering is reached when the noninteractive service is no longer in a position to make further substitutions of one record company's sound recordings for another's because the potential for lost revenues exceeds the cost savings.[138] On the *licensors'* side of the market (the sellers' side), the limit on the willingness to supply recordings at reduced rates is reached when the licensor determines that any further reduction in the rate will not be sufficiently to cover all marginal and recurring fixed costs (including opportunity costs) for its particular repertoire. (This is essentially stating in words the fundamentals of the Lerner Equation discussed at note 123 *supra*).

Because the Judges are utilizing the benchmark approach to rate setting—as both SoundExchange and Pandora endorse—the limits to steering (like the value of promotion and substitution) are implicit in (''baked-in'') the terms of the relevant benchmarks. That is, Pandora and Merlin entered into their agreement because each concluded that its steering terms were advantageous.[139]

SoundExchange argues that, even if the threat of steering could cause a reduction in rates in the hypothetical noninteractive market, the Services have not provided any proof of an actual threat of steering in the direct noninteractive licensing market, but rather have presented only evidence of actual (not threatened) steering. *See, e.g.,* 5/27/15 Tr. 6076 (Talley) (''[N]ot one of these transactions . . . is either negotiated in the shadow of a threat to steer away or negotiated with an undertaking to steer away. It's in the opposite direction . . . a promise to steer towards . . . as opposed to away from. . . .'').

SoundExchange's argument is unpersuasive, for two reasons. First, the evidence shows that Merlin members opted-in to the Pandora/Merlin Agreement specifically because they anticipated that Pandora might enter

[137] *See, e.g.,* Van Arman WDT at 14.

[138] The existence and identification of such a limit was the point of Pandora's steering experiments.

[139] Likewise, iHeart and Warner entered into their steering-based agreement because it was mutually advantageous. By ''advantageous,'' the Judges are noting the essence of the willing buyer/willing seller paradigm—that sophisticated commercial buyers and sellers are presumed to act rationally in their self-interest when entering into agreements that are not coercive.

into steering agreements with other record companies, including the Majors. In fact, SoundExchange's' own witness testified that it was in his record company's self-interest to act ''defensive[ly]'' to enter the Pandora/Merlin Agreement, in light of the fact that Pandora might enter into ''similarly structured deals'' with other record companies. 4/28/15 Tr. 610–11 (Van Arman); *see* 6/1/15 Tr. 6963 (Lexton). These facts reflect the general power of steering as a threat in the marketplace.

The Judges also find unpersuasive the criticism by SoundExchange that there is no record evidence of direct noninteractive agreements that were forged *solely* through a threat of steering. The point of the steering argument is to demonstrate what would transpire in the hypothetical effectively competitive market in which no statutory rate existed—not to demonstrate that a particular form of agreement is pervasive in the market with the extant statutory rate.[140] It is imperative not to confuse the hypothetical market with the actual regulated market.[141]

Moreover, the Judges find the economic opinion expressed by Dr. Shapiro—equating steering with price competition—to be correct. The ability of noninteractive services to steer toward lower priced recordings (and, by necessity therefore, away from higher priced recordings) is the essence of price competition. With Pandora (and iHeart) having demonstrated the capacity and willingness to steer in this manner, it would be economically irrational for the other record companies (that had not agreed to steering) to maintain their position and incur losses. To assume that record companies would ignore the ''opportunity cost'' of steering away from their repertoires would be a fundamental economic mistake. *See* 5/4/15 Tr. 1516–17(Lys) (emphasizing that ''opportunity costs are real costs'').

Dr. Shapiro's point regarding the economic ''threat'' posed, now that steering is technologically possible, can be made clear through a hypothetical example:

- Assume a Licensee was paying a market price of $0.0020 and historically (''naturally'') played 1,000,000 of its total number of songs from Licensor A, thus paying $2,000 to Licensor A.
- Now, assume the Licensee and Licensor A enter into a ''steering'' deal, whereby Licensee promises to play an additional 200,000 songs whose copyrights are owned by Licensor A, representing a 20% increase over the historical (''natural'') quantity of 1,000,000 noted above.
- In exchange, Licensee demands, and Licensor agrees, that Licensor A will receive less than $0.0020 per play, specifically, 10% less, *i.e.,* only $0.0018.

Compare the two scenarios:

- Before steering, the money exchanged equaled $2,000.
- After steering, the money exchanged is more, $2,160 (1,200,000 units × $0.0018).

That is clearly a benefit to Licensor A, who has made an additional $160 ($2160 − $2000).

The corresponding benefit to Licensee arises from the fact that it can now—*ex post* steering—play 1,200,000 songs at $0.0018 per song for a total cost of $2160. *Ex ante* steering, Licensee would have been required to pay the old market price of $0.0020 per song to another Licensor (call it Licensor B) for those 200,000 songs (which equals $400), plus the $0.0020 Licensee also paid to Licensor A *ex ante* steering for 1,000,000 songs (which equals $2,000), for a sum of $2,400 for 1,200,000 songs. Thus, Licensee has saved $240 in costs ($2,400 − ;$2,160). Since there is no ''free lunch,'' who loses? The loser is Licensor B, who has lost the revenue from the foregone licensing of 200,000 songs.

How can Licensor B avoid this loss? By responding to this steering by competing on price and lowering its own price to $0.0018.

How can Licensee obtain the lower price of $0.0018 without any actual steering? By *threatening* to steer and thereby compelling Licensors A and B to compete for Licensee's business by offering to accept a price of $0.0018. Moreover, if Licensor B incurs the loss described above in one contracting period, that loss serves as the ''threat'' necessary to avoid such losses in the subsequent contracting periods by also entering into an appropriate steering arrangement.

Will there be a ''race to the bottom?'' No. The so-called ''bottom'' will be marked by the rate that equates: (1) An acceptable return to the Licensors given their costs (including opportunity costs) and the differentiated values of their repertoires; and (2) an acceptable return to the Licensee by steering as far as possible (but no further), as limited by the potential loss of revenue if steering interferes with revenue as a consequence of an inferior mix of sound recordings.

ii. Is steering in the hypothetical market sufficient to establish an ''effectively competitive'' rate?

The Judges conclude, based on the record evidence and expert testimony, that the injection of steering into the hypothetical market provides for the ''effective competition'' that the law requires. Both Dr. Shapiro and Dr. Katz opined, and the Judges agree, that effective or workable competition arises when licensees have the reasonable (albeit still constrained) ability to select sound recording inputs based upon price.

The injection of steering into the hypothetical market can occur in two ways, as it has in this determination. First, as in the case of the Pandora/Merlin Agreement (and the iHeart/Warner Agreement discussed *infra*), steering is incorporated by adopting a benchmark that explicitly includes steering. Second, a steering adjustment can be made to a benchmark rate that is not otherwise effectively competitive. Such is the case with SoundExchange's interactive benchmark, which needs a steering adjustment in order to eliminate the ''complementary oligopoly'' effect discussed *supra.* The Judges note that adjustments to benchmark rates have regularly been made in § 114 proceedings—and indeed are required to be made—in order to allow the benchmark to correspond to the hypothetical market required by the statute. Here, as concluded *supra,* the

[140] One reason why steering is not yet more widespread in the market, as Dr. Shapiro noted, is that noninteractive services have developed the steering technology only in the past few years since the *Web III* proceeding. Shapiro WDT at 15 (''Pandora has *now* tested and proven its ability to modify its playlist-selecting algorithms to rely more or less heavily on the music of particular record companies.'') (emphasis added). Now that this technological genie is out of the bottle, the Judges cannot minimize its impact in the hypothetical market.

[141] By way of comparison, Dr. Rubinfeld's ''ratio equality'' benchmark royalty rate likewise does not ''exist'' in the *actual* market. Rather, he derived that benchmark rate by: (1) Looking at market data from direct licenses; and (2) applying his economic expertise to express certain economic opinions regarding the necessary equality of the revenue-to-royalty ratio in the interactive and noninteractive markets. (As noted *infra,* Dr. Rubinfeld's ''assumption'' was revealed at the hearing to be premised on a model that serves to limit its applicability.). So too the steering-based proposed royalty rate is based on a benchmark analysis that is tied to certain expert economic opinions regarding market behavior. The Judges must weigh and apply ''economic . . . information presented by the parties'' as the bases for their rate determinations, 17 U.S.C. 114(f)(2)(B), and therefore the expert opinions set forth by the parties' economists as to how the hypothetical market will perform are vital aspects of the record to be considered by the Judges. More broadly, the Judges note that the benchmarking approach, while highly instructive, is not the sole method for ascertaining the statutory rate—indeed, the statute does not require the Judges to utilize the benchmark approach. Here, the threat of steering has been demonstrated by a *combination* of benchmarks, experiments and expert economic theorizing using fundamental principles of profit maximization and opportunity cost. This combination of proofs and arguments is actually *more persuasive* to the Judges than a mere benchmark standing alone.

Judges have found as a matter of law that § 114 requires that they set a rate which is effectively competitive. Thus, the steering adjustment is of a class with any other adjustments necessary to harmonize the benchmark rate with the statutory requisites. *See Web II,* 72 FR at 24092 (noting the Judges' duty ''to determine if the benchmark agreements require any further adjustments based on any evidence of differences between the benchmark market and the target hypothetical market.'').

It is important to emphasize the limited nature of this sort of effective competition. Price competition through steering does not diminish the stand-alone monopoly value of any one sound recording. Further, effective competition through steering does not diminish the firm-specific monopoly value of each Major's repertoire taken as a whole. Although Dr. Katz urged the Judges to reduce the statutory rate to eliminate that market power as well, Katz WDT ¶ 43, the Judges decline to do so. There is absolutely no record evidence to suggest that the market power that a Major enjoys individually by ownership of its collective repertoire is in any sense the consequence of improper activity or that it is being used *individually* by a Major to diminish competition. That is, the Judges have no evidence before them to demonstrate that the Majors' size and *individual* market power is not the result of the efficiencies and economies of scale and/or their superior operations. *See generally,* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy,* 16 J.L. Econ. 1, 3 (1973) (noting that ''scale economies,'' ''[n]ew efficiencies'' and ''superior ability'' can form a ''competitive basis acquiring a measure of monopoly power''). In the absence of evidence that the Majors' market shares preclude effective competition, the Judges have no basis on this record to adjust rates lower to reflect that market concentration.

This holding must not be confused with the Judges' holding regarding the anticompetitive effects of the complementary oligopoly that exists among the Majors. Because the Majors could utilize their combined market power to prevent price competition among them by virtue of their complementary oligopoly power—as proven by the evidence of the pro-competitive effects of steering and the admissions of Universal and its agents discussed *supra,* section IV.B.3—the Judges must establish rates that reflect steering, in order to reflect an ''effectively competitive'' market.[142] Indeed, even economists quite unwilling to assume that a given monopoly or oligopoly structure is inefficient and anticompetitive bristle at the idea that supranormal pricing arising from a complementary oligopoly is reflective of a well-functioning competitive market. *See, e.g.,* Francesco Parisi and Ben DePoorter, *The Market for Intellectual Property: The Case of Complementary Oligopoly* in *The Economics of Copyrights: Developments in Research and Analysis* (W. Gordon and R. Watt eds. 2003) (noting the economic benefits of blanket licenses in reducing the greater-than-monopoly pricing of complementary oligopolists); Mark Lemley and Philip Weiser, *Should Property or Liability Rules Govern Information?* 85 Tex. L. Rev. 784, 786–87, 824 (2007) (comparing the ''hold up'' (''rent seeking'') strategies of copyright owners seeking supranormal complementary compensation and of the owner of a parcel of real property that is complementary to multiple other parcels required for a large scale development, and noting that a compulsory license with a royalty rate set by a regulatory authority (*noting the CRB by name*) can ''minimize the opportunity for rent-seeking behavior'').

iii. Did Pandora test steering under ''Real World'' conditions?

The Judges do not agree with SoundExchange's criticism that the impact of steering is uncertain because listeners were unaware that such steering was being undertaken. The Judges reach this conclusion for three reasons.

First, there is no evidence that Pandora, or any noninteractive service, obtains and retains listeners by describing in any detail the technical methodology it uses to select songs. The purpose of a streaming service is to provide songs to listeners—if they enjoy the music they will be satisfied, if they do not enjoy the music they will be unsatisfied, to the commercial detriment of the service. While it is true that Pandora promotes its service as playing only the music the listener wants to hear, the proof of the pudding, so to speak, is in the listening, not in the puffery used in advertising.

Second, it is clear that Pandora has not taken any steps to conceal that it has engaged in such steering or that it intends to do so going forward. In the present proceeding, the parties had the ability, which they exercised with regularity, to enter into closed session to avoid public disclosure of commercial information they intended to maintain as confidential. However, at no time did Pandora attempt to close the proceedings to prevent the public from learning of the introduction of steering into its music delivery model. The Judges note that no competing service has advertised against Pandora or iHeart, attacking its use of steering. 5/19/15 Tr. 4775–76 (Shapiro). Thus, the evidence is not sufficient to indicate that Pandora would suffer an economic loss merely from listener awareness that Pandora engages in steering.

Third, although the extent of the steering may be economically significant to the licensors and licensees, the extent of steering at issue in this proceeding may have little noticeable impact on listeners. For example, consider the result if, hypothetically, a noninteractive service were to steer away from Major A (which had a pre-steering natural (historic) play rate of 40% on that service) by 12.5%.

Ex ante steering, the copyright on 4 in every 10 songs played on that noninteractive service was owned by Major A. Steering away from Major A by 12.5% would reduce Major A's play rate by 5 percentage points (12.5% of 40% is 5 percentage points). Thus, *ex post* steering, Major A's songs would constitute 35% of the plays on this noninteractive service instead of 40% of the plays.

Consider a consumer who listened to this noninteractive service for a period of time sufficient to hear 20 songs.

Ex ante steering, the consumer would have heard 8 songs from Major A's repertoire (40% × 20 songs = 8 songs).

Ex post steering, the consumer would have heard 7 songs from Major A's repertoire (35% × 20 songs = 7 songs).

The one replacement song from another record company's repertoire would not be a random song, but rather would be the song the algorithm or tastemaker selected after disqualifying the eighth song from Major A.[143] The

[142] The Judges' findings on this issue are not only consonant with the expert opinions of Drs. Shapiro and Katz, but are also consistent with the expert economic testimony of SoundExchange's own witness in *Web III,* Dr. Ordover. *See Web III Remand* at 23114 (summarizing Dr. Ordover's testimony as concluding that ''if the repertoires of all [Majors] were each required by webcasters (*i.e.,* if the repertoires were necessary complements) . . . each [Major] would have an incentive to charge a monopoly price to maximize its profits . . . constitut[ing] *higher monopoly costs* . . . paid by webcasters to each of the [Majors].'') (emphasis added). The Judges in this determination adopt this economic reasoning and will not allow such complementary oligopoly power to be incorporated into the statutory rate.

[143] In his oral testimony, Dr. Shapiro utilized another example, assuming a 15% steering ''boost'' to a Major with a prior ''natural'' performance rate of 20%. According to Dr. Shapiro, such a steering

issue thus is whether such a change in song delivery would diminish listenership to a noninteractive service to a point that would be economically harmful to the service, thus dissuading the service from steering. In fact, Pandora presented evidence regarding this issue, to which the Judges now turn.

iv. What is the impact of Pandora's Steering under the Pandora/Merlin agreement and in Pandora's Steering experiments?

Pandora's steering under the Pandora/Merlin Agreement, which guarantees a [REDACTED]% level of steering, has not resulted in any negative feedback or other deleterious consequence for Pandora. Likewise, the series of steering experiments conducted by Pandora indicated that Pandora could steer away from or toward a Major's repertoire by a change of ± 15% without causing a statistically significant change in listening behavior. McBride WDT ¶ 21.

Importantly, SoundExchange levels no criticisms at Pandora's steering experiments, save to make the point, rejected above, that the experiments did not reflect ''real world'' conditions. *See* SX RPFF ¶¶ 780–784 (and record citations therein).[144] The Judges likewise fail to identify any problems with regard to Pandora's steering experiments. Thus, the evidence is undisputed that Pandora can steer at least ± 15% of its music toward or away from the Majors without a negative impact on listenership.[145]

v. Is the value of steering available under the statutory license?

SoundExchange argues that any benefits from steering must be treated like any other consideration in a direct license that is not authorized under the Act. That is, SoundExchange asserts that steering must be independently valued, and the separate value must be added to the statutory rate. The Judges disagree.[146]

Steering, as Dr. Shapiro emphasized, is simply an example of price competition at work. Further, § 114(f)(2)(B) of the Act and prior decisional law require that the commercial rate reflect an ''effectively competitive'' market. Therefore, the value of steering is a *component* of the statutory license—not extraneous to it—and should not be excluded through an adjustment process or otherwise from the rate ultimately set by the Judges.[147]

b. Does the Pandora/Merlin Agreement contain non-statutory value that either (i) disqualifies the Pandora/Merlin Agreement as a benchmark; or (ii) diminishes the value of steering in the Pandora/Merlin Agreement?

i. The Potential Presence of Non-Statutory Value Does not Disqualify the Pandora/Merlin Agreement as a Benchmark

SoundExchange and Pandora both note that several additional elements of *potential* value are present in the Pandora/Merlin Agreement. Dr. Shapiro, on behalf of Pandora's direct case, went through each item of additional consideration and explained why he either adjusted his benchmark value higher (as in the case of certain advertising consideration) or declined to adjust the benchmark for other elements of potential value.

The Judges do not find that the mere presence of other items of potential value serves to disqualify the Pandora/Merlin Agreement as a suitable benchmark. Benchmarks may be imperfect in the sense that they include features that are ill-suited for adoption in the statutory rate. To reject a proposed benchmark for that reason alone would be—to put it colloquially—throwing out the baby with the bathwater. Because there is no single undifferentiated market for the statutory service, benchmarks must be borrowed from other markets or sub-markets and will always be imperfect to some degree and either in need of adjustment or limited in their applicability. But to ignore a benchmark for that reason alone would be an inappropriate indictment of the benchmarking process itself.

Further, Dr. Shapiro testified that he found these elements of additional consideration to either: (1) Provide joint value to Pandora as well as Merlin members; (2) be unlikely to be achieved; or (3) be already incorporated into his valuation. There was no sufficient rebuttal by SoundExchange witnesses to these points. As the Judges explain *infra* in their discussion of the same issue in connection with the iHeart/Warner Agreement, an important general consideration relating to this issue is the absence of evidence of value from a party with regard to such additional terms, when that party has the incentive (as well as the means) to provide the Judges with such evidence.

Additionally, SoundExchange's assertion that the additional items created sufficient value to offset the lower rate in the Pandora/Merlin Agreement strikes the Judges as economically irrational. If the supposed additional value of the non-steering items in the Pandora/Merlin Agreement equals the difference between the non-steered rates and the lower steered rates, then what is the point of the parties incurring the transaction costs associated with negotiating such a deal? Why would Pandora commit to incur significant expenses to begin to set up an infrastructure necessary to perform the steering function?

change would have ''almost no perceptible impact on the listening experience, as it would entail a change in ''one [song] out of 30'' or ''one song every couple hours.'' 5/19/15 Tr. 4630–35 (Shapiro) (and also explaining that steering need not result in a change with regard to the seeded song or artist, but rather would affect only subsequent songs played on the listener's station).

[144] This is a curious criticism of an economic experiment. By its very nature, an economic experiment, or an economic model, is intentionally *not* designed to replicate real world conditions, but rather to isolate certain conditions of the real world for testing and to hold the other conditions constant. The particular condition that SoundExchange claims the steering experiments held constant—listener knowledge of steering in the algorithm—seems wholly beside the point to the Judges. To state the obvious, consumers listen to noninteractive services because of the quality of the music, not because of their interest in what goes into the algorithmic ''black box.'' If the music is of poor quality, then listeners will vote with their feet—or, more correctly,—with their ears.

[145] iHeart did not run experiments regarding its steering of sound recordings [REDACTED]. However, iHeart [REDACTED] and received complaints from noninteractive custom listeners that [REDACTED]. *See* 6/2/15 Tr. 738–51 (Cutler); SX Ex. 1037 [REDACTED]''.

[146] The Pandora/Merlin Agreement allows for a very limited and conditional [REDACTED]. *See* PAN Ex. 50141(c)(v) and (2)(c). However, there is no evidence in the record to suggest that such a limited and conditional [REDACTED] would be exercised and, if so, how often. There is also no evidence in the record to demonstrate the extent this [REDACTED] would impact the effective rate under the Pandora/Merlin Agreement. Therefore, this contractual safeguard does not constitute a basis to adjust the Pandora/Merlin benchmark.

[147] SoundExchange attempts to impeach Dr. Shapiro on this point by seeking to use his rebuttal testimony against him. *See* SX PFF ¶ 705 (''[Dr.] Shapiro also acknowledged that steering commitments have value. In response to [Dr.] Rubinfeld's statement that ''a direct license containing a binding steering commitment is unsuitable as a benchmark unless some adjustment is made to reflect the value of the commitment to the record company,'' [Dr.] Shapiro agreed with [Dr.] Rubinfeld that ''some adjustment is appropriate.'' Shapiro WRT at 41. However, SoundExchange omitted the remainder of Dr. Shapiro's testimony, which omission seriously distorts his opinion: Without the omission, Dr. Shapiro's full testimony on this point states: ''[Dr.] Rubinfeld takes the position that a direct license containing a binding steering commitment is unsuitable as a benchmark unless some adjustment is made to reflect the value of the commitment to the record company. I agree that some adjustment is appropriate, *but only to the extent that the steering commitment exceeds the amount of steering that the webcaster would engage in just based on price differences. Id.* (emphasis in original).

ii. The Evidence Does not Support a Lessening in the Usefulness of the Pandora/Merlin Agreement as a Benchmark for the Rates Indies Would Pay in the Hypothetical Market Beyond the Adjustments Made by Dr. Shapiro

In rebuttal to Dr. Shapiro's item-by-item consideration of the potential additional items of value in the Pandora/Merlin Agreement, SoundExchange did not introduce expert testimony to establish alternative values. Rather, SoundExchange relied on the narrative testimony of industry witnesses Glen Barros, Darius van Arman and Simon Wheeler to support the position that these other items had some *unquantified value* to the Merlin members. Although such after-the-fact assertions can carry some weight, the Judges find such testimony to be inconsistent with Merlin's conduct during the negotiations.

More particularly, although Merlin has the ability to negotiate and evaluate agreements in a sophisticated manner, it failed to value these additional elements of consideration. *See, e.g.,* 5/1/15 Tr. 125–52 (Simon Wheeler) (Merlin, is ''just as capable of understanding the complexity of the rights and licenses at issue in digital streaming as major record labels.''); 5/28/15 Tr. 6513 (Barros) (agreeing that independent label ''Concord's assessment of the value it receives from licensing its repertoire is just as sophisticated as any other label.''); 6/1/15 Tr. 6924–25 (Lexton) (''Merlin brings expertise to bear on its negotiations with digital music services.''). If the extra-statutory items were of particular and essential value to Merlin, the Judges would have expected to be presented with evidence as to how Merlin valued these several items. However, as noted, no such evidence was presented.[148]

Additionally, one Merlin member presented as a witness by SoundExchange, Glen Barros, President and C.E.O. of Concord Record Group, testified that ''in all likelihood'' he would have opted-in to the Pandora/Merlin Agreement *even if these other elements of value had not been included in that agreement.* 5/28/15 Tr. 6537–39 (Barros) (emphasis added).[149]

Although Mr. Barros represents only one Indie, SoundExchange selected him as a representative of the Indies' position regarding the value of the Pandora/Merlin Agreement. Clearly, SoundExchange could not present the testimony of more than [REDACTED] opting-in Merlin members, and the Judges therefore find the testimony against interest by this Merlin member selected by SoundExchange to be particularly probative.

Additionally, a May 15, 2014 internal email written by Mr. Lexton appeared to the Judges to reference Merlin's strategy to attempt to obfuscate the usefulness of the Pandora/Merlin Agreement as a benchmark in this proceeding:

[REDACTED]

SX Ex. 102. Thus, it appears to the Judges that Merlin's negotiation of additional terms was intended (at least in part) ''to facilitate'' the very argument SoundExchange now asserts through Mr. Lexton's testimony regarding the purported significance of the unvalued additional terms.

In a subsequent email to Pandora dated June 3, 2014, Mr. Lexton made Merlin's position in this regard even more explicit, by asking Pandora to include the following proposed language in the final agreement: [REDACTED]

PAN Ex. 5116 at SNDEX0315243. That request was rejected by Pandora and the requested language was never included in the final Pandora/Merlin Agreement. *Id.* Nonetheless, Merlin proceeded to enter into the Pandora/Merlin Agreement, anticipating that it would be used by Pandora as evidence in this proceeding. *See, e.g.,* 6/1/15 Tr. 6962, 6966 (Lexton); *id.* at 7095 (Wheeler); SX Ex. 102 at 3 (5/14/15/14 email among Merlin executives); PAN Ex. 5117 at SNDEX0437582 (6/9/14 internal email from Mr. Lexton).

The foregoing emails and testimony, combined with Merlin's and SoundExchange's failure to separately value the other elements of consideration either during negotiation or during the proceeding, strongly indicate to the Judges that Merlin found the value in the Pandora/Merlin Agreement to lie in the steering—that is, the trade-off of more plays at a lower rate for more total revenue.

In sum, if there was any additional value to Merlin from the other items sufficient to reduce the overall value of steering as adopted for a statutory license, the record evidence fails to provide a basis for such an adjustment. For these reasons, the Judges decline to increase the Pandora/Merlin benchmark to reflect any extra-statutory consideration that was not already accounted for by Dr. Shapiro.

c. Is Merlin sufficiently representative of a segment of the sound recording market?

The Judges reject SoundExchange's argument that Merlin is not sufficiently representative of the independent sector of the sound recording industry. The Judges rely on several facts in reaching this conclusion.

First, the Judges note that between [REDACTED] and [REDACTED] Merlin members, out of approximately [REDACTED] total members opted-in to the Merlin Agreement. Thus, it is accurate to state that the evidence regarding the Pandora/Merlin Agreement relates—to use Dr. Talley's term—to [REDACTED] to [REDACTED] ''dyads'' between licensors and a licensee. The Judges find this quantity of contracts to be significant and probative with regard to: (1) Steering rates that Indies would accept; and (2) the principle that steering can be utilized as means of price competition in the noninteractive market.

In addition, the Judges do not find persuasive SoundExchange's argument that a majority of Merlin members who opted-in to the Pandora/Merlin Agreement did so through their agreements with aggregators and/or distributors. These opting-in members delegated the decision whether to opt-in to these distributors and aggregators and there was certainly no evidence or testimony to suggest that these arrangements were coerced or that any Merlin members who opted-in through this process disagreed with the decision. Thus, the decision by Merlin members to delegate the decision whether to opt-in to its agents is a component of the business model these Merlin members chose to follow. The Judges cannot criticize the decision of these Merlin members, and by extension, call into question their intention to be bound by the Pandora/Merlin Agreement, merely because they have arranged their licensing affairs in this manner. By way of analogy, just as SoundExchange's criticism of Pandora's business model is not relevant to the setting of rates in this proceeding, the Judges do not find relevant the business judgments of Merlin members to utilize aggregators and/or distributors as their agents in this regard.

Relatedly, the Judges find that the fact that Merlin negotiated collectively on behalf of its members does not diminish the value of Merlin as a party capable of entering into an agreement that is

[148] In fact, with regard to one of the unquantified items of alleged value—the [REDACTED] provision—contemporaneous correspondence among Merlin members and personnel discounted any value in the [REDACTED] provision in the Pandora/Merlin Agreement. PAN Ex. 5110 at SNDEX0374284 (Correspondence from [REDACTED] stating that ''[REDACTED]'').

[149] SoundExchange asserts that Mr. Barros' subsequent testimony that he found the ability for his record company to receive royalties on pre-1972 royalties to be a ''gating'' issue and that such testimony undercut the testimony quoted in the text, *supra.* The Judges find Mr. Barros' testimony as cited in the text, *supra,* to be credible, and they find that his subsequent attempt to qualify that testimony to be lacking in credibility.

otherwise an appropriate benchmark. Merlin members utilize the collective capacities of Merlin in order to transact licensing business in a more efficient manner, as described by a Merlin's testifying executive, Mr. Lexton:

> Merlin's purpose is to allow independent record companies to benefit from direct deals negotiated by Merlin on a collective basis. As such Merlin is a one stop shop for recorded music rights licensing. It represents recorded music rights owned and/or controlled by independent record labels and distributors who are eligible and choose to join Merlin. . . . Merlin's core remit is to represent its members in negotiating licenses with digital music services in the hope of overcoming market fragmentation issues that have historically challenged the independent music sector particularly in the digital domain.

Lexton WRT ¶¶ 11–12. Indeed, Merlin apparently is sufficiently successful in this endeavor that one of the Majors, [REDACTED], has characterized Merlin as the ''fifth Major.'' PAN Ex. 5349 at 9 ([REDACTED] approvingly noting to [REDACTED] that Merlin publicly presents itself as a ''fifth major'').[150]

Further, the Judges reject SoundExchange's assertion that Merlin as a collective had different incentives than its members that somehow diminish the value of the Pandora/Merlin Agreement as a benchmark. These incentives included financial and status benefits to Merlin if its members opted-in, which were distinct from whatever benefits individual members might obtain by opting in to the Pandora/Merlin Agreement. The Judges understand this criticism to be based upon the classic principal-agency problem, in which the interests of the principals (Merlin members) may not be fully aligned with the interests of the agent (Merlin). However, this is a common problem when principals delegate functions to agents. Unless the evidence demonstrates that the agent (Merlin) has engaged in a breach of duty toward its principals (Merlin members), the lack of a complete alignment of interests does not invalidate the benchmark status of the agreement entered into by the principal. Indeed, because this is the principal-agent arrangement that the Merlin members *voluntarily* created—including whatever misalignments in incentives might theoretically exist—it is especially representative of a marketplace transaction. The fact that approximately [REDACTED]-[REDACTED]% of Merlin's [REDACTED] members opted-in to the Pandora/Merlin Agreement is compelling evidence that the Merlin members found the terms of the agreement beneficial to them, notwithstanding any alleged separate benefits to Merlin as a collective organization.

The Judges also reject the criticism that Merlin has not uniformly represented its members because Pandora has used its editorial discretion to exclude (as of the time of the hearing) from its playlist sound recordings owned by some of the opting-in Merlin members. There is no allegation that Pandora promised to make all sound recordings available on its service, and therefore each Merlin member accepted the risk that Pandora, in its editorial judgment, might not include some or all of its sound recordings.

Finally, the Judges do not find merit in SoundExchange's argument that Merlin is not a sufficient representative of Indies in the marketplace. SoundExchange did not produce any witnesses from Indies who were not members of Merlin to testify to this effect. Rather, SoundExchange produced witnesses whose Indie record companies *did* opt-in to the Pandora/Merlin Agreement. Given Merlin's capacity to negotiate and its well-regarded industry status, the fact that non-Merlin Indies are not covered by the Pandora/Merlin Agreement, in the absence of other evidence, is not sufficient to call into question the usefulness of this benchmark.

d. Did Pandora have substantial market power that is reflected in lower effective rates in the Pandora/Merlin Agreement?

The Judges reject SoundExchange's assertion that Pandora had significant market power that caused the effective rates in the Pandora/Merlin Agreement to be lower than effectively competitive rates. Initially, the Judges note that this assertion is not supported by any empirical market data, analysis, or comparison with other negotiated comparable interactive rates.

More importantly, the issue of Pandora's ''market power,'' *vel non,* was anticipated and addressed by Pandora's economic expert, Dr. Shapiro, who explained:

> Pandora is the largest noninteractive webcaster. I have considered specifically whether Pandora had undue market power in its negotiations with Merlin. In the language of antitrust economists, I have considered whether Pandora has monopsony power over Merlin. Pandora's share of listening among noninteractive webcasters is *not* the key variable for determining whether or not Pandora has monopsony power over Merlin. Rather, the correct variable upon which to focus is the share of the Merlin Labels' revenues that comes from Pandora. If a very large share of the Merlin Labels' revenues came from any single music user, then that music user could well have monopsony power over Merlin. But this is demonstrably not the case for Pandora. The Merlin Labels generate revenues from many different users of their sound recordings, including other noninteractive webcasters, interactive services, and from the sale of physical albums and digital downloads. In fact, I estimate, based on data for the recorded music industry overall, that *Pandora accounted for roughly 5 percent of the revenues received by the Merlin Labels in 2013 for the licensing of their music in the United States. Thus, Pandora's share of the Merlin Labels' revenues is far short of the level that would be necessary for Pandora to have undue market power in its negotiations with Merlin.*

Shapiro WDT at 24–25 (emphasis added). The Judges find this explanation sufficient to contradict the assertion that Pandora exercised undue market power in negotiating the terms of the Pandora/Merlin Agreement.

There is an additional and separately sufficient reason why SoundExchange's claim of Pandora's monopsony power cannot be adopted. The assertion that Pandora exercised market power in these negotiations ignores the fact that Merlin did not have to accept any of Pandora's terms—Merlin and its members could have fallen back on the Pureplay statutory settlement rates rather than accede to any demand by Pandora. That is, by this particular assertion, SoundExchange is assuming *arguendo* that the effective Pandora/Merlin rates are below an appropriate market rate because of Pandora's market power.[151] But why would Merlin and its members voluntarily enter into an agreement to accept rates lower than the statutory alternative and lower than what would exist in a competitive market?

Therefore, the Judges reject the assertion that Pandora exercised undue market power in negotiating the effective rates contained in the Pandora/Merlin Agreement.

e. Was the Pandora/Merlin Agreement merely ''experimental?''

Two of SoundExchange's witnesses characterized the Pandora/Merlin Agreement as an ''experiment,'' as distinguished from an actual marketplace agreement. The Judges reject this attempt to characterize this real agreement, involving the exchange of actual consideration, as an ''experiment.''

An economic experiment is undertaken under controlled laboratory conditions, as distinguished from

[150] At the time, there were four Majors, Universal, Sony, Warner, and EMI.

[151] SoundExchange is thus assuming here that, under section 114(f)(2)(B), a benchmark rate must reflect an adequate level of competition.

market transactions that take place in the real world. *See* Guillaume R. Frechette and Andrew Schotter, Handbook of Experimental Economic Methodology 21 (2015) (''[T]o run an experiment . . . experimenters are of necessity engaged in market design *in the laboratory.''*) (emphasis added). Quite clearly, the Pandora/Merlin Agreement was not and is not an ''economic experiment.''

SoundExchange's witnesses may have used the word ''experiment'' to suggest a tentative or impermanent relationship between Pandora and Merlin. If so, that criticism proves too much, as all benchmark agreements—indeed virtually all agreements—could be characterized as ''experiments,'' in that they have stated durations, and the parties are free to vary the terms of their economic relationship after the so-called ''experiment'' has expired. In this sense, the word ''experiment'' is misused to cast a wide disqualifying net on all benchmark agreements.

f. Has Pandora's performance under the Pandora/Merlin Agreement compromised the usefulness of that benchmark? [152]

Even assuming that the Pandora/Merlin Agreement is, in principle, a useful benchmark, SoundExchange asks the Judges to look to Pandora's alleged poor performance of its obligations under the Pandora/Merlin Agreement. As detailed *supra,* SoundExchange alleges that Pandora has failed to perform certain contract obligations (such as, *e.g.,* [REDACTED]) and that the cost of performance is daunting for Pandora, which combine to create what one might call ''seller's remorse'' among Merlin participants with regard to the licensing of rights under the Pandora/Merlin Agreement.

Pandora does not dispute that it had not (as of the hearing date) been able to implement all the benefits promised in the Pandora/Merlin Agreement. However, the Judges note that SoundExchange did not produce any correspondence from Merlin or its members complaining about the failure of Pandora to perform, or any threat to terminate the agreement or sue Pandora for nonperformance. Rather, the evidence suggests that Merlin recognized that the structuring of performance needed to be an ongoing and collaborative effort. As Pandora's Chief Financial Officer, Mr. Herring, testified:

[REDACTED]

5/18/15 Tr. 4318 (Herring); *see also* PAN Ex. 5014 (Pandora/Merlin Agreement, ''Feature Implementation Timeline''), Exhibit C thereto ([REDACTED]'' (emphasis added). SoundExchange did not produce evidence to call into question Pandora's performance under this [REDACTED] clause.

More importantly, the evidence indicates that Pandora has performed its core obligation under the Pandora/Merlin Agreement: The increase in spins of Merlin recordings, in the aggregate, by at least [REDACTED]%, above their collective ''natural'' rate. In fact the evidence shows that Pandora is overspinning Merlin member recordings collectively by [REDACTED]%. On the individual Merlin label level, the results have been uneven—some Merlin labels have been overspun by [REDACTED]-[REDACTED]% of their natural rate, *see* 5/18/15 Tr. 4229–30, 4291–4293 (Herring); SX Ex. 2310 (showing hundreds of Merlin Labels with rates of overspinning exceeding [REDACTED]%)—but other Merlin Labels are spinning at less than a [REDACTED]% increase their above their prior levels. SX Ex. 1748 at 2; SX Ex. 2310.[153]

However, the only specific promise by Pandora of increased spins in the Pandora/Merlin Agreement was its promise [REDACTED] to increase Merlin spins collectively by [REDACTED]%, and it appears undisputed that Pandora has performed this obligation and, in fact, has far exceeded the [REDACTED]% minimum. With regard to the underspinning of individual Merlin Labels, Pandora represented in the Pandora/Merlin Agreement only to [REDACTED] to increase spins by at least [REDACTED]% above the natural rate. Thus, the individual members objectively cannot complain about the level of overspinning at any point in time, unless they can also claim that Pandora had not been [REDACTED]. As noted above, SoundExchange did not produce any evidence suggesting that any individual members had lodged such a complaint.

With regard to SoundExchange's claim that Pandora has incurred substantial unexpected capital costs in implementing a steering system, Mr. Herring testified that these investments, although motivated in the short-term and in part by the Merlin Agreement, in fact laid the groundwork for Pandora to implement steering more broadly across the non-interactive webcasting market. 5/18/15 Tr. 4313–17 (Herring) (''some of these costs are fixed costs to be amortized over time with the anticipation of being applied to other direct licenses with other record companies, and expensed at the time that the costs are incurred, and therefore ''spread over those deals.''). Thus, the existence of these costs does not establish any fact to contradict the Judges' finding that the Pandora/Merlin Agreement is a useful benchmark. In fact, Pandora's commitment to incur substantial build-out costs to create the steering architecture underscores that this agreement (and the iHeart/Warner Agreement) represents the cutting-edge of a technological advance that can ameliorate the anticompetitive effects of a complementary oligopoly.

g. Do the steering experiments and the Pandora/Merlin Agreement demonstrate the rate to which a major would agree?

The Judges find this SoundExchange criticism to be meritorious. These steering experiments reflect only a *quantity* adjustment that could be attempted with regard to the Majors, not a rate adjustment arising from steering to or from a Major. By contrast, the Pandora/Merlin Agreement does reflect the impact of steering on negotiated *rates* (as does the iHeart/Warner Agreement). Thus, while the Judges find the steering experiments to be probative of the general principle that steering can be effected to some extent without a negative impact on listenership, the Judges do not accept that this constitutes direct evidence sufficiently probative of the rates that would result

[152] A general issue of proof arose in this proceeding as to whether a benchmark's value can be measured by the parties' *performance* under a proposed benchmark agreement, in addition to the parties' *expectations* of value when the benchmark was created. This issue arose in a different context, regarding whether iHeart's ''incremental'' rate analysis of its iHeart/Warner Agreement benchmark should be analyzed by reference only to the parties' expectations at the time of contracting, or whether the Judges should also consider the parties' performance under the iHeart/Warner Agreement. As discussed in detail *infra,* the Judges have rejected iHeart's ''incremental'' rate analysis, thereby mooting the issue of whether the parties' performance under that agreement affected the so-called ''incremental'' rate. With regard to the Pandora/Merlin Agreement, SoundExchange argues that Pandora's *performance* under the Pandora/Merlin Agreement indicates that the agreement is not usable as a benchmark. Because—as explained in the text, *infra*—the Judges find that Pandora's performance does not cause them to reject the Pandora/Merlin Agreement as a usable benchmark, the question of whether evidence of performance is *generally* appropriate to consider when setting rates need not be decided by the Judges in this determination.

[153] Labels owned by Beggars Group (whose officer, Simon Wheeler claimed the Pandora/Merlin Agreement was a failure)—including XL Recordings, Matador and Nation Records—are being overspun on Pandora by as much as [REDACTED]%. SX Ex. 2310.

from steering writ large in the marketplace.[154]

Moreover, Pandora's own witness testified in a manner that contradicts Pandora's attempt to bootstrap the Pandora/Merlin rates onto the Majors. Mr. Herring, Pandora's C.F.O., testified that Pandora would have to offer a higher steering-based rate to a Major than Pandora obtained in the Pandora/Merlin Agreement. 5/18/15 Tr. 4253 (Herring). The Judges have noted previously that the Majors' repertoires must be distinguished from those of the Indies. *See SDARS II,* 78 FR at 23063 (the Majors are distinguishable from the Indies ''by virtue of the depth and breadth of their music catalogues [which] make up a critical portion of the sound recording market.'').[155]

Therefore, the Judges consider the rate established by the Pandora/Merlin Agreement to establish only one guidepost (*i.e.,* a relevant financial point of reference) to a statutory rate. The Judges are informed as to the limited weight of this rate in the ultimate statutory rate they shall set, by the fact that Indie sound recordings reflect approximately [REDACTED]% of the sound recordings played on Pandora. SX Ex. 269 at 73.

h. Can the Majors avoid steering in the hypothetical market?

SoundExchange argues that any attempt by a noninteractive service to impose steering on the record companies would be rebuffed by the Majors. In particular, SoundExchange argues that the record companies would respond to a steering threat by: (1) Withholding their entire repertoires; (2) imposing Anti-Steering or ''Most Favored Nation'' contract clauses; and/or (3) requiring up-front lump sum royalty payments from the noninteractive services.

i. Withholding the Entire Repertoire

A Major could respond to a threat of steering by threatening to withhold its entire repertoire from that noninteractive service. There appears to be a consensus that the repertoire of each of the three Majors is a ''must have'' in order for a noninteractive service to be viable. *See* 5/18/15 Tr. 4254 (Herring) (admitting that without the repertoire of a Major, it would be a much different service); 5/18/15 Tr. 4472 (Shapiro) (declining to state the majors are not ''must haves'' for noninteractive services); *see also* SX Ex. 269 at 74 (noting disproportionate share of top spins from Majors' repertoires).

However, the ability of the Majors to utilize such a boycott to defeat steering would be a function of their complementary market power. Simply put, demands by the Majors to prevent steering by insisting that a noninteractive service not deviate from an historical (''natural'') division of market shares would be a classic example of anticompetitive conduct. *See, e.g., Blue Cross & Blue Shield United of Wisconsin* v. *Marshfield clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.) (''It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.'').[156]

While the Majors' individual market power is not in itself necessarily improper, the hypothetical exercise of that power in this manner in the noninteractive market would be antithetical to the ''effective competition'' requirement inherent in the § 114(f)(2)(B) standard. That is, each Major may well be entitled by its firm-specific market power to higher rates than the Indies, but the Majors cannot bootstrap that power into a further capacity to reap the benefits of a complementary oligopolist by brandishing such power as a sword against steering.

Thus, in the present case, the hypothetical use by one or more of the Majors of its power to boycott a noninteractive service—one that had sought to inject some price competition into the market via steering—would undermine the ''effective competition'' standard that the D.C. Circuit, the Librarian of Congress and the Copyright Royalty Judges have declared to be an essential element of the § 114(f)(2)(B) standard.

ii. Anti-Steering or MFN Clauses

In the interactive market, the Majors commonly include anti-steering or MFN clauses in their agreements with the services. The Judges find that such clauses have no purchase vis-à-vis steering in exchange for lower rates in the *noninteractive* market. In the noninteractive market, an insistence by a Major that a noninteractive service abide by an anti-steering clause, or a MFN clause that has the same effect, is tantamount to importing the anticompetitive complementary oligopoly power of the Majors from the interactive market into the noninteractive market. Dr. Rubinfeld's rebuttal testimony at the hearing is telling:

[154] The use of benchmarking serves to tie the quantity aspect of steering to its impact on rates, and the absence of a relevant Majors' benchmark in *Pandora's* evidence prevents the Judges from determining a steered price for Majors from that evidence. Although Dr. Shapiro asserts that the steering experiments demonstrate that the Majors should receive the same rate as the Indies in a market with steering, that opinion is contradicted by the higher rate set forth in the [REDACTED] Agreement which also contains a significant steering component. Dr. Shapiro attempts to explain the higher [REDACTED] rate as a function of a so-called ''focal point,'' ''anchor'' or ''magnet'' effect created by the extant applicable statutory rate, that allegedly raises the negotiated rate toward (yet still below) the statutory rate. However, although this theoretical effect is discussed in the economic literature, Dr. Shapiro acknowledged that it is not an ''ironclad'' economic law, and there is scant evidence in this proceeding why such a potential ''focal point'' or ''magnet'' effect would cause unconstrained licensors to eschew a lower market rate that would produce greater revenue.

[155] Dr. Shapiro opines that the Majors' advantage in the hypothetical market would be reflected economically *solely* through the greater number of noninteractive plays, rather than *also* in a higher per-play rate. *See, e.g.,* 5/20/15 Tr. 5058 (Shapiro) (testifying that the larger repertoires of the Majors ''does not mean'' that the Majors deserve a ''greater value per-performance.''); 5/19/15 Tr. 4730 (Shapiro) (rejecting use of market share alone in determining ''value per spin''). However, Dr. Shapiro ignores the fact that there is apparently a greater per-song value overall for songs in the Majors' repertoire, as evidenced by Pandora's own data—showing that the Majors account for [REDACTED]% of ''top 5% weekly spins,'' [REDACTED]% of the ''top 10% weekly spins,'' and [REDACTED]% of the ''top 20% weekly spins''—despite the fact that the Majors account for only [REDACTED]% of the *total* spins on Pandora. *Compare* SX Ex. 269 at 74 *with* SX Ex. 269 at 73. These ''top spin'' figures are indicative of the ''must have'' aspect of the Majors' repertoire (leaving aside the anticompetitive complementary nature of their combined repertoires). Indeed, the record suggests to the Judges that the popularity of the Majors' spins is the reason why steering away from their repertoires cannot be pursued beyond a certain level, and why Dr. Shapiro candidly declined to reject the idea that the Majors' repertoires were ''must haves'' even though noninteractive services could steer away from them to an extent. To use an imperfect yet helpful analogy: A regular restaurant diner might prefer steak to chicken, to the extent that she orders steak 7 out of every 10 meals at the restaurant. This greater demand for steak versus chicken can result in both: (1) More revenue to the restaurant for *each* steak dinner compared with *each* chicken dinner; and (2) more total revenue attributable to the greater number of steak dinners arising from the patron's more frequent visits to the restaurant to eat steak. In more formal economic terms, the typical listener (or the restaurant patron) gets more ''utility'' from the Majors' songs (or from the steak) each time one is ''consumed,'' and also consumes those songs (and steaks) more often. The seller can benefit from *both* the greater ''utility'' and the frequency of purchases.

[156] The Judges emphasize that their analysis in the text, *supra,* is not intended to suggest any antitrust violations by any actor in the interactive or noninteractive market. The Judges' concern under section 114(f)(2)(B) is to set rates that reflect a hypothetical market that is effectively competitive. If the hypothetical market posited by one of the parties to this action would result in rates that were not effectively competitive, then such a hypothetical market must be rejected—even if it would be the result of tacit or other conduct that might not rise to the level of a violation of the antitrust laws.

Q: Now [Dr.] Shapiro has testified that the threat of steering, alone, would lead to lower rates from record companies. What's your view of that opinion?
[DR. RUBINFELD]
I don't think it's likely to happen because I don't think the threat . . . is a credible threat—that would be the term we use in economics—and the reason is . . . that, first of all, *the record companies, as I have said a number of times before, do have substantial bargaining power* and they have responses to the threat that takes away its credibility. In the rather strong version, they could . . . look to other sources of listeners and say we're going to consider not using your service, but . . . they could say we're not going to feature all of the same artists, maybe we'll take some of our top artists off our offerings . . . .
* * *
[THE JUDGES]
Professor, do you think that the smaller independents have that same bargaining power . . . to respond to the threat of steering . . . ?
[DR. RUBINFELD]
No. They wouldn't have . . . quite the same *bargaining power.*
* * *
[THE JUDGES]
What do the independents lack that the [M]ajors have that makes the independents unable to exercise that threat?
[DR. RUBINFELD]
[T]ypically, they're only going to have a few artists that have really the name recognition and *the power* to make a difference.
[THE JUDGES]
So if the record company industry was more atomistic, the threat of steering would be more credible, but because it's not that atomistic . . . it makes the ability of the [M]ajors to rebut the threat . . . more likely to be successful?
[DR. RUBINFELD]
I think that's true. . . . [T]hat's a harder world for me to imagine because I have been in the world of seeing *three or four major companies having a pretty big impact.*

5/28/15 Tr. 6302–05 (Rubinfeld) (emphasis added).

This testimony underscores the point that the Majors' capacity to undermine ''price competition-via steering'' is a function of their complementary oligopoly power. Once again, the Judges do not find that the mere size of the Majors or their share of the noninteractive market is in itself anticompetitive (especially on this record), but the Judges find that the ability of the Majors to *leverage* that market power to create the complementary oligopoly pricing problem can neither be imported into the noninteractive market nor assumed to be part of the hypothetical effectively competitive noninteractive market. Indeed, in the hypothetical market without a statutory rate, such anti-steering clauses (and other anti-steering tools) would be ripe for judicial invalidation. *See U.S.* v. *American Express Co.,* 88 F. Supp. 3d 143, 189, 194 (E.D.N.Y. 2015) (''anti-steering rules'' can ''block pro-competitive efforts'' to the extent that ''the market is broken,'' when such rules prevent ''price competition,'' by not permitting buyers ''to use their lowest cost supplier, as they can in other aspects of their businesses.''); *United States* v. *Apple,* 791 F.3d at 320 (''we are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be ''misused to anticompetitive ends in some cases.''). The Judges likewise find the hypothetical use by the majors of anti-steering clauses in response to the threat of price competition-via-steering would thwart ''effective competition.'' [157]

iii. Up-Front Royalty Payments

SoundExchange asserts that a record company could frustrate an attempt at steering by requiring noninteractive services to pay their royalties up-front in a lump sum, instead of on a per-performance basis. Such a lump-sum requirement would frustrate steering in the following manner: If a licensee has already paid Record Company A a required, large up-front fee (equal to its natural/historic play level multiplied by the old, higher per-play rate) then the marginal cost going forward to the noninteractive service of playing a sound recording from Record Company A would be zero. By contrast, Record Company B—even if it offered a reduced steering rate—would still be insisting on a rate greater than the marginal rate of zero the licensee would be paying to Record Company A. The noninteractive service would thus be compelled to either pay the up-front lump sum and lose the benefits of price competition, or refuse to pay the lump sum and lose access to 100% of the repertoire of Record Company A.

This up-front lump sum strategy in actuality is merely another way in which a Major could bootstrap its otherwise unobjectionable market power to preserve *complementary oligopoly power* in the noninteractive market. The Judges note that SoundExchange's expert economic witness, Dr. Rubinfeld, has written that ''[i]n dynamically competitive industries, where new product and features are an important part of competition, *even licenses that include only fixed, or lump-sum payments, can result in an anticompetitive lessening of competition.''* Daniel L. Rubinfeld and Robert Maness, ''The Strategic Use of Patents: Implications for Antitrust,'' *reprinted in* Francois Leveque and Howard Shelanski, Antitrust, Patents and Copyright 85, 91–92 (2005). In the present context, the noninteractive service that would be compelled to pay to a Major an up-front lump-sum license based on the old per-play rate (or lose access to 100% of the Major's repertoire) would need to recover those fixed and sunk costs and thus forego price competition-via steering.[158]

In sum, each of the three contract devices relied upon by SoundExchange to defeat steering are dependent upon the exercise of market power to preserve the power of complementary oligopoly, which would thwart effective competition in the noninteractive market. Thus, all three contracting devices would be inconsistent with the statutory direction to set rates, based on competitive information, that would be set between willing buyers and willing sellers in an effectively competitive marketplace in the absence of a statutory license.

i. Conclusion Regarding the Pandora Benchmark

For the foregoing reasons, the Judges will utilize Pandora's steering-based benchmark as a guidepost to establish the zone of reasonableness for the noninteractive royalty rates that would be paid by Indies in the ad supported (free-to-the listener) and subscription markets. Pandora has proposed two sets of such benchmarks, depending upon the level of steering the Judges find to be appropriate for rate-setting purposes.

The Judges find that this guidepost should be established by applying a rate

[157] Dr. Rubinfeld also speculated that in the hypothetical market the Majors could ''take some of our top artists off our offerings'' in response to an attempt at price competition-via steering. 5/28/15 Tr. 6302 (Rubinfeld). But in that hypothetical market, such an attempt by an entity with rights to collectively license a substantial market share would invite scrutiny as anticompetitive. *See* ''*Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP Over Possible 'Coordination,'* '' Billboard.com (July 13, 2014). (''The Department of Justice has sent out CIDs (Civil Investigative Demand for Documents) to ASCAP, BMI, Sony/ATV Music Publishing and Universal Music Publishing Group in connection with their review of . . . whether partial withdrawals of digital rights should be allowed.''). Thus, such behavior would not necessarily be consonant with ''effective competition,'' but rather an anticompetitive leveraging of market power. The Judges thus decline to incorporate such licensor responses in the hypothetical effectively competitive market.

[158] The Judges are not stating that a requirement of an up-front payment lump-sum royalty type provision is *per se* inconsistent with effective competition. For example, in the [REDACTED] Agreement, discussed *infra,* [REDACTED] is obligated to pay [REDACTED] to [REDACTED] even if [REDACTED]. SX Ex. 33 at 14–17, ¶¶ 3(a) and (d). However, there is no evidence that this provision would frustrate effective competition.

premised upon the lower of the two steering alternatives presented by Pandora: the [REDACTED]% steering figure, rather than the higher 30% figure.[159] The lower [REDACTED]% level is appropriate because it is the level to which Pandora was willing to commit [REDACTED]. PAN Ex. 5014 ¶ 4(a). The Judges recognize the relatively nascent nature of steering. Although these factors certainly do not invalidate the Pandora/Merlin Agreement as a usable benchmark, they do suggest to the Judges that the more prudent course is to incorporate only the guaranteed 12.5% level of steering, and use the resultant rates as the appropriate guideposts for the rates attributable to the Indies portion of the statutory market.[160]

E. iHeart Rate Proposal

1. Introduction

iHeart proposes a per-play rate of $0.0005 for the § 114 license. In support of this proposal, iHeart relies on the analysis undertaken by its expert witnesses, Drs. Daniel Fischel and Douglas Lichtman, of rates set forth in certain agreements entered into by iHeart in the market for noninteractive services.

2. The Fischel/Lichtman Proposed Benchmark

a. The iHeart/Warner Agreement

Effective October 1, 2013, iHeart and Warner entered into an agreement (the iHeart/Warner Agreement) that addressed, *inter alia,* the rates that iHeart would pay to Warner for iHeart's plays of Warner sound recordings on iHeart's custom noninteractive service. SX Ex. 33 (iHeart/Warner Agreement). As it pertained to these noninteractive plays, the iHeart/Warner Agreement provided that iHeart would pay the greater of: (1) A per-performance fee on custom performances; and (2) Warner's *pro rata* share of a specified percentage of iHeart's non-simulcast noninteractive revenue. Specifically, the iHeart/Warner Agreement calls for the following rates:

IHEART/WARNER PER-PERFORMANCE ROYALTY RATES

Calendar year	Per-performance rate
2013	$0.[REDACTED].
2014	$0.[REDACTED].
2015	$0.[REDACTED].
2016	$0.[REDACTED].
Each calendar year during the Renewal Term if any.	$0.[REDACTED].

IHEART/WARNER PERCENTAGE REVENUE ROYALTY RATES

Period	Percentage
First [REDACTED] months after Effective Date.	[REDACTED]%.
Months [REDACTED] after Effective Date.	[REDACTED]%.
Each month during the Renewal Term if any.	[REDACTED]%.

SX Ex. 33 at 15–16 (iHeart/Warner Agreement).

The iHeart/Warner Agreement incorporates the same economic steering logic as the Pandora/Merlin Agreement. Specifically, at the time of the execution of the iHeart/Warner Agreement, Warner's actual share of iHeart's custom noninteractive webcasts was approximately [REDACTED]%. However, under the iHeart/Warner Agreement, iHeart is obligated to [REDACTED]. Drs. Fischel and Lichtman concluded that this provision created an incentive for iHeart to increase Warner's share of performances substantially [REDACTED]. Fischel/Lichtman AWDT ¶ 36.

The iHeart/Warner Agreement also contains the following additional elements that, according to iHeart: (1) Were not independently valued by the parties on a monetary basis; (2) benefited both parties; and (3) therefore had an uncertain net value:

- Warner's grant to iHeart of sound recording rights [REDACTED];
- iHeart's commitment to provide Warner with no less than [REDACTED] percent of total airplay devoted to a music advertising campaign that iHeart provides on its webcast stations, known as the Artist Integration Program (''AIP''); [161]
- Warner's [REDACTED] right to [REDACTED] and iHeart's [REDACTED] right to [REDACTED]); and
- iHeart's ''most favored nation'' protection *vis-à-vis* [REDACTED], such that, if Warner were to enters into an agreement to license sound recording rights for [REDACTED]'s [REDACTED] and provide [REDACTED] with terms that are more favorable than those offered to iHeart, then iHeart would be afforded the option to adopt those [REDACTED] terms.

Fischel/Lichtman AWDT ¶ 38.

Drs. Fischel and Lichtman described the [REDACTED] as an ''insurance policy'' that benefited iHeart in the event it would [REDACTED]. Likewise, they described the AIP provision as an ''insurance policy'' that benefited Warner, because iHeart's commitment to continue to provide the AIP benefit meant that Warner did not have to assume the risk that iHeart might charge Warner for the right to access the benefits of AIP. *See* iHeart PFF ¶¶ 179–180 (and record citations therein).

Drs. Fischel and Lichtman recognized the difficulty in quantifying the values of what they described as these ''insurance policy'' equivalents. However, they aver that neither party assigned any values to these (and the other) non-rate terms and that the *net* value of these items therefore can only be set at zero. Fischel/Lichtman AWDT ¶ 39. As Dr. Fischel further testified:

> We followed the . . . real-world example of the parties . . . who did not price any of these terms. . . . [T]here was no separate pricing in the agreement or separate valuation in the agreement in terms of the spreadsheets . . . that I reviewed as background for the contract. . . . For that reason . . . the best answer, given the real-world data that we have, is to place a net value of zero on them because that's what the parties themselves did.

5/21/15 Tr. at 5336–40 (Fischel).

Moreover, according to iHeart, even SoundExchange's economic expert, Dr.

[159] The lower steering level results in a higher per-play rate.

[160] Pandora attempted to corroborate its Pandora/Merlin benchmark by introducing, in rebuttal, its agreement with a classical music record company, Naxos of America, Inc. (Naxos), that had been entered into as of January 1, 2015. PAN Ex. 5018 (the Pandora/Naxos Agreement). However, the Judges reject the Pandora/Naxos Agreement as a corroborating benchmark for several reasons. First, Naxos, as a classical music label, is at best representative of a narrow genre and therefore its agreement cannot serve to be representative of a wider variety of sound recordings. 5/13/15 Tr. at 3512 (Herring). Second, the Pandora/Naxos Agreement does not contain any steering terms, but rather sets a statutory per-play rate ($0.[REDACTED]), lower than the default rate ($0.0014) established by the Pureplay settlement. PAN Ex. 5018. Although this difference, *ceteris paribus,* would create an incentive for Pandora to play more classical music owned by Naxos, there was evidence, *acknowledged by Dr. Shapiro,* that Pandora was constrained in any potential steering toward Naxos by the fact that there was only one other classical label, Decca, which would make it hard for Pandora to steer away from the latter given its share of the market. 5/17 Tr. 4706–07 (Shapiro) (considering Naxos's and Decca's presence in classical music market and acknowledging ''there are issues with some specialized areas of music where it might be harder to steer.'') Further, Pandora did not conduct any steering experiments with regard to steering away from Decca, as it did with regard to steering away from the Majors. Third, Dr. Shapiro opined that, if steering did occur at the 30% level, Naxos would pay two different rates for plays on Pandora's ad-supported and subscription services, respectively. Shapiro WRT, at 37–38. However, the Pandora/Naxos Agreement does not bifurcate rates in this manner, but rather sets a single per-play rate of $0.[REDACTED] that would apply to Pandora's ad-supported and subscription services. PAN Ex. 5018.

[161] According to Drs. Lichtman and Fischel, under the AIP program, iHeart dedicates airtime to promoting particular artists or songs, typically new artists or recently-released songs. These promotions may include [REDACTED]. SX Ex. 33 at 19.

Rubinfeld, admitted that none of the experts in this proceeding likewise ''actually put[ ] a numerical value on these additional items.'' 5/28/15 Tr. 6289 (Rubinfeld). In addition, iHeart notes, Dr. Rubinfeld acknowledged that several of these items were ''terms that favor iHeart,'' and yet were not separately valued and priced by the parties. *Id.* at 6435.

However, iHeart does not conclude from the foregoing that the iHeart/Warner Agreement sets forth a usable benchmark rate that mirrors the stated rates of $0.[REDACTED] to $0.[REDACTED], or even the purported lower rates of $0.[REDACTED] to $0.[REDACTED] resulting from the [REDACTED] adjustment applied by Drs. Fischel and Lichtman (as discussed *infra*). Rather, according to Dr. Fischel, the foregoing rates reflect only the average rates in or derived from the iHeart/Warner Agreement. Dr. Fischel asserts that such an average rate ''does not necessarily reflect the rate . . . that a willing buyer and willing seller would have reached in a marketplace'' unconstrained by government regulation or interference.'' Fischel/Lichtman AWDT ¶ 44.

In an attempt to correct for this alleged defect, Dr. Fischel conceptualizes the Warner plays on iHeart as comprising two distinct economic bundles. Dr. Fischel states:

> As an economic matter, the [iHeart]-Warner agreement reflects a bundle of two distinct sets of rights. The first set provides a license for iHeartMedia to play the same number of Warner performances as it would have played absent the agreement. The second set of rights provides a license for iHeartMedia to play additional Warner performances, above and beyond those it would have played absent the agreement.

Id. ¶ 45.

Accordingly, Dr. Fischel opines that compensation for the first ''bundle'' of rights is directly affected by the existing statutory rate, and therefore ''provides essentially no information about the rate willing buyers and sellers would negotiate in the absence of government regulation.'' *Id.* ¶ 48.

However, Dr. Fischel opines that the second ''bundle'' he conceptualizes is ''highly relevant to what willing buyers and willing sellers would negotiate if unconstrained by government regulation.'' *Id.* ¶ 49. In support of this opinion, Dr. Fischel testified:

> This part of the bundle involves a license for iHeart to play additional Warner performances, above and beyond those it would have played absent the agreement. Those additional performances are not directly influenced by the existing statutory rate, because absent the agreement, iHeart wouldn't play them and Warner wouldn't receive any compensation for them. The royalty rate negotiated for this second part of the bundle, therefore, is a more appropriate measure of what a willing buyer and a willing seller would negotiate if unconstrained by government regulation. Warner licensed the rights to those performances to iHeart, and iHeart compensated Warner for that license, at rates that were acceptably profitable for both parties. The rate here was not determined by regulation; it was determined by the give-and-take of a true negotiation.

Id.

Thus, Dr. Fischel needed to distinguish between the two bundles that he had conceptualized, which required him to consider the projected number of Warner plays in each bundle. To perform this analysis, he relied upon a set of projections that iHeart's Board of Directors used when evaluating and approving the iHeart/Warner Agreement. Fischel/Lichtman AWDT ¶ 40 (projections also served as basis for iHeart Board's approval of *stated* rates in iHeart/Warner Agreement). According to iHeart's Head of Business Development and Corporate Strategy, Steven Cutler, this set of projections, referred to by iHeart as the ''Today's Growth'' model, was [REDACTED], representing the parties' ''best estimates'' of performance under the iHeart/Warner Agreement. 6/2/15 Tr. 7247–48 (Cutler); *see* Fischel/Lichtman AWDT ¶ 40; 5/21/15 Tr. 5365 (Fischel).

The Today's Growth model projected that iHeart would play [REDACTED] total performances of all labels' sound recordings over the [REDACTED] term of the agreement. Fischel/Lichtman AWDT ¶ 41 and Ex. A thereto (''Projected Performances During Initial Term of iHeartMedia Agreement with Warner''); IHM Ex. 3034 at 170. iHeart estimated Warner's share of those performances under two key scenarios: (1) The [REDACTED] scenario, which reflected iHeart's expectations if no agreement with Warner was reached; and (2) the ''Warner Direct License Terms'' scenario, which reflected its projections under the terms and conditions of the Warner agreement as signed. Fischel/Lichtman AWDT ¶ 42 and Ex. B thereto (''Projected iHeartMedia/Warner Royalty Rates''); IHM Ex. 3034 at 172.

Under scenario (1), iHeartMedia expected Warner music to constitute [REDACTED]% of total performances, or [REDACTED] performances, on the iHeart custom service. Under scenario (2), iHeart expected to increase Warner's share of performances to [REDACTED] percent, and thus expected to play [REDACTED] Warner performances over the duration of the agreement. Fischel/Lichtman AWDT ¶ 42; IHM Ex. 3034 at 172 (''Projected iHeartMedia-Warner Royalty Rates'').

Under scenario (1), *without* the steering of additional plays at lower average rates, iHeart expected to pay Warner a total of $[REDACTED] in royalties. Under scenario (2), *with* the steering of additional plays at lower average rates, iHeart expected to pay Warner a total of $[REDACTED]. Fischel/Lichtman AWDT ¶¶ 43, 51.

Dr. Fischel then divided the total expected compensation under the Today's Growth Model ($[REDACTED]) by the total number of performances projected in that model ([REDACTED]). This calculation projected an average per-play rate of $0.[REDACTED], rounded to $0.[REDACTED]. Fischel/Lichtman AWDT ¶43; IHM Ex. 3034 at 172 (''Projected iHeart Media/Royalty Rates'').

Even before Dr. Fischel attempted to determine his ''*incremental* rate'' under the iHeart/Warner Agreement, he emphasized that this *average* rate itself was [REDACTED]% lower than the statutory rate of $0.0025 that iHeart would otherwise pay under the applicable NAB/SoundExchange settlement. Fischel/Lichtman ¶ 43.

Additionally, Drs. Fischel and Lichtman opined that this $0.[REDACTED] rate needed to be adjusted downward for a [REDACTED] adjustment, to reflect the fact that, under the iHeart/Warner Agreement, [REDACTED] are not subject to a royalty payment by iHeart to Warner. *Id.* ¶ 35. They then noted that iHeart, had projected that an adjustment for [REDACTED] would reduce the effective average per-play rate under the iHeart/Warner Agreement ''to between $0.[REDACTED] and $0.[REDACTED].'' *Id.*

Dr. Fischel then turned his analysis toward the calculation of his so-called ''incremental rate.'' He noted the simple math demonstrating that, according to the Today's Growth Model, the difference in the number of Warner *plays* on iHeart's custom noninteractive service between Scenario (2) ([REDACTED] plays) and Scenario (1) ([REDACTED] plays) equaled [REDACTED] plays. He further noted that the difference in *royalties*—again according to the Today's Growth Model—between Scenario (2) ($[REDACTED]) and Scenario (1) ($[REDACTED]) equaled $[REDACTED]. Fischel/Lichtman AWDT ¶¶ 50–51; IHM Ex. 3034 at 172 (''projected iHeart Media/Warner royalty rates.

Dr. Fischel then divided the $[REDACTED] additional revenue by the additional [REDACTED] plays to

derive his ''incremental rate'' of $0.0005. *Id.* As noted *supra,* Dr. Fischel opined that his so-called ''incremental rate of $0.0005 was a better benchmark than the average rate of $0.[REDACTED] implied by the Today's Growth Model or the rates actually set forth in the iHeart/Warner Agreement, because the so-called ''incremental rate'' was not tainted by the upward influence of the statutory rate. Accordingly, Dr. Fischel opined, ''this $0.0005 per-performance rate is the best available evidence on the question at issue in this proceeding.'' Fischel/Lichtman AWDT ¶ 52.[162]

As noted at the outset of this section, the iHeart/Warner Agreement contains a greater-of rate structure. However, Drs. Fischel and Lichtman declined to incorporate any greater-of formula into their rate structure and they did not include any percentage-of-revenue alternative rate in their proposed benchmark. Dr. Lichtman explained this deviation from the iHeart/Warner Agreement: ''[N]o one thought that provision would be binding. So they have a number that both parties looked at and said that number would never actually be used in the real world, so who cares what the number is . . ..'' 5/15/15 Tr. 4016–17 (Lichtman); *see also* 5/21/15 Tr. 5334 (Fischel) (same).[163]

b. The 27 iHeart/Indies Agreements

iHeart also relies upon its separate agreements with 27 Indies that, as of July 2014, accounted for approximately [REDACTED] percent of performances on its custom service. Fischel/Lichtman AWDT ¶ 57 and Ex. C thereto; IHM Exs. 3340, 3342, 3343, 3345, 3347, 3349, 3351–3370, 3642. Despite this relatively small percentage of plays (compared to Warner), Drs. Fischel and Lichtman opine that ''these 27 deals provide important additional evidence as to the rates negotiated by willing buyers and willing sellers.'' Fischel/Lichtman AWDT ¶ 57.

The principal custom noninteractive rate in these 27 agreements is [REDACTED]. Indeed, the 27 Warner/Indies Agreements contain the following provision:

[REDACTED]

See generally IHM Exs. 3340, 3342, 3343, 3345, 3347, 3349, 3351–3370, 3642. However, iHeart states that [REDACTED] of these 27 webcasters has paid royalties under the percentage of revenue prong, because the per-play rate has generated the higher royalty. Fischel/Lichtman AWDT ¶ 61.

Each of these 27 iHeart/Indies Agreements contains a [REDACTED]-year term. *Id.* These iHeart/Indies Agreements also contain other rates that are not applicable to custom noninteractive webcasting. *Id.; see* Fischel/Lichtman AWDT ¶ 58.

As in the iHeart/Warner Agreement, the iHeart/Indies Agreements contain various additional items, some of which iHeart claims inure to its benefit, and some of which benefit the labels. iHeart points, by way of example, to the provision in all 27 agreements that iHeart received a license for [REDACTED] and thereby avoided the risk of [REDACTED] Additionally, in many of those agreements, the Indies agreed [REDACTED]. Fischel/Lichtman AWDT ¶ 62.

As they analyzed the iHeart/Warner Agreement, Drs. Fischel and Lichtman concluded that the value of these terms cannot be determined in isolation, and found that there was no evidence indicating that the parties had explicitly assigned value to them when analyzing whether to enter into these 27 agreements. Accordingly, they concluded that it is appropriate to assign a zero net value to the non-pecuniary terms. *Id.*

Therefore, Dr. Fischel proceeded to derive a so-called ''incremental rate'' for the 27 iHeart/Indies Agreements. He determined that, between 2012 and 2014, and *prior* to the execution of these 27 agreements, iHeart expected to pay to all these Indies $[REDACTED] (of which $[REDACTED] was for custom webcasts) covering [REDACTED] performances (of which [REDACTED] were custom webcasts), resulting in an *average* royalty rate of $0.[REDACTED] (iHeart was subject to the SoundExchange/NAB settlement rates). IHM Ex. 3034 (Fischel/Lichtman AWDT, Ex. D).

Dr. Fischel then determined that, after the execution of these 27 iHeart/Indies Agreements, total performances would increase to [REDACTED] (of which [REDACTED] were custom webcasts) and total royalties would increase to $[REDACTED] (of which $[REDACTED] was for custom webcasts), resulting in an *average* royalty rate of $0.[REDACTED]. *Id.*

As with the iHeart/Warner analysis, Dr. Fischel then calculated his so-called ''incremental rate'' by applying his ''two bundles'' approach. He noted that iHeart expected to play an additional [REDACTED] performances and expected to pay $[REDACTED] more in royalties. This incremental difference yielded the so-called ''incremental rate'' of $0.[REDACTED] ($[REDACTED]/[REDACTED] plays). Fischel/Lichtman AWDT ¶ 68; IHM Ex. 3034 (Fischel/Lichtman AWDT, Ex. D thereto).

Unlike the iHeart/Warner Agreement, these 27 Warner/Indies Agreements were not supported by an internal projection of expected increased plays, such as the ''Today's Growth'' model upon which Dr. Fischel relied for his iHeart/Warner ''incremental'' analysis. Rather, Dr. Fischel testified that he and Dr. Lichtman ''assumed (consistent with our understanding) that iHeart believed that, after signing each of these deals, it would increase each label's share of all webcasts ([REDACTED]) by [REDACTED] percent.'' Fischel/Lichtman AWDT ¶ 66. Apparently, Dr. Fischel did not use iHeart's or his own ''projections'' of increased performances, as he did for his iHeart/Warner analysis, but rather ''assume[d] iHeart approximately met its projections for . . . custom performances,'' and therefore ''the projections in [this] category[y] [are] equal to the *actual* number of performances.'' Fischel/Lichtman AWDT ¶ 66 (emphasis added).

Drs. Fischel and Lichtman concluded from the foregoing that the $0.[REDACTED] ''incremental rate'' that they estimated for the 27 iHeart/Indies Agreements ''demonstrates our main conclusion, regarding the $0.0005 per-performance rate.'' Fischel/Lichtman ¶ 69.[164]

3. SoundExchange's Criticisms of the iHeart Rate Proposal

a. Introduction

SoundExchange attacks the iHeart rate proposal on six separate fronts. First, SoundExchange sets forth an overview that purports to provide a different and more accurate understanding of the terms of the iHeart/Warner Agreement, compared with the presentation put forth by iHeart. Second, SoundExchange

[162] Dr. Fischel then speculates as to whether even the non-incremental plays would be priced higher or lower than $0.0005, but he comes to no conclusion in that regard. Fischel/Lichtman AWDT ¶ 53.

[163] iHeart speculates that the percentage-of-revenue prong was added to the iHeart/Warner Agreement by Warner to set a precedent for future rate-setting proceedings for sound recordings and points to a document pertaining to Warner's negotiations with [REDACTED] for support. See IHM Ex. 3435 at 5; 5/15/15 Tr. 4024–25 (Lichtman). However, iHeart does not identify any sufficiently similar evidence that suggests the percentage-of-revenue prong in the iHeart/Warner Agreement was included for this reason.

[164] Drs. Fischel and Lichtman acknowledged the obvious—that the $0.[REDACTED] ''incremental'' rate derived from the iHeart/Indies Agreements was lower than the $0.[REDACTED] ''incremental'' rate derived from the iHeart/Warner Agreement. *See* 5/21/15 Tr. 5383 (Fischel). They opined that the Indies might receive a lower rate because the Indies artists may be ''less well-known,'' and because Indies may have repertoires that are not ''already familiar to listeners.'' Fischel/Lichtman AWDT ¶ 69. This testimony is generally consistent with the Judges' finding, *supra,* with regard to the Pandora/Merlin Agreement, that Indies in fact receive lower royalty rates than the Majors.

seeks to demonstrate the invalidity of Dr. Fischel's ''incremental rate'' approach. Third, SoundExchange avers that iHeart's analysis is also flawed because it fails properly to consider and give value to other elements of consideration in the iHeart/Warner Agreement, which would result in a significantly higher benchmark per-play rate. Fourth, SoundExchange takes issue with iHeart's failure to account for the parties' actual performance under the iHeart/Warner Agreement. Fifth, SoundExchange takes issue with iHeart's reliance on a single projection made by iHeart during negotiations (the ''Today's Growth'' model) to establish a benchmark in this proceeding, and its failure to consider other contemporaneous alternative projections. Sixth, SoundExchange seeks to discredit the 27 Warner/Indies Agreements as proper benchmarks.

b. SoundExchange's Overview of the iHeart/Warner Agreement

SoundExchange begins its critique by referring to the negotiation period *before* the iHeart/Warner Agreement was executed. It notes that iHeart originally offered Warner [REDACTED]. IHM Ex. 3114 at 10. Warner rejected that proposal and according to Dr. Fischel, Warner ultimately achieved a ''better deal than [REDACTED]. 5/22/15 Tr. 5542, 5551 (Fischel).[165]

- When SoundExchange turns its attention to the several non-rate and non-steering aspects of the iHeart/Warner Agreement, it notes the following provisions that were essentially ignored by iHeart. iHeart agreed to provide to Warner the greater of [REDACTED]% of all AIP inventory that iHeart offers in the marketplace and AIP having a ''fair market value,'' as stated in the iHeart/Warner Agreement, of at least $[REDACTED] per agreement year. SX Ex.33 at 19–20 § 5(a).
- In addition to this ''[REDACTED] AIP,'' iHeart agreed to provide Warner with another advertising opportunity, to participate in two ''[REDACTED]'' campaigns each year. This ''[REDACTED]'' guarantees at least [REDACTED] insertions of ads in duration up to [REDACTED] seconds each on iHeart's terrestrial stations for artists selected at Warner's discretion. Each advertisement also must include a [REDACTED]. SX Ex. 33 at 19–20 § 5(a); 81, Exhibit F. Warner calculated the value of a single [REDACTED] campaign at $[REDACTED], yielding a combined value for [REDACTED] such campaigns of close to $[REDACTED] over the initial term of the agreement. SX Ex. 32 at 14 n.9 (Wilcox WRT); 6/3/15 Tr. 7403 (Wilcox).
- iHeart also agreed to pay royalties to Warner for [REDACTED]. SX Ex. 33 at 10 § 1(pp); SX Ex. 32 at 14 (Wilcox WRT).
- iHeart agreed to pay Warner a $[REDACTED] fee for a [REDACTED] provision, the [REDACTED] agreement, which iHeart requested be in a separate agreement but ultimately was included in the iHeart/Warner Agreement. 6/3/15 Tr. 7387 (Wilcox).[166]

Through testimony at the hearing, SoundExchange and Warner asserted that Warner perceived the additional items it received, combined with the rate and steering terms, as greater than what it would have received under the statutory license. 5/7/15 Tr. 2370 (Wilcox) (Warner received ''a package of consideration that is material and greater and different in positive ways than what we would be obtaining just through a compulsory statutory deal.''). Further, Mr. Wilcox testified that he did not think this ''deal'' would ''go forward on the existing terms if one of these were missing.'' 6/3/15 Tr. 7416 (Wilcox). However, SoundExchange did not proffer evidence or testimony that was contemporaneous with the negotiation of the iHeart/Warner Agreement that was probative as to whether Warner required the other contract terms in order to avail itself of the rate and steering terms. SoundExchange notes, however, (regarding the additional contract items of potential value to Warner) that iHeart did not produce a fact witness who testified regarding the actual value of these terms to iHeart.

SoundExchange also notes, as did iHeart, that the latter also received additional contractual consideration beyond the right to perform Warner's sound recordings under the agreement. *See* Fischel/Lichtman AWDT at 20 (''insurance policy'' allowing iHeart to avoid [REDACTED] if [REDACTED] and [REDACTED] protection if [REDACTED] granted better terms to [REDACTED] for [REDACTED] service); SX Ex. 33 at 31.

However, despite the absence of any actual values being placed by the parties on these additional items, Mr. Wilcox concluded that the *net* value of all the other consideration provisions is ''heavily weighted to the Warner Music Group.'' 6/3/15 Tr. 7385 (Wilcox).

SoundExchange also notes in this context, as it did in its opposition to Pandora's rate proposal, that the steering elements of the iHeart/Warner Agreement provide only ''first mover'' advantages'' that would be ''mathematically impossible'' to replicate across the industry. 5/7/15 Tr. 2374 (Wilcox); Rubinfeld CWDT at 46 ¶ 183; 6/2/15 Tr. 7239 (Cutler). Moreover, SoundExchange noted that iHeart found its ability to steer toward any particular record company to be limited. As noted in the Judges' discussion of the Pandora rate proposal, SoundExchange asserts that, when iHeart tried to [REDACTED] it created ''challenging listening experiences.'' For example, a listener's seeded ''[REDACTED] Radio Station'' [REDACTED] turned into a *de facto* ''[REDACTED] Radio Station,'' [REDACTED] and a listener's seeded ''[REDACTED] Radio Station'' [REDACTED] turned into a *de facto* ''[REDACTED] Radio Station [REDACTED]. Thus, iHeart concluded that too much steering (to [REDACTED]%) was ''[REDACTED] all to the detriment of our custom product.'' SX Ex. 1037.

c. SoundExchange's Criticism of the ''Incremental Rate'' Approach of Drs. Fischel and Lichtman

SoundExchange begins its critique with these undisputed assertions:

- None of these agreements—or any other agreement submitted by any other party—has $0.[REDACTED] as the stated per-performance rate or within any range of stated rates.
- There is not a single document in evidence showing that any parties—not just Warner and iHeart—ever had a ''meeting of the minds'' as to a rate of $0.[REDACTED] per-performance.
- There is not a single communication between iHeart and Warner citing a rate of $0.[REDACTED] under the iHeart-Warner agreement.
- No internal iHeart document shows such a rate for the iHeart-Warner agreement.
- There is no evidence in the record showing that a willing copyright owner would agree to license the performance of its sound recordings at a rate of $0.[REDACTED].
- None of the other economic experts who testified used such an approach in his written testimony.

SX PFF ¶¶ 768–69 (citing 5/22/15 Tr. 5489–90 (Fischel); Rubinfeld CWRT ¶ 23); *Id.* ¶¶ 784–88 (and additional citations to the record therein).

Next, SoundExchange takes substantive aim at the ''two bundles'' of

[165] SoundExchange also notes that Sony and Universal turned down a similar offer from iHeart because ''[REDACTED].'' SX Ex.1139; SX Ex. 25 at 12, ¶ 35 (Harrison WRT); 4/28/15 Tr. 509–510 (A. Harrison) (describing iHeart's proposal as ''[REDACTED].'')

[166] In pertinent part, the [REDACTED] Agreement provided that, in exchange for a $[REDACTED] to Warner by iHeart, Warner granted to iHeart [REDACTED] SX EX. 1339.

rights approach. SoundExchange (accurately) summarizes this opinion as stating that, according to Drs. Fischel and Lichtman, the *only* relevant information regarding the rate to which willing buyers and willing sellers would agree, absent a statutory license, can be found in the number of performances and revenue in the second bundle.[167] As SoundExchange continues to correctly note, they then claim that dividing the so-called ''incremental'' revenue by the ''incremental'' number of performances yields the precise per-play royalty rate to which the parties would have agreed for 100% of the performances expected under their agreement in a world without the statutory license. *See* SX PFF ¶ 771 (and record citations therein).

The fundamental problem with this ''incremental'' approach, according to SoundExchange, is that it artificially and erroneously divides the royalty payments by breaking the single actual bundle of performances under the agreement into two hypothetical bundles. According to SoundExchange, that approach artificially and erroneously divides consideration into separate bundles that the parties did not negotiate. To make the point, Dr. Rubinfeld, on behalf of SoundExchange, applied an analogy: In a ''buy one, get one free'' transaction, the price of the second product is not zero; the second product could not be obtained without paying the full price for the first. Accordingly, the appropriate price for each of the two products is not the ''incremental price'' of the second item, but rather the average price of the two items. Rubinfeld CWRT at 6, ¶ 24.

SoundExchange also notes that Drs. Fischel and Lichtman analyzed the Pandora/Merlin Agreement through the lens of their so-called incremental approach and concluded that the proper rate derived from that agreement—for use as the statutory benchmark—is between $0.0002 and *negative* $0.0002 (*i.e.,* a rate at which the record companies would pay the noninteractive services rather than receive royalties from these services). *See* Fischel/Lichtman AWDT at 40–41. In attempting to highlight the purported absurdity of this result, SoundExchange notes that, despite the clear economic appeal of such a range of rates to Pandora, its own expert, Dr. Shapiro, did not adopt such an incremental rate, but rather recommended a rate that was multiple times greater. Rubinfeld CWRT at 22, ¶ 79.

For these reasons, SoundExchange asserts that the so-called *incremental* per-play approach of Drs. Fischel and Lichtman must be rejected, in favor of an approach that determines per-play rates on an *average* royalty basis.

d. The Alleged Importance of the Value of Non-Rate/Steering Items in the iHeart/Warner Agreement

SoundExchange criticizes Drs. Fischel and Lichtman for failing to make a sufficient attempt to attach monetary values to provisions in the iHeart/Warner Agreement. *See* Fischel/Lichtman AWDT ¶ 39. More particularly, SoundExchange rejects their assumption that the non-royalty rate term provisions benefiting Warner, and those benefiting Heart, have a net value of zero. *See* 5/21/15 Tr. 5/21/15 Tr. 5340 (Fischel); (Fischel/Lichtman AWDT at 20–21).

Rather, SoundExchange asserts the record reflects that this ''net zero value'' conclusion is inaccurate. The ''record'' to which SoundExchange cites to support this position is a conclusory statement made by Warner's testifying executive, Mr. Wilcox, who stated that the net value of the non-royalty rate provisions is ''heavily weighted to the Warner Music Group.'' 6/3/15 Tr. 7385 (Wilcox).[168] SoundExchange further seeks to buttress its argument that the iHeart benchmark fails to adjust for the value of items that favored Warner by reciting the list of such items and noting that Mr. Wilcox, in his oral and written testimony, characterized such items as ''incredibly important'' ([REDACTED]); ''so important'' ([REDACTED]); a ''floor valuation'' ([REDACTED]); an ''immediate uptick'' in value ([REDACTED]). SX PFF ¶¶ 810–814, 827 (and citations to the record therein).

SoundExchange also takes issue with iHeart's claim, as asserted by Dr. Fischel, that the absence of any projections or spreadsheets detailing the value of these additional items is evidence that the parties did not assign values to them. However, SoundExchange acknowledges that ''when the Judges asked Mr. Wilcox whether Warner had assigned a number value to . . . many of these provisions,'' his ''consistent'' response was that he ''could not be certain'' of the number value. SX PFF ¶ 827.

i. AIP and [REDACTED]

Among the non-royalty and non-steering elements within the iHeart/Warner Agreement, SoundExchange emphasizes iHeart's failure to adjust its benchmark to reflect the value of two items referred to *supra,* AIP and [REDACTED].

(A) AIP

SoundExchange notes that the iHeart/Warner Agreement *itself* states that AIP has a ''fair market value'' of at least $[REDACTED] over [REDACTED] years. SX PFF ¶¶ 807–808 (and citations to the record therein). Thus, according to SoundExchange, it is irrelevant whether the parties had internal projections or spreadsheets establishing the value of AIP. *See* SX Ex 33 at 19, ¶ 5(a)(ii) (declaring that AIP has a ''fair market value of at least [REDACTED] Dollars USD $[REDACTED] per Agreement Year'').

Additionally, SoundExchange points to internal iHeart documents in which Bob Pittman, iHeart's C.E.O., asked of his employees, with regard to AIP, [REDACTED]'' SX Ex. 207. SoundExchange further notes that, in an attempt to bridge differences in the ongoing negotiations, Mr. Pittman suggested that iHeart asked Warner if AIP has value to Warner, because it has value to iHeart. SX Ex. 1372. Additionally, SoundExchange points to Mr. Wilcox's written and oral testimony, in which he claims to recall that [REDACTED] indicated that iHeart intended to [REDACTED], but he cannot identify a document confirming that alleged representation by [REDACTED]. Wilcox WRT ¶ 23, 6/3/15 Tr. 7460–61 (Wilcox)

SoundExchange also points to numerous documents in which iHeart confirms the substantial value to record companies of AIP participation. *See, e.g.,* IHM Exs. 3114 at 5, 10; 3121 at 4; 3225 at 2. Further, during negotiations, iHeart emphasized to Warner that AIP had substantial stand-alone value. *See*

[167] SoundExchange also accurately summarizes the contents of the two bundles: ''The first is a 'bundle' for the purported right to perform sound recordings up to the number of performances [Drs.] Fischel [and]Lichtman say the parties expected to occur under the statutory license in the absence of a direct license,'' and ''[t]he second is a 'bundle' for the purported right to make all the additional performances over and above those in the first bundle that [Drs.] Fischel [and]Lichtman say the parties expected to occur because of the direct license.'' SX PFF ¶ 770.

[168] Actually, Mr. Wilcox made this statement with regard to a list of contractual items that would provide value only to Warner, not the entirety of other non-royalty/steering items that Drs. Fischel and Lichtman asserted had value to both parties and should be weighed and deemed for rate purposes to have a *net* value of zero. *See id.* at 7384–85 (Mr. Wilcox responding to a question regarding a demonstrative list of contractual items and testifying that ''they're heavily weighted to the Warner Music Group. These were, every one of them, things that were important wins for us, if you will, in the negotiation and were key to getting to yes.''). Drs. Fischel and Lichtman did not dispute that some contractual items had value to Warner, but rather concluded that the absence of valuations by the parties required an expert to net the offsetting values at zero. Thus, the cited testimony does not support SoundExchange's assertion in the text, *supra,* that ''the record'' reflects a net value for these other items tilted toward Warner.

SX Ex. 93 at 1. Additionally, at the hearing, witnesses for *both* iHeart and Warner acknowledged the significant value of AIP to a record company. 5/21/15 Tr. 5194–95 (Poleman) (iHeart executive describing AIP as ''invaluable''); 6/3/15 Tr. 7392 (Wilcox); Wilcox WDT at 12–13; (Warner executive describing AIP as ''[REDACTED]'').

Based on such reasoning, iHeart estimated the quantity of AIP to be given to Warner not only [REDACTED], but also [REDACTED], as set forth on iHeart's rate card.'' *See* 5/20/15 Tr. 4885–86 (Pittman). As SoundExchange further points out, Mr. Poleman also noted that access to AIP slots could in the future be [REDACTED], and, if so, Warner would [REDACTED]. 5/21/15 Tr. 5189–90 (Poleman). *See also* SX Ex. 1139 ([REDACTED].

For these reasons, SoundExchange avers that iHeart erred in declining to attribute value to AIP in its iHeart/Warner benchmark.[169]

(B) [REDACTED]

According to SoundExchange, the value of [REDACTED] is different from [REDACTED] AIP in a way that enhances record company promotional programs on iHeart. First, unlike AIP, Warner was not [REDACTED], and iHeart did not [REDACTED]. 6/3/15 Tr. 7405 (Wilcox).

The iHeart/Warner Agreement's [REDACTED] provision guarantees Warner at least [REDACTED] of up to [REDACTED] for [REDACTED] on all of iHeart's [REDACTED] of [REDACTED] chosen by Warner. SX Ex. 33 at 19–20 § 5(a); *id.* at 81, Exhibit F, §§ 1–2. According to Warner, both the [REDACTED] and the fact that [REDACTED] are unique to this program, [REDACTED]. 6/3/15 Tr. 7401 (Wilcox). Further, the [REDACTED] provisions require iHeart to include a [REDACTED] and give Warner the right to [REDACTED], and to [REDACTED]. SX Ex. 33 at 82, Exhibit F, § 7.

Warner did not attempt to value [REDACTED] contemporaneous with the negotiations, and did not include a stated value for [REDACTED] in the iHeart/Warner Agreement. SoundExchange did not utilize an expert to value [REDACTED] in the hearing. However, for this proceeding, a non-expert, Mr. Wilcox, the Warner executive, calculated his understanding of the value of a [REDACTED] campaign at $[REDACTED] per year, or approximately $[REDACTED] for the [REDACTED] campaigns to which Warner was entitled over the initial term of the agreement. Wilcox WRT at 14 n.9; 6/3/15 Tr. 7403 (Wilcox). SoundExchange notes that no iHeart fact witness disputed this attempted valuation.

For these reasons, SoundExchange disputes the decision by Drs. Fischel and Lichtman to assign no independent value to the [REDACTED] benefits contained in the iHeart/Warner Agreement.

ii. [REDACTED] Agreement

Another non-royalty/steering provision identified in the iHeart/Warner Agreement is a reference to a separate agreement—the ''[REDACTED] Agreement'' between the parties. SoundExchange avers that Drs. Fischel and Lichtman wrongly omitted the value of this $[REDACTED] payment from their calculation. According to SoundExchange, this omission was improper because Mr. Wilcox testified that ''it was ''worth . . . $[REDACTED]'' 6/3/15 Tr. 7385 (Wilcox). Mr. Wilcox further testified that iHeart had requested that this ''[REDACTED] transaction be set forth in a separate agreement, but Warner preferred that it be included—as it ultimately was—in the iHeart/Warner Agreement. 6/3/15 Tr. 7387 (Wilcox). SoundExchange also notes that iHeart does not dispute that the $[REDACTED] was executed on the same day. 6/2/15 Tr. 7304 (Cutler); 5/22/15 Tr. 5505 (Fischel). Further, SoundExchange points out that none of iHeart's fact witnesses testified that the $[REDACTED] was *not* consideration tied closely to the webcasting agreement.

SoundExchange acknowledges that the ''[REDACTED] Agreement'' contains an [REDACTED]. *See* SX Ex. 1339 at 1–2. However, SoundExchange argues that iHeart is inconsistent by claiming that the Judges should apply that express clause, yet they should ignore the express valuation of AIP at $[REDACTED] in the iHeart/Warner Agreement. *See* SX PFF ¶ 830. Additionally, SoundExchange avers that Warner would not have executed the webcasting agreement (all else equal) absent the $[REDACTED] payment. 6/3/15 Tr. 7388 (Wilcox) (''It was a material amount of money and important to us as part of the total list of consideration we were getting . . .'').

In sum, when Dr. Rubinfeld and SoundExchange account for all of the value they claim was missing from the valuation undertaken by Drs. Fischel and Lichtman, they conclude that under iHeart's ''Today's Growth'' model, the benchmark per-play rate would equal or exceed $0.[REDACTED]. *See* SX PFF ¶¶ 846–853 (and record citations therein).

e. Performance Under the iHeart/Warner Agreement Has Not Matched the Projections in iHeart's ''Today's Growth'' Model

In this proceeding, SoundExchange did not rely in its direct case upon any of Warner's projections reflecting its expectations at the time the iHeart/Warner Agreement was negotiated and executed. Rather, SoundExchange relies upon an analysis by Dr. Rubinfeld of available data regarding performances and royalties paid during the first eight months of the iHeart-Warner agreement—from October 2013 to May 2014. Dr. Rubinfeld relied upon this slice of performance data, rather than the expectations of the contracting parties, because he found that ''performance data reflect actual experiences in the marketplace [and] [t]he most recent performance data is likely to be the best predictor of what will happen in the immediate future.'' Rubinfeld CWRT ¶ 27. However, Dr. Rubinfeld also cautioned that ''review of a longer period of performance data may offer additional value if the review reveals important trends in the industry.'' *Id.* SoundExchange also points out that Dr. Katz (the NAB's economic expert), Mr. Cutler (an iHeart executive), and Aaron Harrison (a Universal executive) all recognized the importance of using current performance data to update prior projections or expectations. *See* SX PFF ¶¶ 800, 803–04 (and citations to the record contained therein).

From the 8-month slice of data that he reviewed and about which he opined, Dr. Rubinfeld calculated an alternative average per-play royalty rate. Rubinfeld CWDT at 57–59, ¶¶ 229–236); SX Ex. 64 (Rubinfeld App. 1b, backup calculations).[170] For custom noninteractive performances, Dr. Rubinfeld calculated a per-play rate of $0.[REDACTED] ($0.[REDACTED] rounded). When he attributed the value of AIP to the per-play rate, his eight-month performance-based rate rose to $0.[REDACTED] per play ($0.[REDACTED] rounded). SX Ex. 66. Dr. Rubinfeld then attempted to equalize the iHeart/Warner and derived potential statutory rate to equalize

[169] SoundExchange, noting one of iHeart's rebuttals on this issue, acknowledges that in the past, iHeart provided AIP [REDACTED]. Therefore, SoundExchange recognized that AIP provisions could be construed as a form of ''insurance'' against [REDACTED]. SoundExchange asserts that the threat that iHeart would [REDACTED] AIP was real, so any ''insurance'' value would be quite high, albeit indeterminate. *See* SoundExchange PFF ¶ 823 (and citations to the record therein).

[170] Dr. Rubinfeld also updated his calculations to include June to September 2014). SX Ex. 133.

royalty-bearing performances by adjusting for skips and for the playing of [REDACTED]. To that end, he used the same adjustment factor, 1.1, as he had used when performing his own interactive benchmarking analysis. Rubinfeld CWDT at 58 ¶ 234; SX Ex. 66.

SoundExchange avers that Dr. Rubinfeld's calculations as they relate to custom webcasting are conservative for the following reasons:

- He makes no adjustment upward for the certainty of value that Warner receives as a result of getting [REDACTED]. Rubinfeld CWDT at 57, ¶ 229.
- He does not account for any additional value from [REDACTED].[171]

f. iHeart Relies on Projections From Only One Model—the ''Today's Growth'' Model

SoundExchange avers that Drs. Fischel and Lichtman relied exclusively on one specific projection that applied certain ''assumptions'' regarding future performance under the iHeart/Warner Agreement. These expectations were contained in the ''Today's Growth'' model presented to iHeart's Board of Directors in mid-2013. Fischel/Lichtman AWDT at 21 ¶ 40.

Although Drs. Fischel and Lichtman state that they chose the ''Today's Growth'' model because the iHeart Board purportedly ''relied on [it] as the most realistic [case]'' when approving the iHeart-Warner Agreement, 5/21/15 Tr. 5322 (Fischel), SoundExchange notes that iHeart actually [REDACTED]. IHM Ex. 3338 (Cutler WDT); *see also* 6/2/15 Tr.7263–64 (Cutler).[172]

Although there is no evidence that the iHeart Board relied on the ''[REDACTED]'' or ''[REDACTED]'' models, SoundExchange avers (albeit without supporting evidence) that because iHeart executives [REDACTED], ''it was wrong for Drs. Fischel and Lichtman to ignore them completely.'' SX PFF ¶ 779. SoundExchange further notes that, although Mr. Cutler testified that he viewed the Today's Growth model as the best estimate, neither he nor any other iHeart witness testified that [REDACTED]. *Id.* Consequently, SoundExchange asserts that the Fischel/Lichtman analysis is compromised because they failed to test [REDACTED]. *See* 5/22/15 Tr. 5496–97 (Fischel).

SoundExchange noted when it looked at actual performance under the iHeart/Warner Agreement, one of the models that was [REDACTED]—the ''[REDACTED]'' Model—proved to be a more accurate estimate of [REDACTED]. *See* 5/22/15 Tr. 5494 (Fischel); 6/2/15 Tr. 7264–65 (Cutler). This consistency between the ''[REDACTED]'' model and initial actual performance existed, according to SoundExchange, because iHeart had [REDACTED]. 5/22/15 Tr. 5522 (Fischel); 5/20/15 Tr. 4839–40 (Pittman) ([REDACTED]).

SoundExchange surmises that such [REDACTED] policies were put into effect, and thus contributed to the actual initial performance under the iHeart/Warner Agreement that resembled the ''[REDACTED]'' model rather than the ''Today's Growth'' model. Whatever the reason, as Mr. Cutler of iHeart acknowledged, iHeart's growth in Warner plays over the initial contract period has been [REDACTED]. 6/2/15 Tr. 7264–65 (Cutler).

SoundExchange notes as well that Dr. Fischel admitted on cross-examination that he had performed an analysis of the effective incremental rates under the ''[REDACTED]'' model (but did not submit evidence of that calculation or testify as to that calculation). On cross-examination, Dr. Fischel further acknowledged that the incremental rate he had calculated equaled $0.[REDACTED] per play under the ''[REDACTED]'' model. 5/22/15 Tr. 5523 (Fischel).[173]

SoundExchange additionally points to an effective per-play rate that iHeart supposedly wrongly ignored—the rate derived from a model [REDACTED]. *See* SX Ex. 367 at 005; 6/3/15 Tr. 7552–53 (Wilcox); *see also* SX Ex. 92 at 15 (alternative model comparisons). Applying this model, according to SoundExchange, yielded an average performance rate above $0.[REDACTED], and an incremental rate of approximately $0.[REDACTED]. Once again, these rates were mathematically derived by SoundExchange, not its witnesses, based on ''the simple math that Prof. Fischel described'' as applicable to calculating these rates. *See* SX PFF ¶ 794.[174]

g. The Alleged Deficiencies in the 27 iHeart/Indies Agreements and in The Analysis of Their Terms by iHeart's Experts

SoundExchange raises several challenges to iHeart's attempt to use the 27 iHeart/Indies Agreements as benchmarks in this proceeding. First, SoundExchange avers that the status of these licensees as Indies renders them unrepresentative of the rates and terms that a noninteractive webcaster would negotiate with a major recorded music company. SoundExchange notes that even Dr. Fischel acknowledged, ''Warner got a [[REDACTED]%] better deal than the Indies'' from iHeart. 5/22/15 Tr. 5542 (May 22, 2015) (Fischel).

Second, SoundExchange notes that the greater-of rate structure in the iHeart/Indies agreements for custom noninteractive webcasting are [REDACTED], and thus are unduly influenced by that statutory rate. *See, e.g.,* IHM 3340, Tab 7/Ex. F (agreement between Indie DashGo and iHeart at 4, 8) Third, SoundExchange avers that these Indies comprise in total no more than [REDACTED]% of plays on the service in July 2014, and most account for less than [REDACTED]% of plays *See* SX PFF 863.[175]

SoundExchange notes that Drs. Fischel and Lichtman determined both average and incremental rates related to these 27 iHeart/Indies Agreements. iHeart calculated an *average* royalty rate of $0.[REDACTED] from these 27 agreements, and an *incremental* rate of $0.[REDACTED] from these 27 agreements. Fischel/Lichtman AWDT, Ex. D.

However, with regard to the incremental rate, SoundExchange notes that Drs. Fischel and Lichtman did not possess the same contemporaneous projections from iHeart (or the Indies) as

[171] Dr. Rubinfeld claims his estimate is also conservative because he applies the conservative pre-deal market share of [REDACTED]% despite a claim by Warner that its actual market share on iHeartRadio was approximately [REDACTED]%. Rubinfeld CWDT at 59 n. 135.

[172] [REDACTED]. Cutler WDT, Ex. DD.

[173] Although Dr. Fischel did not identify the average rate derived from the ''[REDACTED]'' model, the basic math derived from iHeart's ''[REDACTED]'' model projections reveal an average royalty rate of $0.[REDACTED]. for the entirety of performances under the iHeart/Warner Agreement if the ''[REDACTED]'' model had been applied. SX Ex 207; *See* SX PFF ¶ 793.

[174] Although Mr. Wilcox testified that this model indicating higher rates was [REDACTED], he did not clearly identify a model upon which [REDACTED]. Indeed, Mr. Wilcox testified that that the model that he identified as having been [REDACTED] ''was just one of many sets of assumptions we used throughout the course of negotiating this deal to stress-test the, you know, edge cases, you know, trying to figure out that this deal would perform positively for us in as many situations as we can throw at it. That's, sort of, the point.'' 6/3/15 Tr. 7421 (Wilcox). Thus, it is unclear as to exactly what model or models were [REDACTED]. Moreover, Mr. Wilcox did not identify in his written testimony which model or models were [REDACTED]. The Judges find Mr. Wilcox's oral testimony on this subject to be neither credible nor informative.

[175] SoundExchange does not provide a citation to the record for these statistics, referring only to ''iHeart's data.'' SX PFF ¶ 863. By contrast, Drs. Fischel and Lichtman stated in their written testimony that ''[a]s of July 2014, these 27 labels accounted for approximately [REDACTED]% of webcast performances on iHeart,'' but it was unclear from their testimony whether that percentage combined custom and simulcast performances. *See* Fischel/Lichtman AWDT ¶ 57 & n.51. Thus, the record is unclear what percentage of plays on iHeart's custom noninteractive service is comprised of these 27 Indies' recordings.

they had relied upon to determine the incremental rate under the iHeart/Warner Agreement. 5/22/15 Tr. 5543 (Fischel). Accordingly, the presumption by Drs. Fischel and Lichtman that iHeart would increase performances by [REDACTED]% is not based on any iHeart projection, nor is it supported by any provision of the 27 contracts. 5/22/15 Tr. 5544 (Fischel). Moreover, the starting point, pre-agreement performance numbers were based upon iHeart's *actual performances* of Indie recordings. *Id.* at 5545.[176] From this number, Drs. Fischel and Lichtman extrapolated an ''expectations''-based [REDACTED]% increase in the number of post-execution performances. *Id.*

Finally, SoundExchange notes the testimony of one Indie representative, Mr. Barros of Concord, who stated that Concord would not have entered into this agreement with iHeart to reduce custom noninteractive webcasting rates to [REDACTED] if the agreement did not also include the [REDACTED] and compensation for performances of [REDACTED]. 5/28/15 Tr. 6506 (Barros).[177] According to SoundExchange, Drs. Fischel and Lichtman erred by failing to adjust their proposed rates to account for this additional consideration.

4. The Judges' Analyses and Findings Regarding iHeart's Rate Proposal

a. The Judges Reject iHeart's ''Incremental'' Rate Analysis

The Judges agree with SoundExchange's critique that the ''incremental approach'' advanced by iHeart is an inappropriate method for determining rates under § 114. There are a number of reasons why the ''incremental approach'' is improper.

First, the basic premise of the approach is erroneous. In an effort to avoid the so-called ''shadow'' of the statutory rate, Drs. Fischel and Lichtman essentially substitute a rate of zero for the number of sound recordings played under the existing statutory rate. Then, they conceptually divide the expected total of performances under the direct license (the iHeart/Warner Agreement) into two value-bundles. The first conceptual value-bundle (Scenario 1) consists of the lower number of performances (without steering) that iHeart expected to be played under the higher existing statutory rate. The second conceptual value-bundle (Scenario 2) consists of the number of performances (with steering, from [REDACTED]% to [REDACTED]% market share) iHeart expected to be played under the lower direct deal rate. Drs. Fischel and Lichtman then consider the expected difference between the higher revenues arising from the direct deal. Finally, they divide the incremental revenue by the number of incremental plays to determine their ''incremental rate.''

This methodology intentionally attributes no market value to the rate and revenue paid for the *pre-incremental* performances. Although, as noted above, Drs. Fischel and Lichtman engage in this process in order to remove the alleged impact of the ''shadow'' of the statutory rate, they merely replace one supposed problem with a very real and more serious problem. That is, they replace the statutory rate with an effective rate of zero for the pre-incremental performances. There was no evidence presented in this proceeding, indeed no logical evidence could be presented, to support an assertion that the bulk of the pre-incremental performances under iHeart's ''two bundle'' concept would be priced at zero in an actual market. To state the obvious, the creation of sound recordings is not costless, and prices are positive because costs must be recovered.[178]

Relatedly, although iHeart would like the Judges to focus only on the incremental number of performances and the incremental revenue, those incremental values cannot exist without iHeart first paying for the pre-incremental performances at pre-incremental rates. To put the point colloquially, ''you cannot get there from here.'' That tautological point is not avoided by arbitrarily attributing a zero value to the pre-incremental performances.

SoundExchange makes this point well by analogizing to a ''buy one, get one free'' offer. If a vendor offered an ice cream cone (to adopt SoundExchange's demonstrative example at the hearing) for $1.00, but offered two ice cream cones for $1.06, it would be absurd to conclude that the true market price of an ice cream cone is the incremental six cents. Rather, this offer indicates a market price of $0.53, the average price for the two ice cream cones. Or, to take a common example, tire sellers will often advertise a special offer: A buyer can pay for three tires and get the fourth tire free. This is economically (and mathematically) equivalent to a 25% reduction in the price of four tires. No one could go to the automotive store and receive only the ''free'' fourth tire!

iHeart attempts to distinguish the ice cream cone example by noting that, in the present case, Drs. Fischel and Lichtman are not eliminating a market-based price for the pre-incremental bundle, but rather are eliminating a government-set rate that casts a ''shadow'' on the market. There are several errors in this reasoning. First, the statutory rates were set after market participants provided the Judges in the prior proceeding with market evidence. There is no *a priori* reason to conclude that the rates set in that earlier proceeding failed to reflect or approximate market forces, and iHeart does not provide evidence as to why the Judges should re-litigate prior rates and reach such a conclusion.[179] Second, to use a zero rate in order to remove the alleged shadow of the Judges' statutory rate or a settlement rate would be, to put the matter colloquially, ''throwing out the baby with the bathwater.'' A functionally zero rate for the pre-incremental performances is no mere potential ''shadow;'' it is an ink blot that obliterates any economic value inherent in the majority of the performances for which the rates must be established.[180]

Accordingly, the Judges reject iHeart's incremental approach and they reject the $0.0005 rate its experts derived by using the incremental approach. To be clear, that incremental $0.0005 proposed rate does not constitute a benchmark or a guidepost which the Judges have relied for any purpose, and that incremental rate and the analysis from which it was derived has not influenced the Judges in their determination of the statutory rate in this proceeding.[181]

[176] SoundExchange also points out that Drs. Fischel and Lichtman only had performance data for [REDACTED] of the 27 Indies, so they extrapolated the data that they had. *Id.* at 5548; *see also* SX Ex. 2347.

[177] As noted in the Judges' analysis of the Pandora/Merlin Agreement, Mr. Barros did not indicate that Concord, or anyone on its behalf, established a monetary value for these other contractual items.

[178] It is also unsupported by the evidence that record companies would forego all royalties in the hypothetical market merely to obtain a promotional value from the playing of their recordings on a noninteractive service.

[179] Similarly, iHeart has not proffered evidence sufficient to show why the rates set in settlements between parties, that both parties agree may be evidence of a market rate, fail to reflect, or at least approximate, market rates as of the time they were set.

[180] On a less colloquial and more economic basis, iHeart has confused an elasticity-type concept with price. iHeart calculates the change in total revenue divided by the change in quantity. Such a proportionate change is not equivalent to a unit price.

[181] iHeart attempts to support its ''incremental'' analysis with three arguments that it claims are confirmatory of the $0.0005 rate. *See* iHeart PFF ¶¶ 236–260 (and citations to the record therein). The Judges note that their rejection of this ''incremental'' analysis moots the relevance of any attempt to confirm its purported contextual reasonableness. Further, the fact that iHeart did not

b. The Judges Find the Average per-Play Rate Indicated by the iHeart/Warner Agreement to be a Useful Benchmark

Unlike the incremental rate derived by iHeart's experts, the ''average rate,'' *i.e.,* the stated per-play rate contained in the iHeart/Warner Agreement is a useful benchmark that, after adjustment, is probative of the rate that would be paid by a Major, as a willing seller/licensor, to a noninteractive service, as a willing buyer/licensee.[182]

i. The Benchmark Passes the ''Four-Part Test'' Derived From the Judges' Prior Decisions

The iHeart/Warner Agreement satisfies the sub-tests implicit in the Judges' prior determinations, as outlined by Dr. Rubinfeld:

Willing buyer and seller test: The rates are intended to be those that would have been negotiated in a hypothetical marketplace between a willing buyer and a willing seller.

There is no dispute that Warner was a willing seller in connection with the iHeart/Warner Agreement. As one of the three Majors, Warner is a sophisticated entity capable of negotiating direct agreements in a manner that it understands will advance its economic interests. Likewise, iHeart is a leading noninteractive webcaster—not to mention one of the largest transmitters of music across various platforms. iHeart thus without dispute is also clearly capable of representing its economic interests in negotiating direct agreements.

In the present case, the record is replete with voluminous submissions and substantial testimony indicating the diligence of both iHeart and Warner in negotiating this direct agreement. Clearly, each party was a willing participant in the legal sense; that is, each party was under no compulsion to enter into the iHeart/Warner Agreement, and each party had the opportunity to avail itself fully of all facts that it deemed pertinent before executing that agreement. *See, e.g., Amerada Hess Corp.* v. *Comm'r,* 517 F.2d 75, 83 (3d Cir. 1975) (defining a ''willing buyer'' and a ''willing seller'' as parties not ''being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.' '').

Same parties test: The buyers in this hypothetical marketplace are the statutory webcasting services and the sellers are record companies.

In the iHeart/Warner Agreement, the buyer/licensee, iHeart, is a statutory webcasting service. The seller/licensor, Warner, is a record company. Clearly, this aspect of the benchmark test is satisfied.

Statutory license test: The hypothetical marketplace is one in which there is no statutory license.

The iHeart/Warner Agreement is a direct agreement between the parties. The rates established in this agreement are not statutory rates. More particularly, at the time the iHeart/Warner Agreement was executed, iHeart was obligated to pay royalties to Warner according to the schedule of rates set forth in the SoundExchange/NAB settlement.[183]

SoundExchange asserts that, nonetheless, the rates in the iHeart/Warner Agreement are too heavily influenced by the ''shadow'' of the statutory rates to satisfy this ''statutory license test.'' The Judges disagree. As with regard to the Pandora/Merlin Agreement, it is crucial to appreciate that the adjusted effective rate[184] in the direct license is *less* than the default rate that would otherwise control (the SoundExchange/NAB settlement rates for iHeart, and the Pureplay rates for Pandora). Accordingly, Warner was under no compulsion to accept the lower rate (compared to the SoundExchange/NAB settlement rate) set forth in the iHeart/Warner Agreement; *it could have rejected that rate and defaulted to the higher SoundExchange/NAB settlement rate.* Instead, Warner agreed to the lower rate, in exchange for the anticipated steering by iHeart of additional webcast performances of Warner sound recordings (from approximately [REDACTED]% to [REDACTED]% of total sound recordings). Accordingly, the Judges find that the ''statutory license test'' has also been satisfied by the iHeart/Warner Agreement.

Further, and as discussed in connection with the Pandora/Merlin Agreement, the steering aspects of the iHeart/Warner Agreement also satisfy a statutory ''test'' omitted from Dr. Rubinfeld's four-part approach: The ''effective competition'' test. The steering aspect of the iHeart/Warner Agreement reflects price competition—an increase in quantity (more performances) in exchange for a lower price (a lower rate). All of the reasons set forth in this determination in the analysis of the Pandora/Merlin Agreement regarding the pro-competitive aspects of such steering, including the dynamic effect of a threat of steering, apply with equal force to the iHeart/Warner Agreement.[185]

Same rights test: The products sold consist of a blanket license for digital transmission of the record companies' complete repertoire of sound recordings, in compliance with the DMCA requirements.

propose these approaches as benchmarks or as other *independent* bases to set the rates makes them unhelpful and inappropriate as evidence to support iHeart's rate proposal. However, in the interest of completeness, the Judges note the following with regard to those arguments. First, Drs. Fischel and Lichtman undertook what they called a ''thought experiment,'' whereby they attempted to estimate a rate necessary for sound recording copyright holders to maintain revenue at current levels if 100% of all listening to recorded music migrated to noninteractive webcasting. (They concluded that the rate would be $0.[REDACTED] per play.) They also did the same analysis on the assumption that only 25% migrated to noninteractive services. (They concluded that the rate would be $0.[REDACTED] per play.) However, Drs. Fischel and Lichtman acknowledge that this ''thought experiment'' is *''not evidence of what a willing buyer and willing seller would negotiate.''* Fischel/Lichtman AWDT ¶ 128 (emphasis added). Therefore, such speculation is irrelevant to the Judges. Second, Drs. Fischel and Lichtman performed an ''Economic Value Added (''EVA'') analysis of the costs, revenues and necessary ROI of a ''hypothetical simulcaster'' to determine the rate necessary for it to remain in business in the long-run, which they determined to be between $0.[REDACTED] and $0.[REDACTED] per play. However, as the Judges have repeatedly held, rate proceedings under section 114 are not public utility style proceedings whereby parties are guaranteed a rate of return. *See, e.g., Web III Remand,* 79 FR at 23107. Further, their EVA model was based on a sample of terrestrial radio firms that is not necessarily representative of simulcasters. Additionally, their EVA analysis fails to consider the rates necessary for *record companies* to obtain a sufficient rate of return, so they have simply focused on the demand side of the market and ignored the ''willing sellers'' on the supply side. Third, Drs. Fischel and Lichtman compare the statutory rate for satellite digital audio radio services (SDARS) and find that it suggests a per-play rate of $0.[REDACTED] to $0.[REDACTED]. However, rates set by the Judges in other types of proceedings are not probative of rates that should be set in this proceeding, especially when the standards in the two proceedings are different. The rate standard in SDARS proceedings is different from the standard in section 114(f)(2)(B) for noninteractive services. *See* 17 U.S.C. § 801(b)(1)(A)–(D) (setting forth particular objectives that the rates must achieve).

[182] In discussing the reasons why this average rate is a useful benchmark, the Judges find it helpful to organize their finding by adopting Dr. Rubinfeld's characterization of the elements of the statutory test implicitly set forth in section 114. *See* Rubinfeld CWDT ¶ 122(a)–(d).

[183] See note 28, supra.

[184] The Judges' determination of the adjusted effective rate under the iHeart/Warner Agreement is discussed infra.

[185] iHeart notes that the threat of steering could cause steering to occur in a number of differentiated ways, *e.g.,* with one service making steering deals with several licensors, several licensees making similar deals with the same licensor(s), or a licensee making different deals with different licensors over time. *See* iHeart RPFF at 6 n.15. However, the Judges need not rely on such specific predictions. In whatever ways in which the reality of steering and the concomitant threat of steering-induced price competition develop, it is clear to the Judges that, as Dr. Shapiro explained, steering is the mechanism by which the complementary oligopoly power of the Majors is offset, allowing the Majors to realize only their considerable (non-complementary) oligopolistic power generated by their repertoires and their organizational acumen.

It is not disputed that the iHeart/Warner Agreement provides in pertinent part for a license from Warner to iHeart to play Warner sound recordings on iHeart's noninteractive webcasting service. *See* SX Ex. 33 at 8 ¶ 1(y) (defining ''[REDACTED]''); *id.* at 11, ¶ 2(a)(1) (granting right to play ''[REDACTED]'' on ''[REDACTED]''). Pursuant to the iHeart/Warner Agreement, a ''[REDACTED]'' must ''[REDACTED]. *Id.* at 8, ¶ 1(y). In turn, Exhibit A to the iHeart/Warner Agreement permits [REDACTED]; requires iHeart to [REDACTED]; and allows a listener [REDACTED]. *Id.,* Ex. A.

Accordingly, the Judges find that iHeart/Warner Agreement satisfies the core of the ''same rights test.''

ii. The Average Rate in the iHeart/Warner Agreement

The Judges agree with SoundExchange that any use of the iHeart/Warner Agreement as a benchmark must apply the effective *average* rate contained in that agreement.[186] *See* SX RPFF ¶ 844 (''The *average effective rate* approach . . . is the proper analytical method. . . .'') (emphasis in original). The iHeart/Warner Agreement sets forth different per-play rates for [REDACTED]. The record does not reflect the reason(s) why iHeart and Warner negotiated an increase in the rates from a low of $0.[REDACTED] in [REDACTED] to a high of $0.[REDACTED] in [REDACTED] (and for any renewal term thereafter). In any event, the parties' inclusion of specific per-play rates paid to Warner in exchange for the right granted to iHeart to play Warner's sound recordings reflects the parties' WTA and WTP for the particular years. In the absence of relevant evidence necessitating adjustments or legal conditions extrinsic to the parties' agreement, the Judges cannot second-guess the rates to which the parties have agreed in a benchmark contract that otherwise satisfies the statutory test for a usable benchmark.

By applying the average rate explicitly set forth in the iHeart/Warner Agreement (subject to potential adjustments), the Judges have obviated the protracted dispute between the parties regarding the probative value of different models and projections of future growth of performances and royalties. That is, in the absence of a ''two-bundle'' theory, the parties' expectations and projections are baked into the single explicit annual rate contained in the iHeart/Warner Agreement. Regardless of whether actual performance eventually resembles the ''Today's Growth Model'' relied upon by the iHeart Board, or some more pessimistic or optimistic model of projections considered by iHeart or Warner, iHeart was contractually bound to pay a fixed royalty per year, and Warner had the duty to provide iHeart with access to Warner's sound recordings if those fixed per-play payments were made. Accordingly, the Judges look to the average rate agreed to by the parties in the iHeart/Warner Agreement for 2016, which coincides with the first year of the statutory 2016–2020 period. That agreed-upon rate is $0.[REDACTED] per play.

However, that average, stated per-play rate is not necessarily applicable, standing alone, as a benchmark, if it is subject to necessary upward or downward adjustments to account for other forms of consideration or to more accurately account for probative evidence related to the rights available under the statutory license. The Judges turn to these issues in the next section of this determination.

iii. Potential Adjustments to the Rate Derived From the iHeart/Warner Agreement

(A) General Considerations

A potential benchmark can include terms that provide a *licensor* with additional compensation, whether in cash or in kind, beyond the simple receipt of money in exchange for the right to play sound recordings. In similar fashion, a potential benchmark can also provide a *licensee* with additional compensation, beyond the basic right to play sound recordings in exchange for the payment of money. When the parties' proposed benchmark agreement has bundled such other items with the simple payment-for-plays obligation that mirrors the rate provisions of § 114, the issue arises as to whether and how, if at all, to value these non-statutory items.

As an initial matter, the Judges note that the parties have a strong self-interest to establish values for non-statutory items that would support their positions. Thus, the Judges would anticipate that the record companies and SoundExchange would present specific evidence of the monetary value for the non-statutory consideration they received under the contract that must be added to the stated (''headline'') rate on a per-play basis. More particularly, the Judges would expect that the record companies' *internal valuations and spreadsheets* would set forth their understanding of these *monetary* values (not merely the existence of some unquantified value). Similarly, the Judges would anticipate receiving *expert testimony* from SoundExchange's economic witnesses, ascribing a *monetary* value to such additional contractual consideration allegedly benefiting the record companies, especially if there were no contemporaneous internal valuations made by the record companies themselves.

Reciprocally, the Judges would also expect to receive evidence from the webcasters/licensees with regard to *their contemporaneous calculation* of the *monetary* value of contractual consideration they allege to have received in addition to the basic right to play sound recordings. Also, and especially if such evidence did not exist, the Judges would expect to receive evidence from the economic experts testifying on behalf of the webcasters/licensees regarding the *monetary* value of such additional forms of consideration supposedly benefiting the webcasters/licensees.

The Judges' expectation that such evidence would be proffered is heightened by the accurate accusations hurled by each side that the other side was manipulating the terms of the potential benchmark in order to influence the Judges in this proceeding. *See, e.g.,* 4/30/15 Tr. 1141–42 (A. Harrison) ([REDACTED]); 4/28/15 Tr. 508–09 (Kooker) [REDACTED]); 6/1/15 Tr. 6962 (Lexton) (acknowledging that any deal Merlin concludes will be available as evidence in CRB hearings); SX Ex.102 at 3 (5/14/14 email among Merlin executives); PAN Ex. 5117 (same); 5/19/15 Tr. 4760 (Shapiro) (''My working assumption is that *everybody* is aware of this proceeding and how . . . deals they cut might affect it.'') (emphasis added); IHM Ex. 3517 [REDACTED]). It would be surprising, to say the least, if parties who anticipated that a direct deal would be used by an adversary improperly in this proceeding did not develop evidence sufficient to rebut that attack, unless no such evidence—factual or expert—could reasonably be presented. Thus, when a party fails to provide such important, competent and probative factual or expert evidence, the Judges are left with no evidentiary basis to support the assertion that the alleged additional value of other contractual items is sufficient to alter the rates and terms of

[186] The stated per-play rate is the equivalent of the ''average'' rate because it is the same rate paid for each performance. To use iHeart's parlance, there is only one ''bundle'' of rights, with each performance priced at the same rate. The issue of how to adjust, if at all, that ''average'' rate into the average ''effective'' rate is discussed *infra.*

the benchmark agreements in which they are contained.

With those general considerations in mind, the Judges now analyze particular issues disputed by the parties regarding the valuation of certain items in the iHeart/Warner Agreement.

(B) AIP

AIP, iHeart's Artist Integration Program, allows Warner's artists to benefit from particular advertising on iHeart's music-formatted radio stations and iHeart's Web sites, in the form of [REDACTED].'' SX Ex 33 at 19 § 5(a)(i). Clearly, such advertising inures to Warner's benefit.

Additionally, the iHeart/Warner Agreement contains an express provision stating that this ''[REDACTED] AIP Commitment'' has an annual ''*fair market value* of [REDACTED] *Dollars (USD $*[REDACTED]*).'' Id.* at § 5(a)(ii) (emphasis added). SoundExchange argues that there is no reason to require evidence of an internal valuation when the parties have agreed to a ''fair market value'' on the face of their contract.

iHeart makes several arguments in an attempt to disavow this agreed-upon valuation:

- AIP provides value to iHeart and to Warner because AIP content is valuable to listeners and therefore also ''helps build [iHeart's] brand . . . as [a] trusted curator[] . . . .'' 5/21/15 Tr. 5189–92 (Poleman).
- Warner received [REDACTED] AIP [REDACTED] and the $[REDACTED] reference was intended to reflect [REDACTED]. 6/2/15 Tr. 7312 (Cutler).
- iHeart's commitment to [REDACTED] AIP therefore was in the nature of ''insurance,'' rather than a granting of an additional right. *See* IHM RPFF ¶ 815 (and citations to the record therein).
- Neither iHeart, Warner, nor Universal treated AIP as a ''[REDACTED],'' and iHeart [REDACTED]. *Id.* ¶ 817 (and citations to the record therein).
- The $[REDACTED] was derived from iHeart's advertising ''rate card'' as a means to measure that Warner got [REDACTED]. 5/21/15 Tr. 5190 (Poleman).
- In its own projections, Warner declined to value AIP because AIP ''[REDACTED].'' 6/3/15 Tr. 7500 (Wilcox).

The Judges find that the AIP provision in the iHeart/Warner Agreement does not support an increase in the effective average per-play rate derived from that benchmark. As an initial matter, the AIP language in the iHeart/Warner Agreement does not state that the parties agreed, *inter se,* that the value of the AIP terms is $[REDACTED]. Rather, the iHeart/Warner Agreement sets forth a purported general economic fact regarding a ''market,'' *i.e.,* that that there [REDACTED]. However, that assertion of supposed ''fact'' is belied by the record. It is undisputed that iHeart provided AIP [REDACTED] to Warner (and to Sony and Universal) *prior* to the formation of the iHeart/Warner Agreement, and that iHeart continued to provide AIP—[REDACTED]—to Sony and Universal *after* the execution of the iHeart/Warner Agreement. 5/21/15 Tr. 5343–44, 5348 (Fischel); 6/2/15 Tr. 7312, 7335 (Cutler). It is also undisputed, and clear from the iHeart/Warner Agreement, that [REDACTED], further negating the existence of any market value. SX Ex. 33 at 34, ¶ 18(g).

As Mr. Poleman, an iHeart witness, testified: ''these monetary figures serve no other purpose than [REDACTED]. These monetary figures do not reflect [REDACTED] Poleman WRT ¶ 22.

The Judges find these undisputed facts to demonstrate that there was no actual ''market'' in which Warner procured AIP from iHeart. If such a market existed, with a fair market value of $[REDACTED] for the AIP provided to Warner, it would have been irrational for iHeart simply to give away such substantial value (*e.g.,* the equivalent of [REDACTED]% of Dr. Rubinfeld's proposed rate for 2016 and of the NAB/SoundExchange settlement rate for 2015). *See* 5/28/15 Tr. 6284 (Rubinfeld) (AIP at a value of $[REDACTED] per year would raise the effective rate by $0.[REDACTED] per play).

Rather, the Judges find guidance for the meaning and of this ''$[REDACTED]'' figure as it relates to the setting of rates in this proceeding in the context of the contractual clause in which the figure is contained. The contract states: ''[iHeart] shall provide Warner AIP insertions in each Agreement year . . . that (i) have a fair market value of at least . . . $[REDACTED] per Agreement Year; and represent at least . . . [REDACTED]% of all AIP inventory in each daypart and market.'' SX Ex. 33 at 19 ¶ 5(a)(ii). This provision is consonant with iHeart's explanation that the $[REDACTED] figure was used to establish [REDACTED], and therefore is not a monetary value that the Judges may simply pro-rate, and thereby grossly inflate the benchmark rate.[187]

The Judges also find that iHeart's willingness to provide AIP [REDACTED] to record companies was rational. As Mr. Poleman testified, *see supra,* AIP campaigns provided information about sound recording artists that served to build iHeart's brand as a trusted ''curator'' of music for its listeners. Thus, AIP had value to both the record companies and iHeart, which would explain why a sophisticated entity such as iHeart would [REDACTED] AIP time [REDACTED] to record companies. Relatedly, the Judges note internal iHeart communications indicating that iHeart [REDACTED].

The Judges further find that the testimony by Warner's executive, Mr. Wilcox, confirms that the ''$[REDACTED]'' figure was used as [REDACTED] rather than a statement of value that the Judges could simply add to the effective rate under the iHeart/Warner Agreement. The following testimony on direct examination is telling:

> Q: Did iHeart represent to you [AIP] had value, monetary value?
>
> A: Yes.
>
> Q: What was that amount?
>
> A: Well, ultimately it was agreed on that we would *say* that it was [REDACTED]. They were contending it was worth more and that was a conservative estimate. *Ultimately, they gave us the $*[REDACTED] *CPM number as a way to value the different impressions that were available to us through AIP. So that was ultimately where we agreed to settle in terms of valuing it.*[188]

6/3/15 Tr. 7388–89 (Wilcox). This testimony reveals two points: First, the valuation was negotiated to establish a quantity term for AIP. Second, this testimony does not indicate any reference in the negotiations to a ''fair market value'' for AIP that the parties later simply plugged into the iHeart/Warner Agreement. *See also* 6/2/15 Tr. 7318 (Cutler) (''This is a sort of a quick-and-dirty formula where we took a hugely averaged rate and applied it to what we—you know, ultimately these promotional spots in these AIP programs.'').

The Judges also find credible and important the undisputed fact that no party, and no record company,

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[187] The Judges find that the contractual remedial provisions relating to AIP support their findings in this regard. Performance of the AIP terms required iHeart and Warner to [REDACTED]. *Id.* ¶ 5(a)(i). In turn, the iHeart/Warner Agreement provides that, if Warner and iHeart disagree regarding [REDACTED], then ([REDACTED]) Warner may [REDACTED]. *Id.* Thus, as a remedy for breach [REDACTED]. This remedial provision further indicates that Warner had obtained in the iHeart/Warner Agreement [REDACTED] which, upon an iHeart breach, [REDACTED]. Additionally, [REDACTED]. *See id.* (''[REDACTED]'').

[188] ''CPM'' is cost per thousand advertising impressions. 4/28/15 Tr. 419 (Kooker). Thus, the $[REDACTED] per 1,000 impressions factor can be used to determine the quantity of impressions if $[REDACTED] is substituted for the $[REDACTED] figure. Impressions are viewed or heard ads. 6/3/15 Tr. 7403–04 (Wilcox).

considered that AIP could be valued as a cash equivalent. That is consistent with the finding that the AIP term in the iHeart/Warner Agreement was intended as an [REDACTED], rather than a valuing mechanism for dramatically inflating the effective per-play rate in that agreement.

The Judges' decision on this issue is also informed by the negotiating position taken by Warner. In particular, under cross-examination, Mr. Wilcox, the testifying Warner executive, when asked if ''you told the iHeart representatives during negotiations that you thought AIP *was worth zero,''* testified: ''I don't have a specific recollection right now, but . . . *that would have been consistent with the negotiating posture that I might have taken.''* 6/3/15 Tr. 7466 (Wilcox) (emphasis added). This testimony undermines Warner's assertion that the Judges should simply add $0.[REDACTED] to the per-play rate derived from this benchmark, when Warner's own witness had claimed in negotiations that AIP had no value. Moreover, even if Mr. Wilcox's assertion represented only his ''negotiating posture,'' then the Judges find that iHeart's representation of a positive value, including the $[REDACTED] figure plugged into the agreement, was also the consequence of negotiation rather a declaration of fact as to the existence of a ''fair market value'' of $[REDACTED].[189] Finally, the Judges do not find credible Mr. Wilcox's testimony that he was informed by iHeart that it would [REDACTED] AIP, in light of the absence of any document sufficient to corroborate that assertion, and in light of the fact that iHeart has not [REDACTED] AIP. Moreover, even if iHeart had taken such a negotiating position, the Judges do not find, after listening to Mr. Wilcox's testimony, that he genuinely believed such a change in AIP policy was forthcoming.

The Judges do recognize that, by converting AIP from a discretionary, voluntary program to a contractually binding commitment, iHeart provided Warner with what Drs. Fischel and Rubinfeld both considered to be ''insurance'' value. However, neither party through a fact or expert witness presented any basis to create a monetary value for this ''insurance.'' Therefore, the Judges are presented in this context with the conundrum of an item of ostensible (insurance) value that has not been valued by the parties, but is tendered to the Judges without evidentiary guidance. The Judges return to the point made in the General Considerations section. SoundExchange, through Dr. Rubinfeld, acknowledges that there is some insurance value in the conversion of AIP into a contractual commitment, yet SoundExchange did not present a method for valuation. iHeart, through Dr. Fischel, avers that this ''insurance'' value would be quite small, and he too did not provide a monetary value. If a party had the understanding that an element within a benchmark could be valued in a manner that would further support its position, the Judges would expect that party to present evidence in that regard. Here, SoundExchange declined to do so with regard to the ''insurance'' value of the conversion of AIP into a contractual commitment. The Judges therefore find that such unquantified ''insurance'' value cannot be added to the effective per-play rate under the iHeart/Warner Agreement.[190]

(C) [REDACTED]

[REDACTED] the [REDACTED], is a program by which Warner may [REDACTED]. *See* SX Ex. 33, Ex. F thereto. SoundExchange asserts that it has a quantifiable value to Warner that must be pro-rated across the number of performances and added to the per-play rate. However, the record indicates that Warner did not engage in any valuation of [REDACTED] contemporaneous with the negotiation of the iHeart/Warner Agreement and that Dr. Rubinfeld did not perform any such expert economic valuation. 5/28/15 Tr. 6437 (Rubinfeld).

Rather, SoundExchange's entire argument in support of a valuation, in excess of $[REDACTED], for [REDACTED] is based upon the hearing testimony of Mr. Wilcox. He derived this value from a single [REDACTED] campaign undertaken by Warner after the iHeart/Warner Agreement had been executed. Wilcox WRT at 14 n.9. However, as iHeart points out, Warner's post-execution performance—or more accurately, non-performance—contradicts this attempt at a performance-based valuation. That is, Mr. Wilcox did not dispute that Warner had [REDACTED]. 6/3/15 Tr. 7452 (Wilcox). Thus, the Judges find that, even to the extent that post-contract performance might be helpful in determining value, Mr. Wilcox's testimony as to a value in excess of $[REDACTED] for [REDACTED] is simply not credible.

In this context as well, neither party's negotiators nor its economic experts set forth a monetary value. The rebuttal performance-based testimony that SoundExchange relies upon from Mr. Wilcox to demonstrate that [REDACTED] had value is simply insufficient when considered against Warner's failure to [REDACTED], and in light of the fact that the Judges did not find Mr. Wilcox to be a particularly credible witness. Accordingly, the Judges do not find that the inclusion of [REDACTED] rights in the iHeart/Warner Agreement supports an increase in the effective average per-play rate derived from that agreement.

(D) The [REDACTED] Agreement

The Judges decline to include in the average effective rate any value derived from the $[REDACTED] payment by iHeart to Warner for rights under the [REDACTED] Agreement. As an initial matter, this agreement is not even part of the iHeart/Warner Agreement. Second, the [REDACTED] Agreement contains an integration clause that, as iHeart correctly notes, by its plain language declares that it is the entire agreement between the parties and thus excludes reference to any other agreement, such as the iHeart/Warner Agreement. SX Ex. 1339. The Judges further note that the iHeart/Warner Agreement [REDACTED]. SX Ex. 33 ¶ 18(c). Third, the [REDACTED] Agreement provides for a payment of $[REDACTED] in exchange for a specific set of rights unrelated to iHeart's right to play Warner sound recordings on iHeart's noninteractive service. Fourth, it is irrelevant that Warner was aware of, and made reference to, the [REDACTED] Agreement value when it considered the value of its forthcoming relationship with iHeart. Indeed, as iHeart points out, Warner's internal models and other documents identified the [REDACTED] Agreement's $[REDACTED] payment obligation as a distinct payment for [REDACTED]. *See* iHeart RPFF ¶ 828 (and citations to the record therein).

The Judges also agree with iHeart's argument that the $[REDACTED] payment obligation in the [REDACTED] Agreement presents the Judges with an issue of *allocation* rather than valuation. *See* iHeart RPFF ¶ 830. The fact that the [REDACTED] Agreement contains an

[189] The irony surrounding this issue is not lost on the Judges. In this proceeding, Warner claims AIP has significant value, in order to inflate the benchmark, but claimed during negotiations that AIP had no value, in order to [REDACTED]. 6/3/15 Tr. 7466 (Wilcox). Likewise, during negotiations, iHeart touted the benefits of AIP, but minimizes its significance during this proceeding, in an attempt to avoid an increase in the effective benchmark rate. Such switching of positions, combined with the other issues discussed in this section regarding AIP, underscore the indeterminacy of AIP's impact, if any, on this benchmark.

[190] Also, the unquantified value of any ''insurance'' aspect of the contractual AIP commitment would have had to be offset against the value of other non-pecuniary items in the iHeart/Warner Agreement that favor iHeart, as discussed *infra.*

unambiguous integration clause underscores the fact that the rights and payments under that contract must be allocated only to that contract. The Judges therefore find that the $[REDACTED] payment to Warner by iHeart under the [REDACTED] Agreement is properly *allocated* to that agreement for the provision of [REDACTED], and cannot be attributed to the *valuation* of the parties' rights—and rates—under the iHeart/Warner Agreement.

(E) Other Unvalued Contract Items

As noted *supra,* SoundExchange asserts that the effective average rate under the iHeart/Warner Agreement must be increased to reflect the value of additional contract items, including:

- The guarantee that iHeart would [REDACTED] even if such steering fell short of that level.[191]
- The alternative percentage-of-revenue rate in the greater-of formulation.
- The additional $[REDACTED] payment guarantee by iHeart even if it never played any Warner sound recordings.
- The guarantee that Warner would receive at least the same [REDACTED], as it did prior to the iHeart/Warner Agreement.
- Warner's [REDACTED], which iHeart could [REDACTED].
- Royalties paid for [REDACTED].

See SX RPFF ¶ 889 (and citations to the record therein).

With regard to all of these items, notwithstanding any potential monetary value that might be associated with them, neither Warner nor SoundExchange established values for these items. Indeed, SoundExchange acknowledges that, when the Judges asked Mr. Wilcox whether Warner had assigned a number value to ''these provisions,'' he admitted that Warner ''could not be certain.'' 6/3/15 Tr. 7409 (Wilcox). As the Judges noted in the General Considerations section of this analysis of the iHeart proposal, if the party that seeks to increase (or decrease) an otherwise effective benchmark rate to account for other items of potential value cannot or has not provided evidence of such value, when it was in its self-interest to do so, the Judges cannot arbitrarily adjust or ignore that otherwise proper and reasonable benchmark.

(F) Offsetting Value to iHeart in the iHeart/Warner Agreement

iHeart points out that the iHeart/Warner Agreement also provides value to iHeart in the form of: (1) A [REDACTED] royalty ceiling that serves as *de facto* insurance against [REDACTED] and (2) most-favored-nation status at least equalizing iHeart's terms with Warner's terms in any agreement with [REDACTED] Fischel/Lichtman AWDT ¶ 38. However, the chronic problem the Judges have referenced *supra* applies here as well: iHeart did not attempt to place a value on such items. *Id.* ¶ 39 (''It is difficult to precisely quantify the value of these various non-pecuniary terms'' and iHeart ''made no explicit attempt to value these terms.'').

However, Drs. Fischel and Lichtman point out that because both parties failed to value such terms, it is acceptable to ''assume[] a net value of zero for these terms.'' Id.; see 5/28/15 Tr. 6435–37 (Rubinfeld) (acknowledging that he failed to attribute numerical dollar values to items in the iHeart/Warner Agreement that benefited each party respectively).

The Judges disregard these unvalued items; not because, as Drs. Fischel and Lichtman assert, they should be presumed to have a net value of zero. Rather, as stated in the General Considerations section, the Judges tie the indeterminacy of the net value of these offsetting items to a (perhaps tactical) failure of proof of value by sophisticated parties. As Dr. Rubinfeld acknowledged in a colloquy with the Judges:

> [JUDGES]
> [I]f iHeart is paying a . . . rate based on dollar denominated items and gets some other non-dollar denominated value—net value to iHeart as if it was paying some lower rate because it got new items of value—. . . we just can't value them because *nobody* did and we don't have the evidence to do so.
> [DR. RUBINFELD]
> Yeah, that's possible.

5/28/15 Tr. 6439. Continuing, the Judges reiterated that for these other items of value, ''the sign is moving plus and minus'' but ''without dollar values attached by the experts or the parties in their contracts or their negotiations,'' and lamented that they ''have no way of valuing them . . . .'' Dr. Rubinfeld responded by commiserating, acknowledging that he too did not, and instead he simply fell back to a non-sequitur: that his proposed rate was closer to the ''actual NAB rates . . . than [Dr.] Fischel's proposed incremental rate.'' *Id.* at 6439.

(G) Adjusting the iHeart/Warner Benchmark Rate to Account for [REDACTED] and Thereby Equalizing the Number of Royalty-Bearing Plays Between the Benchmark and the Statute

Drs. Fischel and Lichtman note that an iHeart listener is entitled to [REDACTED] [192] per hour per station or channel, for which iHeart is not required to pay royalties. Fischel/Lichtman AWDT ¶ 35; SX Ex 33 at 15 ¶ 3(b)(i); *id.* at 38 Ex A therein. They note, after setting forth the number of [REDACTED] and performances that, ''[i]n July 2014, [REDACTED] . . . constituted approximately [REDACTED] percent of all iHeart custom performances, so that the functional per-performance rate paid on these contracts is approximately [REDACTED]% lower than the statutory per-performance pureplay rate.'' Fischel/Lichtman AWDT ¶ 61 & n.9. This [REDACTED] adjustment is very close to Dr. Rubinfeld's skips adjustment factor of [REDACTED], which also included an offset for increased plays by virtue of the royalty value of [REDACTED] under his interactive benchmark agreements).

If Drs. Fischel and Lichtman had applied that [REDACTED]% reduction to the otherwise stated average rate of $0.[REDACTED] for 2013 in the iHeart/Warner Agreement, they would have equalized that rate to a statutory rate of $0.[REDACTED]. However, Drs. Fischel and Lichtman adjust their 2013 stated average rate from $0.[REDACTED] to $0.[REDACTED]. SoundExchange avers that it appears from iHeart's own documents however that this $0.[REDACTED] rate reflects an incorporation of the Pureplay rate rather than a calculation to adjust for [REDACTED] *See* SX Ex. 221 at 1, 4 & n.21.

In response to this criticism, iHeart does not refer the Judges to any evidence of calculations it did to support a [REDACTED] reduction from $0.[REDACTED] to $0.[REDACTED]. Rather, iHeart simply declares SoundExchange's reliance on SX Ex. 221, iHeart's own document, is insufficient to call into question the [REDACTED] adjustment proposed by iHeart. *See* iHeart RPFF at 119–20.

The Judges find that SoundExchange's criticism is appropriate. In order to reflect not only the [REDACTED] adjustment, but also to make an

[191] The parties disputed whether the pre-agreement pro rata level was [REDACTED]% or [REDACTED]%. That dispute related to a measurement of the ''two bundles'' hypothesized by Drs. Fischel and Lichtman, but rejected by the Judges in this determination. Under an average rate approach with a steering-based [REDACTED]% *pro rata* share, it is irrelevant whether the pre-contract pro rata Warner share on iHeart was [REDACTED]% or [REDACTED]%.

[192] [REDACTED] custom performances are defined in the iHeart/Warner Agreement as performances ''that are [REDACTED].'' SX Ex. 33 at p. 15, ¶ 3(b)(i).

adjustment to reflect plays of [REDACTED], the Judges adopt Dr. Rubinfeld's [REDACTED] adjustment to equalize the number of plays as between this benchmark and the statutory rate. Thus, the 2013 rate of $0.[REDACTED], as noted above, would equalize to $0.[REDACTED].

More importantly, for the first year of the statutory period at issue, 2016, the stated average rate is $0.[REDACTED]. Applying a [REDACTED] adjustment of [REDACTED] results in an equalized rate of $0.[REDACTED]. (Even applying iHeart's proffered [REDACTED]% rate reduction for this factor would result in an adjusted rate of $0.[REDACTED], before any consideration of additional [REDACTED].).[193]

c. The Percentage of Revenue Provision in the iHeart/Warner and iHeart/Indies Agreements

The iHeart/Warner Agreement contains a greater-of rate formula that includes a [REDACTED]%–[REDACTED]% rate, depending upon the year of the agreement. SX Ex. 33 at 15–16, ¶ 3(b)(ii).[194]

For the reasons set forth in the Judges' comprehensive rejection of a greater-of structure with a percentage-of-revenue prong, the Judges do not include these iHeart greater-of provisions in the benchmarks they derive from the iHeart/Warner Agreement and the iHeart/Indies Agreements.

d. The Judges Consideration of the 27 iHeart/Indies Agreements

iHeart has calculated an *average* royalty per play for Indies of $0.[REDACTED]. Fischel/Lichtman AWDT Ex. D therein.[195] However, the iHeart/Indies Agreements apply the per-play rates that have a set (*i.e.,* average) per-play rate that controls for each year.[196] Those per-play rates are all equal to the [REDACTED] rates and therefore are less than $0.[REDACTED]. *See, e.g.,* IHM Ex. 3353 ¶ 1(w) (the iHeart/Next Plateau Entertainment Agreement). Thus, iHeart apparently has derived that $0.[REDACTED] rate by adding to the stated custom rates its per-play calculation of additions to the rate arising from the [REDACTED] revenue to which Indies are entitled under the iHeart/Warner Indies Agreements. As the Judges noted with regard to the [REDACTED] revenues in their analysis of the proposed rates for simulcasting, these revenues are simply too indeterminate to support a rate analysis by the Judges. The Judges incorporate those findings here, and find that the 27 iHeart/Indies Agreements are not usable as benchmarks, guideposts or other evidence to support the rates set in this proceeding.[197]

F. Sirius XM Rate Proposal

1. Proposed Royalties

Sirius XM proposes that the § 114 digital sound recording public performance royalty rate applicable to commercial webcasters for the 2016–2020 rate period be $0.0016 per-performance. Introductory Memorandum to Sirius XM WDS at 1 (October 7, 2014). In support of this rate, Sirius XM avers that a zone of reasonableness can be established for the statutory rate. The high end of the zone, according to Sirius XM, is the $0.0016 per-performance rate, which represents the lowest rate contained in the 2009 WSA settlement agreement between SoundExchange and Sirius XM. The low end of the zone, according to Sirius XM, is represented by several ''guideposts,'' *i.e.,* the low end of the estimated range of proposed rates proffered by the economic experts who testified on behalf of the other Services who participated in this proceeding. That lower bound, according to Sirius XM, is $0.0011. *See* Sirius XM PFF ¶¶ 65–68.[198]

Sirius XM did not produce an expert witness to testify in support of its rate proposal. Rather, as noted above, Sirius XM relies upon the lowest rate within its WSA with SoundExchange and the work of the other Services' economic witnesses to support its range, endpoints and proposed rate. Thus, the probative value of the Sirius XM rate is dependent in large measure upon the Judges' analysis and conclusions regarding the models proffered by these other experts. Indeed, Sirius XM does not attempt to independently support the work of those other experts. Instead, Sirius XM devotes the bulk of its *independent* argument to an analysis of its WSA settlement agreement.[199]

2. Sirius XM's Arguments in Favor of Its Rate Proposal

Sirius XM's primary business is broadcasting on a subscription fee basis over its two proprietary satellite systems. However, it also provides a simulcast of its satellite broadcast over the Internet. SXM Ex. 6000 ¶ 20 (Frear WDT). Thus, Sirius XM's Internet radio service is primarily a *simulcast* of Sirius XM's satellite service. *Id.* ¶ 27 (emphasis added).

Sirius XM also offers as an Internet service a noninteractive feature, ''My Sirius XM,'' at no extra charge to its Internet radio subscribers. *Id.* ¶ 28. (Sirius XM also offers an on-demand service, ''Sirius XM On Demand,'' that is not subject to the § 114(f)(2)(B) rates). The noninteractive, non-simulcast service, My Sirius XM, allows subscribers to slightly personalize a select group of music and comedy channels from the satellite service, to adjust for characteristics like library depth, familiarity, and music style. *Id.* ¶ 28.

Although introduced as a response to truly customized Internet radio like Pandora, My Sirius XM does not provide the same amount of customization. My Sirius XM begins from the same playlist created by human curators for a satellite radio channel, and narrows that playlist

[193] SoundExchange also takes issue with iHeart's alleged application of a [REDACTED] adjustment to [REDACTED] webcasts [REDACTED], which SoundExchange avers cannot be adjusted for [REDACTED] because these stations, [REDACTED], do not [REDACTED]. *See* SX PFF ¶¶ 849–850 (and citations to the record therein). iHeart disputes that assertion. *See* IHM RPFF at 120 (and citations to the record therein). SoundExchange also combined its [REDACTED] criticism in this regard with a separate criticism regarding the treatment of ''digital only'' transmissions by iHeart, leading Dr. Rubinfeld to make a $0.[REDACTED] upward adjustment to account for both of these issues. *See* SX PFF ¶ 851 (and citations to the record therein). SoundExchange did not clearly and sufficiently explain its position on these combined issues, and the Judges therefore decline to make the $0.0001 upward adjustment advocated by Dr. Rubinfeld.

[194] The iHeart/Indies Agreements contain a greater-of structure that, as noted above, fixes the percentage-of-revenue prong at [REDACTED]%. *See, e.g.,* IHM Ex. 3353, at 7–8, ¶ 4(a)(iii)(A). However, as stated in the text, *supra,* the Judges find these agreements not to be probative.

[195] Drs. Fischel and Lichtman also calculated an ''*incremental*'' per-play rate for Indies of $0.[REDACTED]. *Id.* The Judges reject that rate for the same reason they rejected the $0.0005 ''*incremental*'' rate they proffered under the iHeart/Warner Agreement.

[196] The greater-of percentage of revenue alternative was never triggered. Fischel/Lichtman AWDT ¶ 61.

[197] To be clear, the Pandora/Merlin *effective* rate is $0.[REDACTED]—below the Pureplay rate because of the steering provisions in that agreement. *See supra.* Pandora had been subject to the Pureplay rates and utilized steering to induce the Merlin members to agree to a lower rate in exchange for more plays. The same concept (albeit with different rates) underlies the 27 iHeart/Indies Agreements. These 27 Indies agreed to reduce the rate to $0.[REDACTED] in [REDACTED], from the $0.[REDACTED] settlement rate on which they could have insisted, in exchange for a lower rate that incentivizes iHeart to steer more plays to them plus some indeterminate amount of [REDACTED] revenues.

[198] Although Sirius XM asks the Judges to rely on the low end of these ''guideposts,'' it notes that the high end of these ''guidepost'' ranges from the other Service economic experts is *$0.0017,* higher than the top of its proposed range and its proffered benchmark of $0.0016.

[199] For this reason, the Judges need not discuss the merits of Sirius XM's proposed range or, in particular, the low end of that range. The relative merits of the benchmarks on which Sirius XM relies are discussed in the sections of this determination dealing directly with those other benchmarks.

slightly by manipulating a few sliders, which emphasize or deemphasize broad characteristics common to the relevant genre. 5/22/15 Tr. 5419–21 (Frear). For example, listening to the '60s channel through My Sirius XM might allow the subscriber to emphasize more late '60s music, more early '60s music, more electric music, or more acoustic music. *Id.* at 5419:19–25. My Sirius XM allows users to shrink the playlist by adjusting for these characteristics—but does not permit users to expand the playlist from that of the satellite radio channel. *Id.*

The Sirius XM Internet radio service is a minor part of Sirius XM's overall business, with its self-pay subscription revenue (*i.e.,* excluding trial subscriptions) accounting for only [REDACTED]% of Sirius XM's total revenue. Frear WDT ¶ 29. Usage of the non-simulcast My Sirius XM is low even in comparison to the usage of Internet radio simulcast channels. *Id.* ¶ 28.

Sirius XM points out the relatively low importance of noninteractive services to its overall business model in order to explain why it entered into the WSA with SoundExchange in 2009—and why that settlement agreement was and remains not probative of market value and lacked the persuasive value attributed to it in the *Web III Remand.* In this regard, Sirius XM avers:

- As a result of the *Webcasting II* rates, Sirius XM made the decision to drop all free streaming on both the Sirius and XM platforms, a decision that resulted in a [REDACTED]-[REDACTED]% drop in the Internet radio service's reported listening hours and a resulting decrease in royalty payments to SoundExchange. *Id.* ¶ 35; 5/22/15 Tr. 5416–17 (Frear).
- By late 2008, Sirius XM had insufficient cash to repay hundreds of millions of dollars of debt scheduled to come due in February 2009, and was unable to access the capital markets to refinance this, and other, debt. Frear WDT ¶ 40.
- The pre-merger predecessors to Sirius XM, Sirius and XM, had recently spent over $150 million on merger costs alone. *Id.* ¶ 46.
- Sirius XM narrowly avoided filing for bankruptcy protection when a potential lender agreed to provide a loan that narrowly enabled Sirius XM to avert a default on its debt and bankruptcy. *Id.;* 5/22/15 Tr. 5430 (Frear).
- The Sirius XM stock price fell from over $4.00 per share in January 2007 to a low of $0.05 per share on February 11, 2009. Frear WDT ¶ 45. On September 15, 2009, Sirius XM received a delisting notice from NASDAQ. *Id.*

In the context of the severe financial stress affecting Sirius XM's entire business, and the Internet radio services' extremely low usage and importance to its core business, Sirius XM believed it had no sensible option other than to accept the deal offered by SoundExchange. If it had not taken the deal, Sirius XM would have been required to continuing paying the higher *Webcasting II* rates. At the same time, NAB simulcasters with which Sirius XM's Internet radio service competes would be paying the lower WSA settlement rates, and Pandora would be paying a small fraction of the *Webcasting II* rates, putting Sirius XM at a significant competitive disadvantage.

Although Sirius XM could have refused to sign the WSA with SoundExchange and instead sought lower rates in the then-forthcoming *Web III* proceeding, the low listenership to the Internet radio service meant that the cost of participation in that proceeding could far exceed any possible future savings in royalty payments. Although Sirius XM attempted repeatedly to negotiate a more significant reduction, SoundExchange consistently refused to materially move off its opening offer of essentially matching the NAB rates. 5/22/15 Tr. 5435–36 (Frear). With no other option that would have a less costly net result, Sirius XM entered into the WSA settlement agreement with SoundExchange. *Id.* at 5434–35.

Then, according to Sirius XM, two days before the deadline on which Sirius XM and SoundExchange were required to close negotiations—and after the parties had already agreed on the rate schedule and finalized their deal—Michael Huppe (the party negotiating on behalf of SoundExchange) added an extra term into the Agreement, requiring that it be precedential under the WSA. 6/3/15 Tr. 7627–29 (Huppe); 5/22/15 Tr. 5443–54 (Frear). Having already failed to advance its other interests in negotiations, Sirius XM agreed to this new term requiring its WSA settlement agreement to be precedential, concluding negotiations and consummating the agreement before the statutory deadline. *Id.* at 5444.

For the foregoing reasons, Sirius XM maintains that the rates in the Sirius XM WSA settlement agreement do not reflect any industry-wide fair market value for the license. Instead, it claims that the rates are a product of: (1) The *Web II* rates, which, in Sirius XM's view, Congress found to be so wildly supracompetitive as to warrant Congressional intervention and which would continue to apply in the absence of a settlement; (2) SoundExchange's monopoly power as the only entity that could provide any effective relief from those rates; and (3) the exacerbation of that imbalance in bargaining power caused by various unrelated circumstances affecting Sirius XM at the time of the negotiations. Sirius XM Ex. 6000 ¶ 52. Sirius XM further avers that, by contrast, neither SoundExchange nor its constituent record companies had similar countervailing pressures that could have mitigated this extreme imbalance. *Id.* ¶ 57 (and citations to the record therein).

Nonetheless, Sirius XM proposes that the Judges rely on the WSA settlement agreement between Sirius XM and SoundExchange, by adopting its lowest rate, $0.0016, not only as the ''the outer boundary of a range of reasonable rates,'' but also as the rate to be set in the present proceeding. *See* Sirius XM PFF ¶ 64. Additionally, Sirius XM does not propose any rate escalation or reduction over the 2016–2020 period, whether to reflect inflation, deflation, or any other factor. Finally, Sirius XM does not propose a two-prong rate structure embodying any other rate formula than the per-play structure.

3. SoundExchange's Opposition to the Sirius XM Rate Proposal

SoundExchange opposes the Sirius XM rate proposal on several grounds. First, SoundExchange rejects Sirius XM's suggestion that its settlement contained above-market rates, because Sirius XM voluntarily agreed to those rates, even though it was under no compulsion to negotiate with SoundExchange. *See* SX RPFF ¶ 1022. Second, SoundExchange states that Sirius XM is flatly wrong to suggest that its negotiation with SoundExchange did not ''mov[e] the needle with respect to royalty rates.'' In fact, Sirius XM was not only able to negotiate rate lower than the then-prevailing statutory rates for 2009, 2010, and 2011, but it was also able to negotiate lower rates for 2013, 2014, and 2015 than were contained in the NAB settlement. SX PFF ¶ 1079; SX RPFF ¶ 1027.

Third, when SoundExchange, through Mr. Huppe, informed Sirius XM that SoundExchange wanted the settlement agreement to be precedential under the WSA, Sirius XM voiced no objection whatsoever in its email response less than an hour later. NAB Ex. 4235.

Fourth, SoundExchange argues that basic economics suggests that any financial distress Sirius XM was experiencing at the time should have reduced, not increased, its willingness to pay royalties for webcasting. SX Ex. 29 ¶ 228 (Rubinfeld Corr. WRT).

Fifth, Sirius XM had a number of alternative options in addition to

agreeing to the settlement with SoundExchange. Specifically, SoundExchange notes that Sirius XM instead had the option to:

- litigate in the *Web III* proceeding and seek lower rates from the Judges;
- avoid the cost of litigating *Web III* and simply awaited the Judges' rate determination (a ''costless option'' according to SoundExchange); or
- avoid the statutory license completely and enter into direct licenses with the various record companies.

SX PFF ¶ 1077 (and citations to the record therein).

Sixth, SoundExchange notes that Sirius XM—despite its asserted financial difficulties—continued and expanded its noninteractive services, even though it asserted that such services were an insignificant portion of Sirius XM's total subscribership revenue. Moreover, SoundExchange notes, Sirius XM's internet revenue grew from $[REDACTED] in 2010 to $[REDACTED] in 2014 while Sirius XM was paying rates under its WSA settlement agreement with SoundExchange. SX PFF ¶ 1078 (and citations to the record therein).

Seventh, SoundExchange asserts that Sirius XM's rate proposal has no sound basis. According to SoundExchange, the proposal was simply plucked from the first year of the Sirius XM WSA settlement. *Id.* ¶ 61. Moreover, according to SoundExchange, Sirius XM's reliance on the low-end rate in an agreement that its principal witness, Mr. Frear, now expressly disavows, is arbitrarily selective and internally inconsistent. SX PFF ¶ 1081.

4. The Judges' Analysis of the Sirius XM Rate Proposal

The Judges reject Sirius XM's argument for a number of reasons. First, the Judges decline to re-litigate the probative value of the 2009 WSA settlement agreement between Sirius XM and SoundExchange. That agreement was entered into more than six years ago, and therefore does not represent the present state of the noninteractive market, absent affirmative evidence to the contrary. Whether Sirius XM was compelled by its financial circumstances or not to enter into that settlement might have affected the relevance of that agreement as a benchmark in *Web III,* but it has no significance to the Judges in the present proceeding. Indeed, as SoundExchange notes, it is inconsistent for Sirius XM, on the one hand, to criticize the benchmark value of its 2009 WSA settlement agreement, and then to expressly adopt the lowest rate from that agreement as its proposed rate in the present proceeding.[200]

Second, the Judges are unpersuaded by the fact that Sirius XM apparently can afford the $0.0016 rate it now proposes, in contrast to earlier years when it was financially *in extremis.* As the Judges held in the *Web III Remand,* and have consistently held, § 114(f)(2)(B) does not require the Judges to set a rate that ensures the financial viability of any entity. Thus, the fact that Sirius XM may be able to afford the $0.0016 rate now, but might not be able to afford any higher rate, is simply not pertinent to the Judges' determination. Moreover, the fact that Sirius XM acknowledges that noninteractive streaming is only an ''ancillary'' part of its business (in contrast to its satellite service) indicates that the impact of the rates on its noninteractive service cannot be a driver of the statutory rate determination. The Judges note that Sirius XM was willing to accept rates in its 2009 WSA settlement at least in part because of the ancillary nature of its noninteractive service. Because that noninteractive service remains ancillary in nature to Sirius XM, the Judges cannot conclude that impact of the rates set in this proceeding have any greater particular importance to Sirius XM now.

G. NAB Rate Proposal

1. Proposed Rates

The NAB proposes a two-tiered rate structure for webcasts by simulcasters. Broadcasters that transmit fewer than 876,000 ATH would pay only the minimum fee. NAB Proposed Rates and Terms at 3 (October 7, 2014). All other broadcasters would pay a per-performance royalty rate of $0.0005 to simulcast for each year of the rate term. *Id.* at 3–4.

NAB's rate proposal is limited to simulcasts (retransmissions by broadcasters of programming transmitted over their AM or FM radio stations), and does not cover other commercial webcasts. *Id.* at 2 (definition of Eligible Transmission). Having rejected the NAB's proposal to apply a separate rate to simulcasters,[201] the Judges consider the NAB's proposed rate as a rate that would apply to all commercial webcasters. For the reasons detailed below, the Judges reject the NAB's rate proposal.

2. Analysis of Economic Evidence

The NAB presented its methodology for arriving at a rate proposal through its economic expert witness, Professor Michael Katz. Dr. Katz did not perform a benchmark analysis to arrive at a rate. Rather, he selected guideposts that define the lower and upper bounds of what he described as a range of reasonable rates that a willing buyer and a willing seller would agree to in a workably competitive market. *See* Katz WDT ¶80. The NAB's proposed rate of $0.0005 per-performance presumably falls somewhere within that range.[202]

Dr. Katz determined the low end of his ''zone of reasonableness'' by reference to terrestrial radio. *See* Katz WDT ¶¶ 81–84. Radio broadcasters are not required to pay royalties for terrestrial broadcasts of sound recordings, and typically do not do so. *See* 17 U.S.C. 114(a); Katz WDT ¶ 82. Nevertheless, Dr. Katz points out, record companies seek out radio airplay to promote other income streams, such as sales of CDs and permanent downloads. *See* Katz WDT ¶ 82. He argues that economic theory predicts that this promotional effect would drive down royalty rates, possibly even resulting in negative royalty rates if the law permitted record companies to pay broadcasters to play their music (*i.e.,* payola). *Id.* ¶¶ 81–82.

Dr. Katz then argues ''available evidence indicates that promotional benefits also arise from web simulcasts of terrestrial broadcasts.'' *Id.* ¶ 83. In effect, he equates simulcasting with terrestrial radio and concludes that the lower bound of the range of reasonable rates for simulcasting is ''near zero.'' *Id.* ¶ 84.

To set an upper bound to his zone of reasonableness, Professor Katz looked to the Judges' decision in *SDARS II. Id.* ¶ 85. According to Professor Katz,

> In SDARS II, the judges found that 13 percent [of gross revenue] constitutes a sensible upper bound on the zone of reasonableness before adjusting to account for Section 801(b) factors. The rate was then reduced by an additional two percent for the third 801(b) factor, which was specific to Sirius XM and the SDARS II proceeding.

Id. (footnotes omitted). He adopted 13 percent of gross revenue as ''an initial guidepost'' for determining his range of reasonable rates for simulcasters, subject to two adjustments to account for differences between SDARS (satellite

[200] The Judges have also analyzed the impact, if any, of the *other* 2009 WSA settlement agreement—between the NAB and SoundExchange. *See supra.*

[201] *See* discussion *supra,* section I.A.3

[202] As discussed below, the upper bound of the NAB's range of reasonable rates is expressed as a percentage of revenue. The NAB's proposed rate is expressed as a per-performance royalty, however, and there is insufficient data in the record to convert the per-performance rate to a percentage of revenue (and vice versa). Since the Judges deem it highly unlikely that the NAB would propose a rate that exceeds the upper bound of its own expert's zone of reasonableness, the Judges presume that the proposed rate falls below that upper bound.

radio) and simulcasters. *Id.* ¶¶ 86–87. The first adjustment (the ''music-listening adjustment'') accounted for the fact that music accounts for a lower percentage of listening on AM/FM radio than on satellite radio. The second adjustment (the ''music-revenue adjustment'') accounted for ''the fact that non-music-formatted stations generally will not be paying royalties.'' *Id.* ¶ 89.

The net effect of the two adjustments essentially offset each other, resulting in an adjustment factor of one. *Id.* ¶ 92. Consequently, Dr. Katz determined that the upper bound to his zone of reasonableness is 13 percent of gross simulcasting revenues. Nevertheless, he argues ''there are strong reasons to conclude that the actual upper bound of the zone of reasonableness is significantly lower than 13 percent.'' [203] *Id.* ¶ 93.

Dr. Katz's approach is similar in some respects to the approach that the Judges took (and the Court of Appeals affirmed) in *SDARS II.* In that case, the zone of reasonableness that the Judges determined based on the parties' benchmarks was extremely broad. In order to narrow down the possible rates within that zone, the Judges referred to several ''guide posts,'' including the 13 percent rate that had been the basis for the rate that the Judges set in *SDARS I.*

SDARS II, however, is distinguishable from the present case. In *SDARS II* the Judges had little confidence in the benchmark analyses offered by the parties which, in any event, yielded a range of possible rates that was too broad to provide useful guidance to the Judges. Thus the Judges found it necessary to consider other available evidence as guideposts. In the instant case, the Judges have sufficient confidence in the available benchmark analyses to proceed without reference to other guideposts.

In *SDARS II,* the Judges were not determining a market rate under the willing-buyer, willing-seller standard. The Judges decided *SDARS II* under the section 801(b) reasonable rate standard. As the Court of Appeals emphasized, under that standard ''[t]he Copyright Act permits, but does not require, the Judges to use market rates to help determine reasonable rates.'' *Music Choice* v. *Copyright Royalty Bd.,* 774 F.3d 1000, 1010 (D.C. Cir. 2014). That is not the case under § 114(f)(2)(B). The Judges *must* determine market rates, yet the rates used by Dr. Katz to determine the upper and lower bounds of his zone of reasonableness are *not* market rates.

There is no market for licensing of sound recordings for transmission by terrestrial radio stations, since there is no general public performance right for sound recordings. That would be sufficient reason to reject Dr. Katz's proposed lower bound of ''near zero'' that he derived from terrestrial radio. Moreover, Dr. Katz relies on an assumption that the promotional effect of simulcasting is essentially the same as the promotional effect of terrestrial broadcasting, because they carry the same content. As discussed above, broadcasters' use of technologies to substitute songs in their simulcast streams destroys the underlying premise that the content of a simulcast stream is the same as the terrestrial broadcast. Even if the content is the same, the Judges do not find sufficient persuasive evidence supporting the conclusion that simulcasts have the same promotional effect as terrestrial broadcasts.[204]

As for Dr. Katz's use of the *SDARS II* rate to establish an upper bound to his zone of reasonableness, that too is not a market rate. It is a rate established by the government by means of a CRB proceeding. Moreover, it is not even a rate that is intended to replicate market conditions. It is a section 801(b) reasonable rate, albeit one that was informed by marketplace evidence (though from a somewhat different market). In short, neither end of Dr. Katz's zone of reasonableness is anchored in the noninteractive streaming market that the Judges are seeking to replicate in this proceeding. The Judges find Dr. Katz's zone of reasonableness unhelpful in setting a rate for commercial webcasters, and reject the NAB's proposed rate that it derived from Dr. Katz's analysis.

V. Judges' Determination of Noncommercial Webcasting Rates

A. Parties' Proposals

1. SoundExchange

SoundExchange proposes that noncommercial webcasters pay a flat annual fee of $500 per station or channel for all performances up to a cap of 159,140 ATH per month. SoundExchange Rate Proposal at 4 (October 7, 2014) SoundExchange proposes that, in any month that a noncommercial webcaster exceeds 159,140 ATH, the webcaster pay per-performance royalties at the following rates for its transmissions in excess of 159,140 ATH:

SOUNDEXCHANGE PROPOSED PER-PERFORMANCE RATES FOR PERFORMANCES ABOVE 159,140 ATH

Year	Per-performance rate
2016	$0.0025
2017	0.0026
2018	0.0027
2019	0.0028
2020	0.0029

Id. at 4–5. These are the same per-performance rates the SoundExchange proposes for commercial webcasters.

2. NRBNMLC

The NRBNMLC proposes what it describes as a ''tiered and capped flat fee structure.'' NRBNMLC PFF ¶ 80. Under the NRBNMLC proposal, each noncommercial webcaster would pay a $500 annual fee for all performances of sound recordings up to a threshold of 400 average concurrent listeners (3,504,000 ATH) annually, and an additional $200 for each additional 100 average concurrent listeners (876,000 ATH) annually, up to an annual fee cap of $1,500 per station or channel. *See Introductory Memorandum to Written Direct Statement of NRBNMLC* at 3 (October 7, 2014) (NRBNMLC Introduction); *The NRBNMLC's Proposed Noncommercial Webcaster Rates and Terms* at 3 (October 7, 2014) (NRBNMLC Proposed Rates and Terms). The NRBNMLC would define ATH to include only transmissions of recorded music. *Id.* at 1.

3. IBS and Harvard Broadcasting/WHRB

Section 351.4 of the Judges' procedural rules sets forth the required contents of a participant's WDS, including the requirement that, in a rate proceeding, ''each party must state its requested rate.'' 37 CFR 351.4(b)(3) (required contents of WDS). The rule goes on to permit participants to revise their rate proposals at any time up to the filing of proposed findings of fact and conclusions of law. *Id.*

IBS's WDS does not contain a rate proposal, or anything that the Judges could reasonably interpret as a rate proposal. It consists solely of the three-page written testimony of Frederick Kass. Captain Kass introduces himself and IBS, and briefly discusses the nature of IBS members' webcasting activities:

> [IBS member] stations operate as non-profit entities within the meaning of the statute, as amended. They use digitally recorded music as instructional media for announcers and programmers. The instantaneous listenership to such music on member stations is

[203] Professor Katz's primary argument that the 13 percent figure is too high is that it was derived in *SDARS I* from analysis of a market that was not effectively competitive. *Id.*

[204] *See* discussion, *supra* section III.A.3.c.v.

typically on the order of five listeners, with the exception of course-related music and other on-campus events. In contrast, audiences for live sports broadcast live musical performances, and lectures and other live on-campus originations are typically much larger than the audience for digitally recorded music.

IBS Members provide significant science, technology, engineering, management, media, and communication skill set training. The stations typically act as learning laboratories where students may learn and perfect their skills.

IBS Ex. 9000 at 3 (Kass WDT).

Similarly, WHRB's WDS does not contain a rate proposal, or anything the Judges could reasonably interpret as a rate proposal. WHRB's WDS is comprised of the WDT of Michael Papish, one of the station's board members. In three pages of written testimony, Mr. Papish merely introduces himself and describes WHRB's operations. *See generally* WHRB Ex. 8000 (Papish WDT).

Neither Captain Kass nor Mr. Papish presented a rate proposal in the course of their respective live testimony at the hearing. The only hint of a proposal might be gleaned from a colloquy between the Judges and counsel [205] during closing arguments:

[THE JUDGES]: So what exactly is IBS proposing here?

MR. MALONE: All right. In our pleadings as early as the agreement between SoundExchange and CPB, NPR became public when you published it in the **Federal Register**, we have computed to the best of our ability that there is a rate per ATH of 0.0011940. And we think that this is a marketplace agreement entered into voluntarily by one of the big companies in the market, and we think that sets the appropriate rate.

Then when you scale that down to show the number of ATH that these college stations, high school stations, academy stations, and the like are operating, it works out to around $20 a year.

7/21/15 Tr. at 7949 (Kass).

In its proposed findings, IBS directed its efforts to arguing against adoption of the SoundExchange/CBI settlement agreement [206] and, once again, failed to propose a royalty rate.[207] In short, the only arguable reference by IBS to a rate proposal was made by counsel in his closing arguments. The Judges do not credit this statement by counsel as a rate proposal by IBS for three reasons. First, introducing a rate proposal for the first time in closing arguments does not comply with the Judges' rules and is grossly unfair to the other parties. Section 351.4(b)(3) is extremely liberal regarding *revisions* to a party's rate proposal, but it presupposes that the party has made a proposal as part of its WDS, thus giving the other parties an opportunity to analyze it prior to presenting their rebuttal evidence.

Second, ''around $20 a year'' is not sufficiently definite or specific to constitute a rate proposal. For example, which noncommercial webcasters would pay ''around $20 a year''? All of them? Only ones that transmit below a certain ATH threshold? What threshold? IBS does not say.

Third, even if the Judges were to consider this to be a proposal, IBS has offered only statements of counsel to support it. The record is devoid of *any* evidence to support IBS's ''proposal'' or the analysis from which it was purportedly derived. Nothing will come of nothing. Neither IBS nor WHRB has offered a rate proposal that the Judges can consider in this proceeding.

B. Analysis and Conclusions

1. Upper Threshold for Noncommercial Rate

The Judges have recognized noncommercial webcasting as a separate submarket in prior decisions only ''up to a point.'' *Web II Original Determination* at 24097. The Judges stressed that there must be limits to the differential treatment for noncommercials to avoid ''the chance that small noncommercial stations will cannibalize the webcasting market more generally and thereby adversely affect the value of the digital performance right in sound recordings.'' *Id.* (internal quotes and citations omitted). The Judges concluded that any separate rate for noncommercial webcasters must ''include safeguards to assure that, as the submarket for noncommercial webcasters that can be distinguished from commercial webcasters evolves, it does not simply converge or overlap with the submarket for commercial webcasters and their indistinguishable noncommercial counterparts.'' *Id.* at 24097–98. To avoid this convergence or overlap, the Judges adopted a cap on the size (as measured by audience size) of noncommercial webcasting stations or channels that are eligible for the noncommercial rate. *See* 37 CFR 380.3(a)(2) (applying flat $500 royalty rate up to 159,140 ATH per month).[208]

SoundExchange's proposal to continue to impose of a limit on the size of noncommercial webcasters that are eligible for a separate noncommercial rate is supported by the testimony of Professor Thomas Lys. Professor Lys noted that, as a matter of economic logic, ''there is no real difference between a noncommercial and a commercial broadcaster.'' SX Ex. 28 ¶ 256 (Lys WRT); 5/29/15 Tr. at 6738. The Judges credit this testimony, but do not reach precisely the same ultimate conclusion as Professor Lys. While Professor Lys apparently argues that there should be no distinction between commercial and noncommercial rates, he did not consider (and was apparently unaware of) the revealed preference in the marketplace for a separate noncommercial rate. The Judges resolve the tension between Professor Lys's observation concerning economic logic and the revealed preference in the marketplace by limiting the differential treatment of noncommercial webcasters to smaller players that have a correspondingly smaller impact on the commercial market. The Judges thus agree with SoundExchange that eligibility for a noncommercial rate should be limited to those noncommercial webcasters whose audience size falls below a fixed threshold.

While SoundExchange proposes a threshold above which a noncommercial webcaster ceases to be eligible for a noncommercial rate, the NRBNMLC does not. The NRBNMLC does, however, propose a threshold above which a noncommercial webcaster must pay an additional flat royalty fee (this structure is described *supra,* section V.A.2). Under either proposal a flat fee of $500 pays for all performances of sound recordings up to the threshold.

SoundExchange proposes that the threshold remain the same as the

[205] William Malone, Esq., jointly represented IBS and WHRB in this proceeding. In closing arguments Mr. Malone, on behalf of WHRB, briefly discussed a matter related to terms. 7/21/15 Tr. at 7946. The remainder of his closing argument, including the colloquy quoted in the text, was apparently on behalf of IBS alone.

[206] Those efforts were both untimely and not in accordance with the procedures established in the Act, the Judges' rules for submitting comments on a proposed settlement, and the Judges' **Federal Register** notice. *See* 17 U.S.C. 801(b)(7)(A); 37 CFR 351.2(b)(2); 79 FR 65609 (November 5, 2014) (SoundExchange/CBI agreement); 80 FR 15958 (March 26, 2015) (SoundExchange/NPR agreement).

[207] IBS goes through a series of computations in its PFF in an effort to show that the proposed settlement rates ''in no way meet the comparability test for noncommercial royalty rates.'' IBS PFF, at 10. In the course of those computations, IBS comes up with a $20/year figure, but it is unclear what that figure represents. *Id.*

[208] Although the Judges and the parties discuss the ATH threshold as a ''cap'' on eligibility for a reduced noncommercial rate, this is not entirely accurate. A noncommercial webcaster that exceeds the cap in any given month does not pay commercial rates for all of its transmissions in that month, but only those beyond the cap. This results in noncommercial webcasters paying a lower average per-play rate than a commercial webcaster (that pays at the commercial rate for every performance).

current threshold for noncommercial webcasters: 159,140 ATH per month (218 concurrent listeners, on average, for a webcaster that transmits 24 hours per day). 307 CFR 380.3(a)(2). That is also the threshold in the SoundExchange/CBI settlement agreement above which a noncommercial educational webcaster (NEW) ceases to be eligible for the settlement rate. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings: Proposed Rule,* 79 FR 65609, 65611 (November 5, 2014) (proposed 37 CFR 380.22). By contrast, the NRBNMLC proposes a much higher threshold of 400 average concurrent listeners, or 3,504,000 ATH annually (292,000 ATH per month on average).[209]

The NRBNMLC argues that the existing threshold should be increased because it was originally established in 2006 (based on 2004 survey data). NRBNMLC PFF ¶ 143. In addition, the NRBNMLC argues that an increase is necessary to provide noncommercial webcasters with ''breathing room.'' *See* Emert WDT ¶ 40. These arguments are unpersuasive.

While it is correct that the current 159,140 ATH threshold was adopted originally in *Web II* based on survey evidence presented in that proceeding, that is not the only source for that number. S*ee Web II,* 72 FR at 24099. SoundExchange and CBI adopted 159,140 ATH as the threshold in their settlement agreement, which is contemporaneous with this proceeding and covers the same rate period. *See* NRBNMLC Ex. 7034, Attachment at 2–3 (SoundExchange/CBI Joint Motion to Adopt Partial Settlement). By contrast, the NRBNMLC cannot point to any marketplace agreement (contemporaneous or otherwise) that employs the threshold it proposes.

As to the NRBNMLC's argument that noncommercial webcasters need the ''breathing room'' that an increased threshold would provide, there is no persuasive record evidence to support that proposition. Mr. Emert did testify to this effect. Emert WDT ¶ 39; *see also* 5/21/15 Tr. at 5271–71 (Henes). However, that testimony was an expression of opinion, unsupported by any factual evidence. Mr. Emert's and Mr. Henes' testimony that that the dozen or so radio stations they operate stream *far* below the existing threshold tends to contradict their statements concerning the need to increase the threshold to accommodate future audience growth. *See* Emert WDT ¶ 29; Ex. 7010; 5/21/15 Tr. at 5275–77 (Henes). Their stations could achieve significant audience growth under SoundExchange's proposed rate structure without subjecting themselves to additional royalty costs.

To the contrary, there is ample record evidence to demonstrate that the vast majority of noncommercial webcasters do not exceed the existing threshold. SoundExchange payment data show that between 2010 and 2014, noncommercial webcasters[210] paid usage fees 112 times out of 3917 noncommercial webcaster payments (2.86%). NAB Ex. 4141; NAB Ex. 4149; *see also* SX Ex. 2 at 14 (Bender WDT) (''approximately 97% of noncommercial webcasters paid only [the] minimum fee''). The NRBNMLC seeks to counter this evidence with testimony from Mr. Emert and Mr. Henes that they were ''aware of'' some noncommercial broadcasters that impose listener caps on their simulcast streams to avoid exceeding the existing threshold. Emert WDT, ¶ 38; 5/21/15 Tr. at 5271 (Henes). The NRBNMLC's evidence is vague and anecdotal. It was not derived from the witnesses' own experiences, but rather from something they heard elsewhere. Even if the Judges were to deem this testimony credible, the most that it reveals is the existence of some isolated instances of noncommercial webcasters that are constrained by the existing threshold. The testimony emphatically does not demonstrate that a substantial number of noncommercial webcasters are operating near the threshold and taking steps to keep below it.[211]

The NRBNMLC's proposal to increase the threshold to 400 concurrent listeners is unsupported by the record. By contrast, the evidence demonstrates that the current threshold of 159,140 ATH per month that SoundExchange proposes to retain has resulted, for the vast majority of noncommercial webcasters, in no additional liability for royalties beyond the minimum fee. Moreover, the willingness of SoundExchange and CBI to adopt that threshold in their current settlement agreement, after years of experience with the identical threshold under the current rates, demonstrates that it is reasonable and workable. The Judges hereby adopt it.

2. Consequences of Exceeding the Threshold

SoundExchange proposes that a noncommercial webcaster's transmissions beyond the 159,140 ATH threshold should no longer enjoy a reduced royalty rate. The NRBNMLC proposes that a reduced royalty rate, structured in $200 increments for each 876,000 ATH annually, should apply to transmissions beyond the threshold.

a. The NRBNMLC's Proposal

The Judges explained in *Web II* that the threshold on the noncommercial webcasting rate serves as a ''proxy that aims to capture the characteristics that delineate the noncommercial submarket.'' *Web II Remand,* 72 FR at 24099. As discussed in section V.B.1, the Judges do this to assure that the submarket for noncommercial webcasters does not converge or overlap with the submarket for commercial webcasters. SoundExchange's proposal is consistent with this rationale; the NRBNMLC's is not. Not only would the NRBNMLC's proposal grant substantially reduced rates to large noncommercial webcasters whose operations compete with commercial webcasters', but the effective rate for such large noncommercial webcasters would actually *decline* as they grow larger due to the effect of the proposed $1,500 cap on royalties. The NRBNMLC offers no economic rationale for this result. *See* Lys WRT, ¶¶ 256–257.

The NRBNMLC does not address this issue directly. Instead, the NRBNMLC argues that its proposed ''tiered and capped flat rate structure'' is what a willing buyer and a willing seller would

[209] This threshold effectively would be higher still as a result of the NRBNMLC's proposal to exclude certain non-music intensive programming from the definition of ATH.

[210] These are webcasters that are coded ''NCW–CRB'' (noncommercial webcaster paying statutory rates), ''NCW–WSA'' (noncommercial webcaster paying WSA settlement rates) and ''NCEDW'' (noncommercial education webcaster paying under the SoundExchange/CBI settlement) in the SoundExchange data. For purposes of this analysis, the Judges have excluded noncommercial microcasters which, by definition, stream far below the threshold and pay no usage fees. *See* Noncommercial Microcasters, available online at *http://www.soundexchange.com/service-provider/noncommercial-webcaster/noncommercial-microcaster-wsa/* (visited September 8, 2015). The Judges consider a webcaster to be paying usage fees if the fees collected by SoundExchange in a particular year (a) exceed the $500 flat fee, (b) do not equal $600 (which most likely represents the $500 flat fee plus a $100 proxy fee in lieu of census reporting) and (c) are not an even multiple of $500 (most likely representing payment of the minimum fee for multiple channels). This is the approach that the NRBNMLC employed in interpreting these data. *See, e.g.,* NRBNMLC PFF ¶ 95.

[211] The NRBNMLC candidly admits that it does not know the extent to which noncommercial webcasters impose listener caps, noting that ''[t]here is no way of knowing exactly how many Noncommercial entities have done this . . . .'' NRBNMLC PFF ¶ 23. This statement is only partially correct: The NRBNMLC could have surveyed its members or the broader noncommercial webcaster community. While such a survey may not have provided a definitive answer for the entire population of noncommercial webcasters, it would have revealed far more about the current state of affairs across the noncommercial webcasting market than the hearsay testimony of these two witnesses.

agree to in an effectively competitive market (*i.e.,* a market rate). *See* NRBNMLC PFF ¶80. The NRBNMLC cited the testimony of its two witnesses as establishing the need of noncommercial webcasters for rates that are affordable and predictable. NRBNMLC Ex. 7011 ¶¶ 25–27, 30 (Henes WDT); Emert WDT ¶¶ 31–32, 34–37, 41. The fatal flaw in this argument is that it is unsupported by any marketplace evidence and any evidence of sellers who would be willing to accept the NRBNMLC's proposed structure. Mr. Henes and Mr. Emert may be willing, even eager to license music on this basis, but their testimony tells the Judges nothing about the sellers' side of the equation. As discussed in greater detail in the following paragraphs, none of the marketplace evidence that the NRBNMLC cites pertains to a rate structure remotely similar to the one proposed by the NRBNMLC.

As additional evidence to support their argument that a ''tiered and capped flat rate structure'' is a market rate, the NRBNMLC cites the SoundExchange/CBI settlement agreement, the SoundExchange/NPR settlement agreement, the rates established for musical works under 17 U.S.C. 118, and the position taken by SoundExchange on legislation to create a public performance right for sound recordings that covers transmissions over terrestrial radio. *Id.* The Judges reach different conclusions based on this evidence.

The SoundExchange/CBI settlement agreement imposes a flat $500 fee on NEWs that transmit up to 159,140 ATH per month. Any NEW that exceeds that threshold loses its eligibility to operate under the settlement, and thus becomes subject to the CRB rate for noncommercial webcasters for the remainder of the year.[212] The NRBNMLC concludes that ''no usage fees apply under the agreement'' for a NEW that exceeds the threshold, and cites the agreement as support for a flat-rate structure with no usage fees. NRBNMLC PFF ¶ 93. The NRBNMLC's interpretation of the agreement is not credible. The parties' decision not to specify usage fees in the agreement does not mean that they contemplated that a NEW that exceeded the ATH threshold would not pay any usage fees. The existing CRB rates provide for usage fees above 159,140 ATH, and CBI could reasonably assume that SoundExchange's rate proposal (filed with the Judges on the same day as the proposed settlement) would also contain usage fees. At most, the omission of usage fees from the agreement reflected the parties' decision not to resolve the issue of what rates would apply beyond the threshold, and to leave it for the Judges to determine in the proceeding.

The NRBNMLC is correct in pointing out that the SoundExchange/NPR settlement agreement imposes a flat royalty rate with no additional usage fee. However, the SoundExchange/NPR settlement differs so fundamentally in so many ways from what the NRBNMLC is proposing that it cannot serve as a support for that proposal. The SoundExchange/NPR settlement entails a single annual payment by a single payer (CPB), in advance, to cover over 500 NPR member radio stations. 80 FR at 59590–91. The stations include a range of formats, some of which entail very limited use of recorded music. Unlike the NRBNMLC's rate proposal, the settlement does not include tiered payments above the flat royalty rate, but does include a cap on the aggregate amount of recorded music that may be performed. NPR consolidates the reports of use for all of the stations covered by the agreement. The NRBNMLC's proposal does not provide for consolidated reports of use. On the whole, the terms of the SoundExchange/NPR agreement provide SoundExchange with significant benefits—reduced risk of nonpayment; protection against large numbers of uncompensated performances; reduced costs of processing usage data—that the NRBNMLC proposal does not. To pluck out a single element of the deal, the flat royalty rate, and cite it as support for the NRBNMLC rate proposal simply lacks credibility.

The musical works rate under the § 118 statutory license suffers from a similar lack of comparability to the rates the Judges must set in this proceeding. Rates under § 118 are in a different market, with different sellers and for different copyrighted works. The NRBNMLC has presented no evidence to demonstrate how a rate structure in that market, and with those sellers, reflects what a willing buyer and a willing seller would agree to in the sound recordings market.

Finally, SoundExchange's position on legislation has little or no bearing on what constitutes a market rate. The compromises and tradeoffs that parties are prepared to make in the legislative arena have only the remotest resemblance to the give and take of the marketplace. The record industry does not currently enjoy any legal right with respect to the transmission of its sound recordings over terrestrial radio. There is no basis for the Judges to conclude that what the industry may be willing to accept in legislation that establishes such a right is the same as what it would bargain for in an arms-length transaction against the backdrop of an existing statutory right of remuneration.

b. SoundExchange's Proposal

Although SoundExchange's proposal to impose commercial rates above the 159,140 ATH threshold is consistent with the Judge's rationale for limiting the applicability of noncommercial rates, the NRBNMLC levels multiple criticisms against it. These include:

- SoundExchange's entire rate proposal for noncommercial webcasters lacks evidentiary support;
- The specific usage rates that SoundExchange proposes are ''inappropriate for commercial webcasters and even more inappropriate for noncommercial webcasters''; and
- The fact that few noncommercial webcasters have paid usage fees confirms that the proposed fees are unreasonable.

NRBNMLC PFF ¶ 113.

i. Evidentiary Support (or Lack Thereof) for SoundExchange's Rate Proposal

As Professor Rubinfeld readily conceded, there are no current marketplace benchmarks from which to derive SoundExchange's entire rate proposal for noncommercial webcasters. Rubinfeld CWDT ¶¶ 33, 246. The only contemporary agreements in evidence that cover noncommercial webcasters are the two settlement agreements between SoundExchange, on the one hand, and CBI and NPR, respectively, on the other hand. As discussed in the preceding section, there are a number of elements of the SoundExchange/NPR agreement that render it a poor benchmark for setting noncommercial rates generally. The SoundExchange/CBI agreement lends support for some elements of SoundExchange's rate proposal (*e.g.,* a flat $500 rate for noncommercial webcasters that transmit up to 159,140 ATH), but not for the proposed rate for usage beyond the ATH threshold.

That does not mean, however, that SoundExchange's rate proposal is entirely without evidentiary support. As discussed, *supra* section V.B.1, expert economic testimony supports treating transmissions by noncommercial webcasters above a certain ATH threshold the same as transmissions by commercial webcasters. This is what the SoundExchange proposal seeks to

[212] The NEW may operate under the settlement in the following year, provided it takes affirmative steps (*e.g.,* imposes listening caps) to ensure that it will not exceed the threshold again.

achieve. The rates that SoundExchange proposes for transmissions above the ATH threshold are the same that SoundExchange proposes for commercial webcasters.

ii. Inappropriateness of Specific Usage Rates Proposed by SoundExchange

The NRBNMLC pursues two lines of attack against the specific usage rates that SoundExchange proposes. The first, concerning Professor Rubinfeld's interactive benchmark analysis, essentially repeats the licensee services' criticisms of SoundExchange's proposal for commercial webcasting rates. *See* NRBNMLC PFF ¶ 122. The Judges discuss those arguments *supra.* The Judges, in fact, do not adopt the specific rates that SoundExchange proposes, precisely because they find SoundExchange's benchmark analysis lacking in certain respects. Rather, the Judges adopt the same rates for transmissions in excess of the 159,140 ATH threshold by noncommercial webcasters as they do for commercial webcasters.

The second line of attack is that Professor Rubinfeld's benchmark analysis is inapplicable to noncommercial webcasters because none of the licensees under any of the benchmark agreements were noncommercial webcasters. *Id.* ¶ 123. As discussed, *supra* section V.B.1, the Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome, not because it was observed in benchmark agreements.

iii. Small Number of Noncommercial Webcasters Paying Usage Fees Confirms That the Fees Are Excessive

The NRBNMLC notes that few noncommercial webcasters pay usage fees and, of those that do, most pay a lower settlement rate in lieu of the rates set by the Judges for commercial webcasters. NRBNMLC PFF ¶ 131. Based on this evidence, the NRBNMLC concludes that the commercial webcaster rates are excessive, and that noncommercial webcasters are imposing listener caps or taking other affirmative steps to avoid paying them.

Of the 3,917 documented payments by noncommercial webcasters between 2010 and 2014, 112 included payments for usage above the ATH threshold. NAB Ex. 4141; NAB Ex. 4149. Of these, 13 were at the commercial rate determined by the Judges and 99 were at a lower rate established under a WSA settlement.[213] *Id.; see also* 5/6/15 Tr. at 2099–100 (Rubinfeld) (25–30 noncommercial licensees pay lower rates under settlement agreements).

These facts do no support the NRBNMLC's conclusions. In itself, the fact that more than 97% of noncommercial webcaster payments do not include usage fees could just as easily support the conclusion that the vast majority of noncommercial webcasters—like the noncommercial webcasters that testified in this proceeding—operate well below the 159,140 ATH threshold. Without evidence that a substantial number of noncommercial webcasters are operating near the threshold, or are imposing listening caps, the Judges cannot conclude that the threshold operates as a significant constraint or that the usage fees are excessive.

The evidence that most noncommercial webcasters that paid usage fees did so under an alternative rate structure also does not support the NRBNMLC's conclusions. These webcasters made a rational choice to pay an available lower rate. That tells the Judges nothing about their willingness to pay the higher statutory rate in the absence of settlement. Conversely, though, it strongly suggests that nearly all of the webcasters that opted for the statutory rate structure or the NEW settlement expected that they would not exceed the threshold.

3. Cap on Royalties

The NRBNMLC proposes that the total obligation of a noncommercial webcaster to pay royalties should be capped at $1,500, regardless of the number of sound recordings the webcaster performs. As with the other elements of its rate proposal, the NRBNMLC contends that the cap on fees is supported by marketplace evidence. Neither of the two noncommercial agreements in evidence employs the cap that the NRBNMLC proposes. The SoundExchange/CBI settlement imposes a flat royalty rate, but caps eligibility for that rate at 159,140 ATH. Beyond that threshold, the noncommercial webcaster must pay under the noncommercial rate structure determined in this proceeding. The SoundExchange/NPR settlement agreement employs a flat-fee structure (which serves as a cap on royalties), but also imposes a cap on music usage. *See* 80 FR at 15961.

There is no other evidence of any kind that a copyright owner would willingly license unlimited use of its sound recordings for a fixed fee of $1,500. The Judges reject the NRBNMLC's proposed royalty cap.

4. IBS's Additional Arguments

IBS did not direct any criticism directly at either the SoundExchange or the NRBNMLC rate proposal. IBS's rate-related arguments were directed (or misdirected[214]) at the SoundExchange/CBI settlement agreement. Nevertheless, had IBS applied those arguments to the rate proposals before the Judges, the Judges would have rejected them.

a. Lobbying Prohibition

Captain Kass testified that many IBS members are a part of state-funded educational institutions that are barred by state law from providing funds to organizations that lobby. IBS argues that these laws prevent certain IBS members from paying royalties to SoundExchange.

This argument is unavailing for several reasons. First, IBS failed to provide any legal authority or expert testimony to support Captain Kass's interpretation of these state laws. Even if the Judges accept as true the assertion that these state laws prohibit certain IBS members from remitting funds to lobbying organizations, it is far from clear whether those laws would prevent the same IBS members from paying statutory license royalties to an organization designated by regulation as a collective under a Federal statute.

Second, there is no evidence in the record concerning SoundExchange's lobbying activities, *vel non.* The Judges have no basis for concluding that the state laws to which IBS refers even apply to SoundExchange.

Third, and most fundamentally, the entire question is not relevant to the Judges' task of setting rates for noncommercial webcasters. If IBS contends that its members may webcast sound recordings but are forbidden under state law to pay royalties to SoundExchange, that is an argument that must be resolved by a Federal District Court in an infringement action. It has no bearing on the particular rate structure that the Judges must determine for noncommercial webcasters.

b. Lack of ''Proportionality''

IBS argues that royalty payments for noncommercial webcasters must be proportional to their use of sound recordings. While IBS's argument has a superficial appeal, it suffers from several shortcomings.

[213] The noncommercial webcasters' WSA settlement agreement is ''nonprecedential.'' The Judges are not permitted to take into account the rate structure, fees, terms and conditions of that agreement in setting rates in this proceeding. 17 U.S.C. 114(f)(5)(C).

[214] *See supra* note 204.

IBS does not and cannot cite any statutory authority for its argument. The statute directs the Judges to set willing buyer/willing seller rates.17 U.S.C. 114(f)(2)(B). Willing buyers and willing sellers may, and often do, agree to rates that are not strictly proportional to usage. The SoundExchange/NPR and SoundExchange/CBI agreements are examples of agreements that incorporate a flat-rate structure where royalties are not strictly proportional to use.

The statutory requirement of a minimum fee also runs counter to IBS's argument. By definition, a minimum fee (whatever its level) is not proportional to usage.

IBS also fails utterly to provide any evidentiary basis for concluding that the rates proposed by SoundExchange or the NRBNMLC are so disproportional to noncommercial webcasters' usage as to be unreasonable. To be sure, some noncommercial webcasters transmit a very small number of performances of recorded music. *See* Kass WDT at 3 (''instantaneous listenership to such music on member stations is typically on the order of five listeners, with the exception of course-related music . . .''). Noncommercial webcasters—even those that are IBS members—are a heterogeneous group, with some operating above SoundExchange's proposed 159,140 ATH threshold. *See supra,* section V.B.1. IBS has not even proposed, much less provided an evidentiary basis to adopt, subcategories of noncommercial webcasters.

C. Conclusion

For the rate period 2016–2020 the Judges adopt an annual rate of $500 per station or channel for all transmissions by noncommercial webcasters up to a threshold of 159,140 ATH. For transmissions in excess of 159,140 ATH, noncommercial webcasters shall pay royalties for 2016 at the commercial rate (*i.e.,* $0.0017 per-performance), and for such transmissions in excess of 159,140 ATH in the remainder of the statutory term, at the commercial rate as adjusted annually for changes in the Consumer Price Index, as set forth in the regulations.

VI. Minimum Fee

Sections 112 and 114 of the Act require the Judges to establish minimum fees as part of any rate structure under the respective statutory licenses. 17 U.S.C. 112(e)(3)–(4) and 114(f)(2)(A)–(B).

A. Commercial Webcasters

1. Parties' Proposals

a. SoundExchange

SoundExchange proposes a $500 per station or channel annual minimum fee. The minimum fee would be nonrefundable, but would be credited against royalties incurred during the applicable year. The minimum fee would be capped at $50,000 annually for a webcaster with 100 or more stations or channels. SoundExchange Rate Proposal at 2 (October 7, 2014).

b. Pandora

Pandora does not make an explicit proposal for a minimum fee. Pandora does, however, propose that, apart from those terms for which it proposes changes, ''the terms currently set forth in 37 CFR 380 be continued.'' Proposed Rates and Terms of Pandora at 2 (Oct. 7, 2015). Those terms include the current minimum fee of $500 per station or channel (capped at $50,000) for commercial webcasters.

c. iHeartMedia

iHeartMedia does not propose a minimum fee.

d. Sirius XM

Sirius XM does not make an explicit proposal for a minimum fee. Sirius XM does, however, propose that ''other than the royalty rate, the terms currently applicable to commercial webcasters be retained in their current form.'' Introductory Memorandum to the Written Direct Statement of Sirius XM at 1–2 (Oct. 7, 2014). Those terms presumably include the current minimum fee of $500 per station or channel (capped at $50,000) for commercial webcasters.

e. NAB

NAB proposes a $500 annual minimum fee for each terrestrial AM or FM radio station that a broadcaster webcasts. For purposes of calculating the minimum fee, each individual stream (*e.g.,* primary radio station, HD multicast radio side channels, different stations owned by a single licensee) is to be counted as a separate radio station, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL). NAB Proposed Rates and Terms at 4.

The minimum fee would be nonrefundable, but would be credited against royalties incurred during the applicable year. The minimum fee would be capped at $50,000 annually for a webcaster with 100 or more stations or channels. *Id.*

2. Analysis and Conclusion

All participants that proposed a minimum fee for commercial webcasters asked the Judges to retain the current annual minimum fee that the Judges adopted in *Web III* pursuant to a settlement. *See Web III Remand Decision,* 79 FR at 23104. The minimum fee settlement in *Web III* kept in place a settlement of the minimum fee for commercial webcasters that the parties reached in *Web II. See Digital Performance Right in Sound Recordings and Ephemeral Recordings, final rule,* 75 FR 6097 (February 8, 2010) (Web II Minimum Fee Settlement). That settlement, in turn, retained a $500 minimum fee that was determined by a CARP, and upheld by the Librarian, in *Web I, see Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final Rule and Order,* 67 FR 45240, 45262–63 (July 8, 2002), but added a $50,000 cap for a webcaster with 100 or more stations or channels. *See Web II Minimum Fee Settlement,* 75 FR at 6098.

While there is no settlement of the minimum fee issue in the current proceeding, the convergence of the parties' proposals on the existing $500 minimum fee (capped at $50,000) counsels strongly in favor of its retention. In addition, the Judges follow their earlier determination that commercial and noncommercial webcasters alike should have to pay a minimum fee that at least defrays a portion of SoundExchange's costs to administer the statutory licenses. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Determination after Second Remand,* 79 FR 64669, 64672 (Oct. 31, 2014). Mr. Jonathan Bender, SoundExchange's Chief Operating Officer, testified that ''SoundExchange does not track its administrative costs on a licensee-by-licensee, station-by-station, or channel-by-channel basis and, as a result, there is no precise way to determine exactly'' how much SoundExchange spends on that basis. Bender WDT at 16–17. The costs to SoundExchange vary depending on such factors as the quality of the data a service submits. *Id.* at 16. In 2013, the average administrative costs per licensee (*i.e.,* the total administrative costs divided by the number of licensees) were $11,778. *Id.* at 17.

SoundExchange's average administrative cost per licensee is substantially higher than the minimum fee it proposes to charge each licensee.

While a higher minimum fee could be justified on this record, no party has requested anything higher than the current level of $500.

The current $500 minimum fee for commercial webcasters has been in force for more than a dozen years,[215] and has been voluntarily re-adopted by licensors and licensees on two occasions. It has been proposed by licensors and licensees in this proceeding. SoundExchange's administrative costs (which the minimum fee is intended to defray, in part) exceed the proposed minimum fee by a wide margin. The Judges find the proposed minimum fee (including the $50,000 cap) to be reasonable and supported by record evidence, and will therefore adopt it.

B. Noncommercial Webcasters

1. Parties' Proposals

a. SoundExchange

SoundExchange proposes a $500 per station or channel annual minimum fee for noncommercial webcasters. The minimum fee would be nonrefundable, but would be credited against royalties incurred during the applicable year. SoundExchange Rate Proposal at 4.

b. NRBNMLC

NRBNMLC proposes a $500 per station or channel annual minimum fee. The minimum fee would be nonrefundable, but would be credited against royalties incurred during the applicable year.

c. IBS and WHRB

As discussed *supra,* IBS and WHRB did not submit rate proposals.

2. Analysis and Conclusion

Both the SoundExchange and NRBNMLC rate proposals include a $500 annual per station or channel minimum fee for noncommercial webcasters—*i.e.,* retention of the current minimum fee. No other participant proposed a minimum fee for noncommercial webcasters,[216] although CBI and SoundExchange agreed to retain the existing $500 minimum fee as part of their settlement covering noncommercial educational broadcasters. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule,* 80 FR 58201, 58206 (Sept. 28, 2015) (37 CFR 380.22(a)).

Although WHRB and IBS do not attack the SoundExchange and NRBNMLC minimum fee proposals directly, they argued against adoption of the SoundExchange/CBI settlement which incorporates the same $500 minimum fee, and they repeat those arguments in this proceeding. The Judges addressed their objections to the SoundExchange/CBI settlement in the **Federal Register** notice adopting the settlement terms. *See id.* at 58203–04. The Judges have also addressed WHRB's and IBS's objections in the context of the SoundExchange and NRBNMLC rate proposals. For the same reasons articulated in the **Federal Register** notice and *supra,* section V.B.4, the Judges reject WHRB's and IBS's objections as they may apply to the proposed minimum fee for noncommercial webcasters.

The current $500 annual minimum fee for noncommercial webcasters has been in force since *Web I. See* 37 CFR 261.3(e)(1) (2003). It was adopted by SoundExchange and CBI in a settlement agreement covering the rate period of this proceeding. It has been proposed by SoundExchange and the NRBNMLC, the only noncommercial webcaster to file a rate proposal in this proceeding. It constitutes a small (but nontrivial) fraction of the costs that SoundExchange incurs in administering the statutory license. The Judges find the proposed minimum fee to be reasonable and supported by record evidence, and will therefore adopt it.

VII. Ephemeral License Rate and Terms

Section 112(e) grants entities that transmit performances of sound recordings a statutory license to make ephemeral recordings. SoundExchange proposes that the Judges bundle the royalties for Section 114 and 112 and allocate five percent (5%) of the Section 114 performance right royalty deposits to the Section 112(e) ephemeral recording right, a rate structure that would continue the extant arrangement. SX PFFCL ¶ 1369. SoundExchange contends that its proposal regarding the bundled rate for the Section 112 license is supported by the designated testimony of Dr. Ford. SX PFFCL at 1370 & n.64. SoundExchange also cites as support for its Section 112 proposal certain license agreements that were introduced into evidence. SX PFFCL ¶ 1374 (*citing* agreements between [REDACTED] and [REDACTED], [REDACTED] agreements with [REDACTED] and [REDACTED], [REDACTED]'s agreements with [REDACTED] and [REDACTED] for the [REDACTED] service).

SoundExchange contends that no participant offered evidence of a benchmark agreement that does not bundle performance rights and the right to make ephemeral copies. SX PFFCL ¶ 1375. SoundExchange further contends that ''[a]s of the *Web III* proceeding, recording artists and record companies had reached an agreement that five percent of the 'payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities.' '' SX PFFCL ¶ 1377, *quoting* Dr. Ford. According to SoundExchange, no participant has presented evidence in support of a different allocation between artists and record companies. SX PFFCL ¶ 1377. SoundExchange concludes that ''[b]ecause SoundExchange's Board represents both artists and copyright owners, its proposed rate of 5% for ephemeral copies is appropriate evidence and 'credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.' '' SX PFFCL ¶ 1378, *quoting* Dr. Ford.

Other participants that address the rate for the Section 112 license do not contradict SoundExchange's assertions. *See* iHeart Reply PFFCL at 203 (''iHeartMedia supports the current bundling of the § 112 and § 114 royalties''); Sirius XM PFF ¶ 2 (''Sirius XM maintains that the Section 112 ephemeral license has no value independent of the Section 114 performance license, and consequently proposed that the royalty for the Section 112 license be deemed included within the Section 114 royalty payment. Sirius XM takes no position at this time as to what, if any, percentage of the Section 114 royalty should be deemed attributed to the Section 112 ephemeral license.''); NRBNMLC PFFCL ¶ 151 (''[t]here is no dispute between SoundExchange and the NRBNMLC regarding how the royalties for the ephemeral recording statutory license specified in 17 U.S.C. 112(e) should be set. Both participants propose that those royalties for ephemeral reproductions used solely to facilitate transmissions made pursuant to the 17 U.S.C. 114(f) statutory license be deemed to be 'included within, and constitute 5% of' the § 114(f) statutory license payments made by a particular service'' *quoting* the respective proposals of SoundExchange and NRBNMLC); NAB PFFCL ¶ 226 (''no dispute between SoundExchange and NAB regarding how the royalties for the [Section 112(e) license] should be set.'') and Pandora PFFCL ¶ 416 (''[c]onsistent

[215] The $50,000 cap has been in force since 2010 (applicable to the rate period beginning January 1, 2006).

[216] As noted *supra,* neither of the other two noncommercial webcasters that participated in this proceeding (WHRB and IBS) submitted a rate proposal.

with past proceedings and the Merlin Agreement (which has no separate ephemeral recording fee), Pandora proposes that the royalty payable for ephemeral recordings be included within the Section 114 royalty. There is no dispute on this point: SoundExchange has proposed the same.'').

The Judges accept SoundExchange's proposal to continue the current bundling of the Section 112 and 114 rates. The Judges find persuasive the designated testimony of Dr. Ford and the license agreements that SoundExchange cites in its PFFCL that willing buyers and willing sellers would prefer that the rates for the two licenses be bundled and that they would be agnostic with respect to the allocation of those rates to the Section 112 and 114 license holders.[217] The Judges also find that the minimum fee for the Section 112 license should be subsumed under the minimum fee for the Section 114 license, 5% of which shall be allocable to the Section 112 license holders, with the remaining 95% allocated to the Section 114 license holders.

SoundExchange and the services disagree, however, on the terms with respect to the Section 112(e) license. CRB Rule 380.3(c), which addresses ephemeral recordings, states: ''The royalty payable under 17 U.S.C. 112(e) for the making of Ephemeral Recordings used by the Licensee solely to facilitate transmissions *for which it pays royalties* shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.'' 37 CFR 380.3(c), emphasis added.

Pandora proposes that the Judges strike the italicized language and replace it with the phrase ''made pursuant to 17 U.S.C. 114.'' Pandora believes the current language ''creates the possibility (likely unintended) that ephemeral copies of sound recordings that are used by a service for non-compensable performances under Section 114 might not be authorized under the regulations.'' Pandora PFFCL ¶ 416. Pandora also proposes that the Judges add the following sentence to the current amended regulation: ''A Licensee is authorized to make more than one Ephemeral Recording of a sound recording as it deems necessary to make noninteractive digital audio transmissions pursuant to 17 U.S.C. 114.'' Pandora PFFCL ¶ 417. Pandora contends that such ''as necessary'' language is consistent with industry practice. *Id.* ¶ 418. SoundExchange proposes that the current regulation be carried over into the new rate period but appears to acknowledge that authorizing the making of more than one ephemeral copy is not inconsistent with current industry practice.[218]

The Judges adopt Pandora's proposed language and do not carry forward the language ''for which it pays royalties'' in the current regulation because they believe that the phrase could be construed in a way that would limit the application of the Section 112 license to certain transmissions made consistent with Section 114 that are not royalty generating, such as skips. The Judges also are sympathetic to the Services' contention that, in certain circumstances (*e.g.,* where different file format requirements may necessitate the creation of multiple copies), it may be necessary to make more than one ephemeral copy to facilitate transmissions made pursuant to Section 114. Nevertheless, the circumstances must be necessary and commercially reasonable. The language the Judges adopt includes this standard.

VIII. Terms

One of the purposes of this proceeding is to establish terms for the administration of the rates the Judges determine for the rate period 2016 to 2020. The parties proposed changes to Subchapter E of Chapter III, title 37 CFR, relating to royalty rates and terms. The Judges adopted some changes and rejected others in the initial Determination. In its Petition for Rehearing (Rehearing Motion), SoundExchange raised several issues relating to the Judges' determinations regarding proper regulatory language to effect their conclusions in the Determination. After considering the Rehearing Motion [219] and the responses thereto, the Judges issued a separate order detailing SoundExchange's requests and the Judges' conclusions.[220] In the interest of making this final Determination a complete and cohesive record of the Judges' findings and conclusions in this proceeding, the Judges include additional material in this section to reflect their rehearing ruling.

In addition to the proposed terms concerning licensing ephemeral recordings discussed in the preceding section of this Determination, the Judges have weighed the proposals and the arguments of the parties in support of or opposed to various regulatory provisions and, after due consideration of the rehearing papers, adopt the Terms as detailed below this Supplementary Information section. The parties' proposals—and the Judges' rulings—include the following.[221]

A. Section 380.1—Scope and Compliance

1. Legal Compliance—§ 380.1(c)

a. Sound Recording Performance Complement

iHeart proposed changes to the statutory definition of ''sound recording performance complement'' to reflect the practice of waiving the statutory performance complement in private agreements, IHM PFF ¶ 425. The provision would ''ensure[ ] that Broadcasters do not need to alter the content of their radio broadcasts simply because they have elected to simulcast those broadcasts over the Internet''. IHM Rate and Terms Proposal at 2–3. According to iHeart, because programs on terrestrial radio stations can play entire albums, iHeart should be allowed to simulcast the programs without altering them to satisfy the performance complement requirement, and the Judges have the authority to modify such ''background terms of the statutory license'' where willing buyers and sellers would negotiate such terms absent the statute. IHM COL ¶ 34–35. SoundExchange argued that statutory changes can only be made by Congress.

[217] SX Ex. 1931 (designated testimony of Dr. George S. Ford). Dr. Ford testifies that ''in the marketplace deals between record companies and webcasters for non-statutory forms of licenses, it is typical for ephemeral copy rights to be expressly included among the grant of rights provided to the webcasters . . . [incorporating the rate for the ephemeral copy] into the overall rate that the webcaster pays for the ephemeral copy rights and performance rights.'' *Id.* at 10–11. He also concluded that ''recording artists and record companies have reached an agreement that five percent (5%) of the payment for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities [and] that appears to be a reasonable proposal.'' *Id.* at 15.

[218] *Compare* SX Reply PFFCL ¶ 1247 (''SoundExchange believes that Pandora's proposed changes [to CRB regulations] should be rejected outright'') *with* SX PFFCL ¶ 1374 (referencing agreements between labels and services wherein services are authorized to create and store a reasonable, limited number of ephemeral copies).

[219] In the Rehearing Motion, SoundExchange analyzed its concerns regarding several substantive determinations, including the provision for annual royalty rate adjustments. With regard to the regulations, SoundExchange challenged the stated method of calculation of annual royalty rate increases, if any. SoundExchange also listed (without sufficient analysis) several other regulatory concerns. The Judges permitted SoundExchange to detail the other regulatory concerns in a Supplemental Motion (Supplement). The Judges solicited and received responses from the Licensees to all issues in the original Rehearing Motion and the Supplement.

[220] See Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions (Feb. 10, 2016), issued in PUBLIC version on February 22, 2016.

[221] Section references are to the section numbers in the regulations adopted by this Determination.

The Judges agreed. The Judges did not adopt this change.

b. Waiver of Requirement to Destroy Ephemeral Recordings After Six Months

iHeart proposed to add a provision that exempts Broadcasters from the statutory six-month limitation on the retention of ephemeral recordings subject to certain conditions. SoundExchange argued that the Judges are not authorized to make changes to the statute by enacting regulations, and the Judges agreed. The Judges cannot and did not adopt this proposal.

B. Section 380.2—Making Payment of Royalty Fees

1. Monthly Payments—§ 380.2(b)

a. Payment Period

SoundExchange proposed shortening the payment period from 45 days to 30 days. Pandora and Sirius did not oppose the change, but the NAB, NRBNMLC, and IHM did. SoundExchange argued that the shorter term would allow them to distribute payments more quickly and that the majority of agreements in the industry have payments terms of 30 days. The NAB and IHM argued that because of the unique character of their respective business models, shortening the term would cause additional burdens and create inaccuracies and overpayments that potentially would not be refunded. The Judges also are considering this issue in a rulemaking proceeding that is currently pending before them. The Judges do not believe the record before them in this rate-setting proceeding supports the change that SoundExchange seeks, and therefore decline to adopt it. The Judges can perceive the costs to the Services that the shortened reporting period would impose, and it is less clear that the benefits identified by SoundExchange from such a change would justify those costs. Nevertheless, the Judges will consider revisiting this issue in the broader context of the pending rulemaking proceeding.

b. Emails Acknowledging Receipt of Payment

NRBNMLC proposed that SoundExchange send emails (similar to those that the musical works collectives send) with reminders that annual payments are due, which would serve a function similar to an invoice. NRBNMLC also proposed a provision requiring SoundExchange to email acknowledgments of receipt of payment, which would function like a receipt and which is a common business practice, including in the nonprofit arena. SoundExchange argued there is no need for a regulation because it already sends reminders. It also argued that an acknowledgment email would be challenging because it does not have current email addresses for each of its licensees, and the cost would outweigh the benefit. SoundExchange countered that it will soon have an online payment portal, a fact that NRBNMLC points out shows that SoundExchange realizes that the receipts would be useful. The Judges found that the online portal should address the receipt concern and that the practice of sending reminders does not warrant a regulation. Therefore, the Judges did not adopt this proposed change.

2. Late Fees—§ 380.2(d)

a. A Single Late Fee

Pandora proposed a single late fee for both a late payment and a late Statement of Account. It argued that a late fee for each of these is duplicative and unnecessary. SoundExchange countered that it incurs duplicative costs when both items are late and that it is fair to hold a late payor accountable for such costs. In addition, SoundExchange's ability to enforce compliance and make efficient distribution relies on late fees for each of these. The Judges agreed that such fees encourage compliance for each required item. As a result, the Judges did not adopt this proposed change.

b. Late Fee Rate

iHeart, the NAB, and NRBNMLC proposed that the late fee rate be reduced from 1.5% (the equivalent of 18% per year) to a more ''reasonable'' fee; that is, one similar to statutory interest rates on judgments and tax underpayments. iHeart pointed out that its agreements with the Indies contain no late fee provision and that Warner has never asked them to pay the late fee when they have submitted a late payment. SoundExchange argued that the high fee provides an incentive for timely payments and covers costs due to late payments. The evidence shows that late fees in market agreements range from no fees up to the proposed fee of 1.5%. The 1.5% rate is an accepted rate in the market, and the services produced no evidence of actual hardship from the current rate of 1.5%. For this reason, the Judges did not adopt this proposed change.

C. Section 380.3—Delivering Statements of Account

1. Adjustments to Statements of Account—§ 380.3(a)

Pandora proposed a change to allow Licensees to make adjustments to their Statements of Account. iHeart proposed changes that would allow Licensees to recoup overpayments. SoundExchange argued that the proposals are unreasonable because of, *inter alia,* the window of time within which, and the number of occasions upon which, a Licensee could make adjustments. In addition, SoundExchange complained that the administrative burden of such a proposal could be excessive. SoundExchange also noted that the money may not be recoupable once it is paid to artists. Pandora argued that making good faith adjustments are part of the normal course of business and that SoundExchange's technological advances will make the administration of adjustments manageable. Pandora RFF at 192–93. iHeart pointed out that SoundExchange has a method for reversing its own inadvertent overpayments. IHM PFF ¶ 433; IHM RFF ¶ 202; *see* PAN PFF ¶ 1300.

The Judges agreed with SoundExchange. The burden of submitting accurate payments is on the Licensee, and the Licensee bears the risk of overpayment. In addition, the record contained no evidence to guide the Judges in determining a reasonable period for, or a reasonable number of, adjustments. Therefore, the Judges did not adopt this proposed change.

The parties also raised the issue of royalty fee payment adjustments in the context of audits. *See* discussion regarding overpayments and underpayments discovered at audit under section 380.6 below.

2. Signature Attestation—§ 380.3(a)(8)

Pandora proposed adding a sentence to the required language in a Statement of Account—just below the sentence where the signatory attests to the statement's accuracy and completeness—that would allow Licensees to amend their Statements of Accounts. This proposal was related to iHeart's proposal regarding overpayment and corrections to payments. The proposed sentence contained no time limit for making amendments to the Statements of Accounts and is therefore an unreasonable addition to the Statement of Account. The Judges did not adopt this proposed change.

D. Section 380.4—Distributing Royalty Fees

1. Best Efforts to Identify and Locate—§ 380.4(a)(2)

In this proceeding, the Licensees proposed, and the Judges adopted, additional regulatory language regarding the Collective's duty to locate parties

entitled to receive royalty distributions.[222] SoundExchange objected to the added language. A SoundExchange executive testified that the Collective maintains an extensive database and can locate distributees without the due diligence suggested by the new language. *See* SX Ex. 23 at 18–19, SX Ex. 2 at 5–11. As SoundExchange conceded, however, the regulations contain similar language in section 370.5(d) regarding best efforts to find copyright owners in order to make available reports of use.

If SoundExchange is able to make—and amenable to making—records searches to assure proper distribution of reports of use, the Judges should assure that SoundExchange makes no less of an effort to locate copyright owners when the time comes to distribute royalty funds. It would seem even more appropriate for SoundExchange to engage in best efforts when distributing royalties to avoid any appearance of impropriety or conflict of interest, in light of section 380.4(b), which may permit retention of unclaimed funds by SoundExchange. This minimal additional due diligence can do little other than assure the currency and integrity of SoundExchange's distribution database.

Further, SoundExchange outlined its search capabilities, but did not object expressly to the due diligence language proposed by NAB and NRBNMLC. The Judges adopted the proposal of NAB and NRBNMLC.

2. Unclaimed Funds—§ 380.4(b)

Pandora proposed that the provision in the regulations dealing with the Collective's use of unclaimed funds may not be consistent with state escheatment laws. SoundExchange opposed changes to this provision, which allows the Collective, under certain circumstances, to use unclaimed funds for administrative purposes. SoundExchange argued that the changes Pandora had proposed, which would have required the Collective to use unclaimed funds in a manner consistent with applicable law, could impose an unnecessary regulatory burden on the Collective.

The Judges adopted the changes substantially as proposed by Pandora. Although the Judges do not believe the unclaimed funds provision in the current regulations runs afoul of any state law, in abundance of caution and to avoid potential confusion in the upcoming rate period, the Judges adopted the more neutral drafting that Pandora proposed to ensure that the Collective's use of unclaimed funds comports with applicable law.

In the Rehearing Motion, SoundExchange further objected to the Judge's insertion of language to define the three-year holding period for unclaimed funds. The extant regulations contain an internal ambiguity concerning the measurement of the period for holding unclaimed funds. When the Judges suggested reorganization of the Part 380 regulations, they highlighted this issue for the parties. *See Judges' letter to participants dated April 2, 2015.* For example, in § 380.4 of the current regulations, the Collective is required to hold funds if it is ''unable to locate a Copyright Owner . . . within 3 years from the *date of payment by a Licensee* . . . .'' 37 CFR 380.4(g)(2) (emphasis added). If the Collective is unable to locate the rightful payee, then the funds become subject to § 380.8, which requires the Collective to retain ''unclaimed'' funds for ''a period of 3 years from the *date of distribution.'' See, e.g.,* 37 CFR 380.8 (emphasis added). The Collective may apply those funds to offset its costs at the end of the three-year holding period. *Id.*[223]

On its face, the ''date of payment by a Licensee'' is not the same as the ''date of distribution,'' the latter of which is ambiguous, at best. Despite the Judges' invitation, no party offered explanation for the current regulatory discrepancy or suggested clarifying language to eliminate the ambiguity. In section 380.2(e) of the regulations adopted by the Judges as part of this proceeding, the Judges sought to resolve the ambiguity by specifying that the three-year holding period commences on ''the date of final distribution of all royalties.'' SoundExchange averred that the Judges' *introduced* uncertainty into the regulation because it is unclear when a ''final distribution of all royalties'' takes place when a copyright owner cannot be located and the funds that copyright owner may be entitled to cannot be distributed.

SoundExchange requested that the Judges amend the regulation to specify that the three-year holding period commences on the date of the first distribution of royalties from the relevant payment by the service. Rehearing Motion at 10. No other party responded to SoundExchange's requested amendment. The Judges recognized that the language of section 380.2(e) may be unclear, and that the amendment that SoundExchange requested would clarify the regulation in a manner consistent with the Judges' intent. Therefore, the Judges accepted the SoundExchange proposal and clarified the regulatory language accordingly: The three-year escrow period for undistributable royalties shall be three years from the date of first distribution of relevant royalty deposits from a Licensee.

3. Designation of the Collective—§ 380.4(d)(1)

The Judges designated SoundExchange as Collective.[224] SoundExchange participated as the existing and presumed Collective. SoundExchange indicated its willingness to continue as the Collective. *See* Bender WDT at 14–15. No party objected to SoundExchange continuing in the role of Collective. The Judges acknowledged the administrative and technological knowledge base developed by SoundExchange over its years of service as the Collective. Finding no reason to change the designation, the Judges re-named SoundExchange to serve as the Collective for purposes of collecting, monitoring, managing, and distributing sound recording royalties established by this Part 380.

E. Section 380.5—Handling Confidential Information

1. Disclosure of Confidential Information—§ 380.5(c)

Upon review of the supplemental papers, the Judges made an additional change to the language regarding handling of confidential information, anticipating a claim of ambiguity. In its discussion of the new regulatory requirements for, *inter alia,* written confidentiality agreements, SoundExchange referred to confidentiality obligations arising by ''operation of law.'' Supplement at 3. The Judges acknowledged that a Qualified Accountant and any attorney admitted to a state's bar is under a professional ethical obligation[225] to

[222] In their post-Determination review, the Judges noted that the due diligence language was misplaced in § 380.2(e), which is concerned with payment of royalty fees by Licensees. The Judges have deleted the language from § 380.2.

[223] Similar language is repeated in subparts B (§§ 380.13(i)(2), 380.17) and C (§§ 380.23(h)(2), 380.27) of the extant regulations.

[224] In the provision relating to the potential dissolution of SoundExchange as the Collective, Pandora and SoundExchange agreed that the phrase ''that have themselves authorized the Collective'' in current CRB Rule 380.4(b)(2)(i) is unnecessary and should be deleted. See SX Reply PFFCL ¶ 1231 n.74. Accordingly, the applicable provision the Judges adopted, § 380.4(d)(2)(i), does not retain that unnecessary language.

[225] These obligations might or might not arise by ''operation of law'' depending upon the jurisdiction, but any party aggrieved by a breach of these professional obligations is likely nonetheless

maintain confidentiality of his or her client's confidential information. The Judges, therefore, eliminated ''attorney'' from the list of potential viewers of confidential information required to sign a confidentiality agreement. The Judges added ''outside counsel'' to ''Qualified Auditor'' in subsection (c)(2) of section 380.5, as eligible to receive confidential information without executing a separate confidentiality agreement. The Judges specified ''outside counsel'' as some entities involved in these complex proceedings may employ in-house counsel, whose duties would not necessitate their seeing information relating to the Judges' rate proceedings. In-house counsel are deemed to be included in the term ''employees'' in the list of persons required to sign the confidentiality agreement.[226]

2. Written Agreements—§ 380.5(c)(1)

NAB and NRBNMLC proposed, and the Judges adopted, additional verbiage for the regulation (section 380.5(c) (1) in the newly-revised regulations) regarding confidential information shared by participants in webcasting proceedings that: (1) Required confidentiality agreements to be in writing; and (2) limited disclosure of confidential information to those performing activities ''related directly'' to collection and distribution of royalty payments. SoundExchange did not indicate that it ever addressed these proposed changes to the regulations. It was not until SoundExchange sought rehearing that it raised a specific challenge to this added confidentiality language. Supplemental Petition for Rehearing . . . at 4 (Supplement).

In their joint opposition to the Supplement, NAB and Pandora objected to allowing SoundExchange to raise a new issue on rehearing. *See* NAB and Pandora's Opposition to . . . Supplement [ ] . . . at 5 (NAB/Pandora Supp. Opp.). iHeart further pointed to record evidence to support the additional language relating to handling confidential information during the process of royalty collection and distribution. *See* iHeart Opposition to . . . Supplement[ ] at 2–3 (iHeart Supp. Opp.). iHeart cited direct license agreements that were in evidence in this proceeding as support for the reasonable addition of requirements for (1) written confidentiality agreements and (2) restriction of use of confidential information to purposes ''directly'' related to collection and distribution of royalties. *Id.* (citing, *e.g.,* SX Exs 110 at 11 (iHeart-Concord agreement) and 33 at 30 (iHeart-Warner agreement)). iHeart's citation to the record illustrated the Judges' ability to look to ''comparable circumstances under voluntary license agreements'' in setting rates under § 114.

SoundExchange's objection was too little, too late. The Judges declined to change the confidentiality language.

3. Safeguarding Confidential Information—§ 380.5(d)

SoundExchange objected to use of the phrase ''distributees of the collective'' in section 380.5(d) as creating an uncertain standard, contending that the provision could be interpreted to require recipients of confidential information to ''adhere to the unknowable standards employed by SoundExchange's tens of thousands of distributees.'' Supplement at 4. SoundExchange proposed to clarify that recipients of confidential information are bound by the standard of care that they employ with their own confidential information by substituting the phrase ''Person authorized to receive confidential information'' for ''distributees of the collective.'' *Id.* No other party raised an issue with the language of the newly-revised regulation; nor did any party object to SoundExchange's requested change.

SoundExchange correctly discerned the intended meaning of the language that the Judges adopted. The Judges did not view the potential misinterpretation that SoundExchange feared to be a reasonable reading of the section 380.5(d). The Judges also did not view SoundExchange's proposed amendment as likely to clarify the Judges' intent. Nevertheless, to remove all doubt the Judges amended section 380.5(d) by deleting everything after the second-to-last comma and substituting the following: ''but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.''

F. Section 380.6—Auditing Payments and Distributions

1. Frequency of Auditing—§ 380.6(b)

SoundExchange argued that the Judges' newly-revised regulatory language regarding audit frequency included an unintended ambiguity regarding the frequency with which the Collective may audit Licensees. Motion at 10. In its Supplement, SoundExchange contended that section 380.6(b) could be interpreted as limiting SoundExchange to a single audit *of a single service* each year. *Id.* SoundExchange asked the Judges to clarify that it is not restricted to auditing only one licensee per year; rather that the limit is one audit per year *for each licensee.* No party responded in opposition to this clarification request. As SoundExchange's proposed clarification was consistent with the intent of the language originally adopted by the Judges, but was not subject to misinterpretation, the Judges amended the regulatory language accordingly.

2. The Audit—§ 380.6(d)

a. Binding Nature

The NAB proposed the Judges modify the audit regulation by removing the requirement that the Qualified Auditor's results be binding on the parties. SoundExchange objected to the Judges' adoption of the NAB proposal. Supplement at 4. As the NAB noted, SoundExchange[227] witness, Dr. Thomas Lys, testified that requiring an audit report be dispositive would be ''unreasonable.'' NAB/Pandora Supp. Opp. at 3, citing 5/4/15 Tr. at 1507–08 (Lys).

The Judges credited Dr. Lys's testimony and agreed that the subject of any audit should be permitted to contest audit results. SoundExchange offered no record support for its proposal that the regulations return to the current language, albeit made reciprocal in nature. The ''binding'' language has been excised from the newly-revised regulations.[228]

b. Acceptable Verification Process

SoundExchange proposed removing this provision because it allows audits to be routine financial audits instead of specialized ''royalty examinations.'' SX PFF ¶ 1285–86. Although the services did not oppose this change, SoundExchange offered no evidence of the ineffectiveness of the audits to date due to the existence of the provision, and therefore the Judges did not adopt the proposed change. A Service's recent financial audit need not preclude a business audit that focuses on the

entitled to a legal or equitable remedy from a court of competent jurisdiction.

[226] The Judges understand that in-house counsel admitted to the bar carry the same professional ethical obligations as outside counsel. Admission to the bar alone, however, is not sufficient to grant in-house counsel unnecessary access to confidential information of a business competitor.

[227] In drafting, the Judges inadvertently included language the NAB proposed to make the choice of a Qualified Auditor binding, in addition to adopting the NAB proposal to drop the requirement that the audit results be binding. The Judges found that language making the choice of a Qualified Auditor binding is unnecessary, and have removed it.

[228] Accordingly, any attempt to seek a remedy based upon an auditor's findings, and any attempt to challenge those findings, must be made in a court of competent jurisdiction, or through any private alternative dispute resolution procedure to which the affected parties may have agreed.

Service's royalty policies and procedures.

3. Audit Results; Underpayment or Overpayment of Royalties—§ 380.6(g)

a. Terms for Restitution of Underpayment

Pandora suggested that Licensees and SoundExchange be permitted to agree on acceptable terms [229] regarding the time for restitution of underpayments by Licensees.[230] SoundExchange did not oppose Pandora's proposal in its Reply PFF/PCL. In its opposition to the SoundExchange Supplement, iHeart suggested that agreed terms for reconciliation are consistent with market terms allowing for agreement on the identity of an auditor and the scope of an audit. iHeart Supp. Opp. at 2, citing, *e.g.,* SX Ex. 38 at 40 (re timing and scope of audit).

The legislative emphasis in the Act on voluntary, negotiated settlements, should, without clear, contrary evidence or authority, extend to permitting agreement regarding the timing for account reconciliation. SoundExchange failed to show that permission to resolve a conflict by agreement is without evidentiary support or contrary to any legal requirements in the Act. The Judges did not err in adding this provision to the revised regulations. However, the regulatory language the Judges adopted might be construed as requiring, rather than permitting SoundExchange and Licensees to agree on acceptable terms of payment. Accordingly, the Judges clarified section 380.6(g).

b. Recoupment of Overpayment

The parties raised the issue of underpayment collection and overpayment recoupment (with interest) in the context of monthly royalty deposits. A periodic audit may also reveal underpayments and overpayments. SoundExchange objected to new language in section 380.6(g) that gives licensees a credit, with interest, for overpayments that are revealed in an audit, arguing that the provision is inconsistent with the Judges' rejection of a similar proposal by the services in connection with adjustments based on revised Statements of Account. Rehearing Motion at 10. In the then-extant regulations, the provisions regarding audits and audit findings did not address the question of financial adjustment,[231] either restitution for underpayment or recoupment of overpayment. In this proceeding, the Services introduced evidence of the practice of ''truing'' accounts. *See e.g.,* SX Ex. 33 at 18 (¶ 4(c) of document) (Licensee to make immediate restitution of any underpayment discovered by audit), IHM Ex. 3351 at 11 (¶ 7(b), p. 10 of document) (Licensee may withhold royalties prospectively in certain circumstances), IHM Ex. 3340 at 3 (¶ 1(b), p. 2 of document) (same). Reconciliation of accounts should be no less a practice in the context of statutory licensing. *See* 17 U.S.C. 114(f)(2)(B)(II) (in establishing terms, Judges may consider ''comparable circumstances under voluntary license agreements'').

The Licensees participating in this proceeding proposed an open-ended term that would permit them to amend SOAs and make concomitant financial adjustments (with interest). The Judges rejected this proposal because of the open-ended nature of the proposal, which could result in an excessive administrative burden on SoundExchange. The Judges concluded, rather, to allocate the burden of accuracy in reporting to the Licensees.

In allocating that administrative burden, however, the Judges were not opining on the propriety of or need for a balancing of accounts after an audit. SoundExchange may audit Licensees annually, but the period audited may be up to three years. No party offered evidence of past audit practices or results. The Judges were unaware whether any audit findings had ever resulted in cost-shifting, for example, let alone what remedies, if any, the parties had employed to reconcile under- or over-payments. Further, a sampling of direct license agreements did not reveal a standard regarding recoupment of overpayments detected by audit.

Nonetheless, even if directly-contracting parties negotiated reciprocal reconciliation of payments in any circumstance, the Collective is in a different business posture than its members making direct license deals. As SoundExchange pointed out, it is a non-profit organization that makes distributions directly to a multiplicity of artists and record companies from each royalty deposit. SoundExchange is not in the same position that an individual Licensor might be with regard to management of its funds.

The Judges thus adopted for audit findings the same rationale as that applicable to Statements of Account: The burden of accurate reporting and payment is on the Licensee. Accordingly, the Judges' regulations continue to require immediate restitution in the case of underpayment, but no right of recoupment for overpayment. As with any untimely payment, a Licensee that is obligated to remedy an underpayment is liable to pay reasonable interest thereon.

4. Other Audit Related Proposals

a. Notice and Cure

The NAB proposed adding a notice and cure provision to apply in case of breach because it is customary in contracts and is included in some of the agreements in evidence. SoundExchange wanted the option to use informal methods of dealing with breach, but the NAB argued this provision would not preclude such efforts; it would only be required in case of a material breach that SoundExchange planned to assert. Such a provision is not necessary merely because it is customary, and informal or formal methods of notice are always available to the parties. Therefore, the Judges did not adopt this proposed change.

b. Completion of Audit Within Six Months

The NAB and NRBNMLC proposed augmenting the audit notice provision with what they termed a reasonable deadline for completion of audits, arguing the potential for abuse and the burden that lengthy audits place on Broadcasters. They point to comments in a rulemaking proceeding regarding the burden. SoundExchange argues that the length of an audit is in the control of the services more than of the auditor and that the NAB and NRBNMLC point to no such provisions in private agreements. The comments in the rulemaking procedure are not evidence in this proceeding. What is reasonable is the ultimate finding of fact. The parties submitted no evidence on what would be a reasonable time within which to complete an audit. The Judges do not adopt this proposal.

[229] The Judges addressed elsewhere whether those terms shall include interest.

[230] SoundExchange complained that Pandora ''sneaked'' in these changes. The record did not support SoundExchange's allegation. Pandora included its request for this regulatory change twice—once with its written rebuttal statement and again with its proposed findings of fact and conclusions of law. Pandora First Amended Rates and Terms (Feb. 22, 2015) (submitted concurrently with Pandora Written Rebuttal Statement); Pandora Second Amended Rates and Terms at 3, 13 (Jun. 24, 2015) (submitted concurrently with Pandora PFF/PCL).

[231] The only reference to a financial issue in the current audit regulations relates to restitution of an underpayment and allocation of the cost of the audit in the event the auditor finds an underpayment discrepancy of 10% or more. *See, e.g.* 37 CFR 380.6(g), 380.7(g). No regulation addresses underpayment of less than 10% or overpayment at any amount.

G. Section 380.7—Definitions [232]

1. Definition of Aggregate Tuning Hours (ATH)

The NAB and NRBNMLC proposed to redefine ATH to allow for a reduction in reported ATH for broadcast time devoted to talk radio. SoundExchange countered that NRBNMLC provided no evidence to justify a reduction different from the one established (and used) by NPR stations. SoundExchange pointed out that all the rates would have to be recalculated if the basic assumption regarding ATH is changed at this point. The Judges agreed. If the definition changed, the threshold would need to change as well, and there was no basis in the record for making those changes. The Judges did not adopt this change.

2. Definition of Broadcast Retransmission

The NAB and iHeart proposed a change in the definition of broadcast retransmission (simulcast) to cover anything that is at least 51% identical to its antecedent terrestrial broadcast. This proposal was a companion proposal to the NAB's proposal of separate royalty rates for simulcasters. The Judges declined to establish separate rates for simulcasters and therefore did not include a definition of ''broadcast retransmission'' in the new regulations.

3. Definition of Broadcaster To Include ''Affiliate of''

The NAB and NRBNMLC proposed to change the definition of Broadcaster, but did not provide a reason for the change. The Judges determined not to establish separate royalty rates for simulcasts by over-the-air broadcasters, obviating the need for a definition of ''broadcaster'' in the regulations. The Judges did not, therefore, adopt this proposed change.

4. Definition of Commercial Webcaster

In the Rehearing context, SoundExchange asked the Judges to change the definition of ''Commercial Webcaster.'' Motion at 10. As written in the original ''Exhibit A'' to the Determination, the definition of Commercial Webcaster excluded ''an Educational Webcaster,[233] a Noncommercial Webcaster, or Public Broadcasting Entities . . . .'' SoundExchange sought to change the phrase ''Public Broadcasting Entities'' to ''Covered Entity under Subpart D'' to conform the terminology with that adopted in Subpart D of Part 380, pursuant to the settlement SoundExchange reached with The Corporation for Public Broadcasting (CPB) and National Public Radio (NPR). By its terms, the CPB/NPR settlement is by and between SoundExchange on the one hand and, on the other hand, NPR and CPB, on behalf of themselves and on behalf of American Public Media, Public Radio International, and certain public radio stations, together designated the Covered Entities.

No participant in the hearing self-identified as a public broadcasting entity. Presumably, if there were an entity satisfying the statutory definition of a public broadcaster that was excluded by agreement from the settlement memorialized in Subpart D of the revamped regulations, the excluded entity would be treated as a noncommercial webcaster or a noncommercial educational webcaster, as the case may be.[234] As the Judges did not define ''public broadcaster'' in this iteration of their regulations, however, the request from SoundExchange to clarify the reference was well taken.

The Judges have added a definition of ''public broadcaster'' to section 380.7, cross-referencing Subpart D.

5. Definition of Performance

In the current regulations, a ''performance'' is defined as ''each instance in which any portion of a sound recording is publicly performed to a listener . . . .'' *See, e.g.,* 37 CFR 380.2. The Services proposed various changes to the definition of performance. Parties can and do alter the definition of ''performance'' and change other DMCA provisions in directly negotiated licenses. The Judges cannot, however, make regulations that are contrary to the requirements of the Act.

Pandora sought to add ''in the United States'' to the definition. The NAB and NRBNMLC asked for an alternate parenthetical description and a reference to the section in the Copyright Act regarding performances that do not require a license. More substantively, the NAB and NRBNMLC also added two exclusions to the definition, one regarding performances of very short duration and one very technical one regarding second connections from the same IP address. SoundExchange argued that rights owners should be compensated for all uses of their works, and thus that services should pay for performances even if they are of brief duration or the service deems them to be ''skips.'' SoundExchange also pointed out that the proposed rates were calculated based on the current statutory definition of ''performance'' and that any narrowing of the definition would require adjustments to the proposals. The second exclusion is not necessary because SoundExchange's witness, Mr. Bender, agreed that reconnections are not performances under the current regulations, which specify that a ''performance'' requires a listener.

The definition of performance in the regulations has long been established. The NAB and NRBNMLC argued that performances of very short duration are of no value to the listener or the service, and they pointed out that listeners cannot skip songs on their services. The Judges agreed that performance as it has been defined should continue to apply. The Judges did not adopt these changes.

In its Supplement, SoundExchange objected to the Judges' ''linguistic changes'' to the definition of ''performance'' in section 380.7. Supplement at 5. The Judges accepted SoundExchange's concern that the new language may harbor an ambiguity. No party objected to SoundExchange's request for modification of the definition. The Judges made the requested modification.

6. Definition of Qualified Auditor

SoundExchange proposed that the regulations allow non-CPAs to perform audits if they have the requisite industry-specific expertise, arguing that it is difficult to find CPAs with the needed expertise and that other actors in the market allow content owners to audit royalty payments. The NAB and NRBNMLC countered with the argument that CPAs inspire confidence in the audit results because of the standards of their profession and that they can rely on experts in the industry to assist them if necessary. SoundExchange had argued in past proceedings for a change to allow in-house auditors to perform audits. The Judges had rejected that change. Final Rule and Order, Docket No. 2005–1 CRB DTRA (''Web II''), 72 FR 24084, 24109 (May 1, 2007). For the same reasons,

[232] The Judges included two sections numbered 380.6 in the initial iteration of the regulatory language, one of which was the definitions section. The Judges corrected that error and relabeled the definitions section § 380.7.

[233] The Judges noted that the reference to Educational Webcaster in this definition was misplaced and therefore removed it.

[234] Under section 118 of the Act, a ''public broadcasting entity'' means a noncommercial educational webcaster as defined in 47 U.S.C. 397, viz., ''[CPB], any licensee or permittee of a public broadcast station, or any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs.'' Not all noncommercial webcasters are public broadcasters. Not all educational webcasters are public broadcasters. The appellation ''public broadcaster'' appears to be reserved to those stations that receive funding by or through the CPB.

they did not adopt in this proceeding a change to the requirement that the auditor be a CPA. The Judges further inserted the qualifier ''independent'' into the definition of ''Qualified Auditor'' for the sake of regulatory efficiency. The Judges did not adopt SoundExchange's proposed change.

The Judges did, however, adopt language proposed by the NAB and NRBNMLC concerting the licensing of an auditor. In its Rehearing Motion, SoundExchange objected to the addition of a requirement that a Qualified Auditor be licensed in the jurisdiction in which it conducts the audit. Motion at 8–9. The NAB had requested this additional requirement to qualify an auditor as part of its proposed terms. NAB Proposed Rates and Terms at 3 (Tab B to NAB CWDS Vol. 1). SoundExchange asserted that the additional jurisdictional licensure requirement was not supported by the record. This requirement provides assurance that the auditor will be accountable and amenable to local governance in the jurisdiction in which it operates. Differences in ethical standards and sanctions for CPAs among jurisdictions might be small, but the requirement that the auditor submit itself to the jurisdiction of the local CPA governing bodies and local courts is significant. The NAB's suggestion is supported by the testimony of Professor Roman Weil and, therefore, was not without support in the record. *See* Weil WRT at 11–13. The Judges rejected SoundExchange's objection.

H. Section 380.10 (Subpart B)—Royalty Fees for the Public Performance of Sound Recordings and the Making of Ephemeral Recordings

1. Minimum Fee—§ 380.10(b)

The NAB proposed a revision to the minimum fee provision that removed fees for individual channels, leaving only fees for individual *stations.* SoundExchange argued that this is not necessary because of the annual cap on total amount of minimum fees that any licensee must pay; that fees would no longer be in proportion to SoundExchange's costs; and that stations would game the system by streaming on multiple channels in order to reduce fees. The NAB explained that its rate proposal and terms applied only to stations that simulcast and that side channels would have different rates and terms. According to the NAB, this proposed change was a ''conforming change'' that presumably would bring this term in line with the NAB's proposed rate for simulcasters. The Judges did not set a separate rate for simulcasters and therefore did not adopt the proposed revision.

2. Annual Royalty Fee Adjustment—§ 380.10(c)

While the Judges rejected SoundExchange's objections to the royalty fee adjustment adopted in the Determination, the Judges acknowledged that the regulation should be clarified so that, in rounding to the nearest fourth decimal place, it is not understood to create a meaningful deviation from the unrounded real rate. Accordingly the Judges adopted a change to the regulation providing for annual royalty fee adjustment in order to clarify the Judges' intent with regard to, and provide examples of, calculating the indexed increase, if any.

3. Third Party Programming

The NAB proposed a waiver of census reporting on any material that is transmitted by a simulcaster that is programmed by a third party, *i.e.,* not the station owner/operator whose broadcasts are retransmitted. The NAB proposed estimating ATH for third party programming because the stations are unable to get the necessary data from the program originators. SoundExchange argued that some broadcasters use a lot of third party material and that they should be required to get that data in order to make accurate reporting to SoundExchange. If broadcasters use third party programming, SoundExchange should not have to bear the risk of inaccurate reporting. In addition, the broadcaster is in the best position to incorporate costs of census reporting into their negotiated payments with the third-party programmers. The Judges did not adopt this change.

I. Miscellaneous—Proposed Relief From Reporting Requirement

The NAB and NRBNMLC proposed that the regulation regarding distribution of royalties provide relief from reporting requirements for small broadcasters and those noncommercial webcasters that are ''exempt from the report of use requirements contained in § 370.4''. NAB Proposed Terms at 6; NRBNMLC Amended Proposed Rates and Terms at 6. This is an argument the NAB and NRBNMLC make in the pending rulemaking proceeding and did not make in this proceeding other than to add the language to their proposed terms. SoundExchange's response is lodged in the rulemaking proceeding. *See* Docket No. 14–CRB–0005 (RM). The forum for that request is the rulemaking, not this proceeding. The Judges did not adopt these proposals.

IX. Royalty Rates Determined by the Judges

A. Annual Rates and Price Level Adjustments

The Judges will set statutory rates for the year 2016. For the years 2017 through 2020, the rates shall be adjusted to reflect any inflation or deflation, as measured by changes in a particular Consumer Price Index (the CPI–U) announced by the Bureau of Labor Statistics (BLS), in November of the immediately preceding year, as described in the new regulations set forth in this determination. In this regard, the Judges concur with Dr. Shapiro, who testified that a regulatory provision requiring an annual price level adjustment is preferable to an implicit or explicit prediction of future inflation (or deflation). 5/19/15 Tr. 4608–10 (Shapiro).

The Judges shall also adjust any effective *benchmark rate* on which they rely in this proceeding to reflect inflation (or deflation) as measured by the CPI–U in the calendar years between the last calendar year in which the data was collected for the benchmark and 2016, as reflected in the applicable November announcement by the BLS.

B. Commercial Rates

1. Commercial Subscription Rates

Based on the analysis in this determination, the Judges shall set two separate rates for commercial noninteractive webcasting. One rate shall apply to performances on *subscription-based* commercial noninteractive services. A separate rate shall apply to performances on *nonsubscription (advertising-supported free-to-the-listener) services.*

The Judges have identified two usable benchmark rates for commercial noninteractive subscription services for 2016.

The first is the steering-adjusted rate derived from the benchmark developed by Dr. Rubinfeld on behalf of SoundExchange. Dr. Rubinfeld established a subscription-based benchmark rate of $0.002376. SX Ex. 59 (Rubinfeld CWDT Ex. 16(a); *see also* SX PFF ¶¶ 344; 393.

As noted in this determination, the Judges apply a steering adjustment to this benchmark rate to reflect the rate-reducing effect of steering as indicated in the Pandora/Merlin Agreement.[235] In the present case, the steering adjustment

[235] Dr. Shapiro's rate data covered a period through the third quarter of 2014. Shapiro WDT at 32.

derived from the evidence is 12%, calculated as follows:

(1) The unsteered subscription service rate for *2015* in the Pandora/Merlin Agreement is $0.[REDACTED]. *See* Pan Ex. 5014, ¶ 3(a)(ii).

(2) Pandora's effective rate at the [REDACTED]% (low end) of steering for *2016,* as derived by Dr. Shapiro, is $0.002238. *See* Shapiro WDT at 35.

(3) Dr. Shapiro's $0.002238 steered rate for 2016 includes a 2.2% *anticipated* inflation factor that the Judges do not apply. *See id.*

(4) Backing out that 2.2% inflation factor indicates a *2015* steered rate of $0.002189 (*i.e.,* $0.002238/1.022).

(5) Adjusting for the actual inflation in 2015 of 0.5% (announced by the BLS on December 15, 2015 [236]) increases the above steered rate marginally to $0.002194, which the Judges round to $0.0022.

(6) The unsteered 2015 subscription service rate of $0.[REDACTED] (step 1) minus the steered rate of $0.0022 equals $0.0003.

(7) The percentage change in the subscription service rate for 2015 is 12% (*i.e.,* $0.0003/$0.[REDACTED]).

Accordingly, Dr. Rubinfeld's proposed benchmark rate of $0.002376 must be reduced by 12% to reflect an effectively competitive rate. A reduction of 12% brings that subscription service rate to $0.0021 (rounded).

However, Dr. Rubinfeld's data covered the period 2011 through 2014. As noted *supra,* the Judges reject Dr. Rubinfeld's linear $0.0008 year-over-year increase. Instead, the Judges apply the CPI–U inflation adjustment of 0.5% to reflect the inflation announced by the BLS on December 15, 2015. That adjustment raises the rate derived from Dr. Rubinfeld's proposed steering-adjusted benchmark marginally, to $0.0021105, which the Judges round to $0.0021.

The second steering-based subscription rate that the Judges credit is the rate in the Pandora/Merlin Agreement, which already incorporates a steering adjustment. That proposed benchmark rate (at 12.5% steering) is $0.002238, rounded to $0.0022. *See* Shapiro WDT at 35.

Thus (and perhaps not surprisingly), the steering and inflation-adjusted subscription rates under both proposed benchmarks establish an extremely tight zone of reasonableness, separated by only $0.0001.[237]

Based on the foregoing, the Judges determine, in their discretion, that the appropriate per-play rate for royalties paid by licensees to licensors in the noninteractive subscription market under § 114 for the year 2016 is $0.0022. As discussed *supra,* the rate for the remainder of the statutory term—2017–2020—shall reflect the foregoing rate of $0.0022 per performance, as adjusted annually upward or downward to reflect changes in the CPI–U over the preceding year, pursuant to the applicable regulations.

2. Commercial Nonsubscription Rates

The Judges have identified two usable benchmark rates for commercial noninteractive nonsubscription services for 2016. First, the Judges have identified the adjusted, effective average per-play rate derived from the iHeart/Warner Agreement. That rate, as developed, *supra,* is $0.[REDACTED] per play.

Second, the Judges have identified the effective per-play rate in the Pandora/Merlin Agreement (with steering at [REDACTED]%) as a usable benchmark. The effective benchmark rate from that agreement is $0.[REDACTED].

Thus, the Judges identify a zone of reasonableness in this market segment as well. That is, the zone embraces a low effective rate of $0.[REDACTED] and high effective rate of $0.[REDACTED]. As noted earlier in this determination, it would be improper based on the present record, to set separate rates for Indies and Majors.

However, as the Judges have also explained, *supra,* a fundamental difference between these two benchmarks is that the iHeart/Warner benchmark reflects an effective rate between a Major and a noninteractive service, whereas the Pandora/Merlin Agreement reflects an effective rate between Indies and a noninteractive service. The evidence at the hearing indicated that the Majors' sound recordings comprise 65% of noninteractive streams, and the Indies' sound recordings comprise 35% of noninteractive streams. *See, e.g.,* SX Ex. 269 at 73.

Based on the foregoing factors, the Judges find that the appropriate statutory rate within this zone of rates, for nonsubscription, ad-supported (free-to-the-listener) services is $0.0017 per performance, as adjusted annually upward or downward to reflect changes in the Consumer Price Index over the preceding year, as set forth in the regulations.

3. Ephemeral Recording Rate

In accordance with the Judges' analysis *supra,* section VII, the royalty rate for ephemeral recordings under 17 U.S.C. 112(e) applicable to commercial webcasters shall be included within, and constitute 5% of the royalties such webcasters pay for performances of sound recordings under § 114 of the Act.

C. The Noncommercial Rates

1. NPR–CPB/SoundExchange Settlement

The Judges have previously adopted the settlement agreement between SoundExchange, on one hand, and National Public Radio and the Corporation for Public Broadcasting, on the other, for simulcast transmissions by public radio stations. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule,* 80 FR 59588 (Oct. 2, 2015). The rates and terms governing transmissions and ephemeral recordings by the entities that are covered by that settlement agreement for the period 2016–2020 shall be as set forth in the agreement and codified at 37 CFR 380.30–380.37 (subpart D).

2. CBI/SoundExchange Settlement

The Judges have previously adopted the settlement agreement between SoundExchange, and College Broadcasters, Inc., for transmissions by Noncommercial Educational Webcasters (NEWs). *See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule,* 80 FR 558201 (Sep. 28, 2015). The rates and terms governing transmissions and ephemeral recordings by NEWs for the period 2016–2020 shall be as set forth in the agreement and codified at 37 CFR 380.20–380.27 (subpart C).

3. All Other Noncommercial Webcasters

In accordance with the Judges' analysis *supra,* section V, the royalty rate for webcast transmissions by all other noncommercial webcasters during the 2016–2020 rate period shall be $500 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, for each year in the rate term. In addition, if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 ATH on any individual channel or station, the noncommercial webcaster shall pay per-performance royalty fees for the transmissions it makes on that channel or station in excess of 159,140 ATH at the rate of $0.0017 per performance, as adjusted annually

[236] *See* Bureau of Labor Statistics, Economic News Release (Dec. 15, 2015) (available at bls.gov).

[237] From an economic perspective, these rates suggest that a hypothetical willing seller would have a WTA of $0.0021 in this subscription market, and a hypothetical noninteractive service would have a WTP of $0.0022. In such a hypothetical market, the parties could consummate a contract at any price point between $0.0021 and $0.0022 per play.

upward or downward to reflect changes in the Consumer Price Index over the preceding year.

4. Ephemeral Recording Rate

The royalty rate for ephemeral recordings under 17 U.S.C. 112(e) applicable to noncommercial webcasters shall be the same as the rate applicable to commercial webcasters; that is, royalties for ephemeral recordings shall be included within, and constitute 5% of the royalties such webcasters pay for performances of sound recordings under § 114 of the Act.

X. Conclusion

On the basis of the foregoing analysis and full consideration of the record, the Judges propound the rates and terms described in this Determination. The Register of Copyrights may review the Judges' Determination for legal error in resolving a material issue of substantive copyright law. The Librarian shall cause the Judges' Determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

So ordered.

Issue Date: March 4, 2016.

Suzanne M. Barnett,
Chief Copyright Royalty Judge

Jesse M. Feder,
Copyright Royalty Judge

David R. Strickler,
Copyright Royalty Judge

List of Subjects in 37 CFR Part 380

Copyright; sound recordings.

For the reasons set forth in the preamble, amend part 380 of title 37 of the Code of Federal Regulations as follows:

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

■ 2. Revise the title of Part 380 to read as set forth above.

■ 3. Revise Subpart A to read as follows:

Subpart A—Regulations Of General Application

Sec.

§ 380.1 Scope and compliance.

(a) *Scope.* Subparts A and B of this part codify rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the applicable provisions of 17 U.S.C. 114 and for the making of Ephemeral Recordings by those Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

(b) *Limited application of terms and definitions.* The terms and definitions in Subpart A apply only to Subpart B, except as expressly adopted and applied in subpart C or subpart D of this part.

(c) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 must comply with the requirements of this part 380 and any other applicable regulations.

(d) *Voluntary agreements.* Notwithstanding the royalty rates and terms established in any subparts of this part 380, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

§ 380.2 Making payment of royalty fees.

(a) *Payment to the Collective.* A Licensee must make the royalty payments due under subpart B to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this part 380.

(b) *Monthly payments.* A Licensee must make royalty payments on a monthly basis. Payments are due on or before the 45th day after the end of the month in which the Licensee made Eligible Transmissions.

(c) *Minimum payments.* A Licensee must make any minimum annual payments due under Subpart B by January 31 of the applicable license year. A Licensee that as of January 31 of any year has not made any eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service, or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e), but that begins making such transmissions after that date must make any payment due by the 45th day after the end of the month in which the Licensee commences making such transmissions.

(d) *Late fees.* A Licensee must pay a late fee for each payment and each Statement of Account that the Collective receives after the due date. The late fee is 1.5% (or the highest lawful rate, whichever is lower) of the late payment amount per month. The late fee for a late Statement of Account is 1.5% of the payment amount associated with the Statement of Account. Late fees accrue from the due date until the date that the Collective receives the late payment or late Statement of Account.

(1) *Waiver of late fees.* The Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.

(2) *Notice regarding noncompliant Statements of Account.* If it is reasonably evident to the Collective that a timely-provided Statement of Account is materially noncompliant, the Collective must notify the Licensee within 90 days of discovery of the noncompliance.

§ 380.3 Delivering statements of account.

(a) *Statements of Account.* Any payment due under this Part 380 must be accompanied by a corresponding Statement of Account that must contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the Statement of Account;

(3) The signature of:

(i) The Licensee or a duly authorized agent of Licensee;

(ii) A partner or delegate if the Licensee is a partnership; or

(iii) An officer of the corporation if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the Statement of Account;

(5) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the Statement of Account;

(6) A certification of the capacity of the person signing;

(7) The date of signature; and

(8) An attestation to the following effect:

I, the undersigned owner/officer/partner/agent of the Licensee have examined this Statement of Account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence and that it fairly presents, in all material respects,

the liabilities of the Licensee pursuant to 17 U.S.C. 112(e) and 114 and applicable regulations adopted under those sections.

(b) *Certification.* Licensee's Chief Financial Officer or, if Licensee does not have a Chief Financial Officer, a person authorized to sign Statements of Account for the Licensee must submit a signed certification on an annual basis attesting that Licensee's royalty statements for the prior year represent a true and accurate determination of the royalties due and that any method of allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

§ 380.4 Distributing royalty fees.

(a) *Distribution of royalties.* (1) The Collective must promptly distribute royalties received from Licensees to Copyright Owners and Performers that are entitled thereto, or to their designated agents. The Collective shall only be responsible for making distributions to those who provide the Collective with information as is necessary to identify and pay the correct recipient. The Collective must distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the Reports of Use requirements for Licensees pursuant to § 370.4 of this chapter and this subpart.

(2) The Collective must use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under § 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but not be limited to, searches in Copyright Office public records and published directories of sound recording copyright owners.

(b) *Unclaimed funds.* If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part 380, the Collective must retain the required payment in a segregated trust account for a period of three years from the date of the first distribution of royalties from the relevant payment by a Licensee. No claim to distribution shall be valid after the expiration of the three-year period. After expiration of this period, the Collective must handle unclaimed funds in accordance with applicable federal, state, or common law.

(c) *Retention of records.* Licensees and the Collective shall keep books and records relating to payments and distributions of royalties for a period of not less than the prior three calendar years.

(d) *Designation of the Collective.* (1) The Judges designate SoundExchange, Inc., as the Collective to receive Statements of Account and royalty payments from Licensees and to distribute royalty payments to each Copyright Owner and Performer (or their respective designated agents) entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced for the applicable royalty term by a successor Collective according to the following procedure:

(i) The nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding SoundExchange's cessation or dissolution shall vote by a majority to recommend that the Copyright Royalty Judges designate a successor and must file a petition with the Copyright Royalty Judges requesting that the Judges designate the named successor and setting forth the reasons therefor.

(ii) Within 30 days of receiving the petition, the Copyright Royalty Judges must issue an order designating the recommended Collective, unless the Judges find good cause not to make and publish the designation in the **Federal Register**.

§ 380.5 Handling Confidential Information.

(a) *Definition.* For purposes of this part 380, ''Confidential Information'' means the Statements of Account and any information contained therein, including the amount of royalty payments and the number of Performances, and any information pertaining to the Statements of Account reasonably designated as confidential by the party submitting the statement. Confidential Information does not include documents or information that at the time of delivery to the Collective is public knowledge. The party seeking information from the Collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving to the Collective that the requested information is in the public domain.

(b) *Use of Confidential Information.* The Collective may not use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(c) *Disclosure of Confidential Information.* The Collective shall limit access to Confidential Information to:

(1) Those employees, agents, consultants, and independent contractors of the Collective, subject to an appropriate written confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work;

(2) A Qualified Auditor or outside counsel who is authorized to act on behalf of:

(i) The Collective with respect to verification of a Licensee's statement of account pursuant to this part 380; or

(ii) A Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this part 380;

(3) Copyright Owners and Performers, including their designated agents, whose works a Licensee used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, consultants, and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, who require access to the Confidential Information to perform their duties during the ordinary course of their work;

(4) Attorneys and other authorized agents of parties to proceedings under 17 U.S.C. 8, 112, 114, acting under an appropriate protective order.

(d) *Safeguarding Confidential Information.* The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.

§ 380.6 Auditing payments and distributions.

(a) *General.* This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify payments or distributions by auditing the payor or distributor. The Collective may audit a Licensee's payments of royalties to the Collective, and a Copyright Owner or Performer may audit the Collective's distributions of royalties to the owner or performer. Nothing in this section shall preclude a verifying entity and the payor or distributor from agreeing to verification methods in addition to or

different from those set forth in this section.

(b) *Frequency of auditing.* The verifying entity may conduct an audit of each licensee only once a year for any or all of the prior three calendar years. A verifying entity may not audit records for any calendar year more than once.

(c) *Notice of intent to audit.* The verifying entity must file with the Copyright Royalty Judges a notice of intent to audit the payor or distributor, which notice the Judges must publish in the **Federal Register** within 30 days of the filing of the notice. Simultaneously with the filing of the notice, the verifying entity must deliver a copy to the payor or distributor.

(d) *The audit.* The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(e) *Access to third-party records for audit purposes.* The payor or distributor must use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit.

(f) *Duty of auditor to consult.* The auditor must produce a written report to the verifying entity. Before rendering the report, unless the auditor has a reasonable basis to suspect fraud on the part of the payor or distributor, the disclosure of which would, in the reasonable opinion of the auditor, prejudice any investigation of the suspected fraud, the auditor must review tentative written findings of the audit with the appropriate agent or employee of the payor or distributor in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the payor or distributor reasonably cooperates with the auditor to remedy promptly any factual error[s] or clarify any issues raised by the audit. The auditor must include in the written report information concerning the cooperation or the lack thereof of the employee or agent.

(g) *Audit results; underpayment or overpayment of royalties.* If the auditor determines the payor or distributor underpaid royalties, the payor or distributor shall remit the amount of any underpayment determined by the auditor to the verifying entity, together with interest at the rate specified in § 380.2(d). In the absence of mutually-agreed payment terms, which may, but need not, include installment payments, the payor or distributor shall remit promptly to the verifying entity the entire amount of the underpayment determined by the auditor. If the auditor determines the payor or distributor overpaid royalties, however, the verifying entity shall not be required to remit the amount of any overpayment to the payor or distributor, and the payor or distributor shall not seek by any means to recoup, offset, or take a credit for the overpayment, unless the payor or distributor and the verifying entity have agreed otherwise.

(h) *Paying the costs of the audit.* The verifying entity must pay the cost of the verification procedure, unless the auditor determines that there was an underpayment of 10% or more, in which case the payor or distributor must bear the reasonable costs of the verification procedure, in addition to paying or distributing the amount of any underpayment.

(i) *Retention of audit report.* The verifying party must retain the report of the audit for a period of not less than three years from the date of issuance.

§ 380.7 Definitions.

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming containing Performances to 10 listeners, the service's ATH would equal 10 hours. If three minutes of that hour consisted of transmission of a directly-licensed recording, the service's ATH would equal nine hours and 30 minutes (three minutes times 10 listeners creates a deduction of 30 minutes). As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's ATH would equal 10 hours.

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges, and which, for the current rate period, is SoundExchange, Inc.

Commercial Webcaster means a Licensee, other than a Noncommercial Webcaster or Public Broadcaster, that makes Ephemeral Recordings and eligible digital audio transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(d)(2).

Copyright owners means sound recording copyright owners who are entitled to royalty payments made under Part 380 pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Digital audio transmission has the same meaning as in 17 U.S.C. 114(j).

Eligible nonsubscription transmission has the same meaning as in 17 U.S.C. 114(j).

Eligible Transmission means a subscription or nonsubscription transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under this part.

Ephemeral recording has the same meaning as in 17 U.S.C. 112.

Licensee means a Commercial Webcaster, a Noncommercial Webcaster, or any entity operating a noninteractive Internet streaming service that has obtained a license under Section 112 or 114 to transmit eligible sound recordings.

New subscription service has the same meaning as in 17 U.S.C. 114(j).

Noncommercial webcaster has the same meaning as in 17 U.S.C. 114(f)(5)(E).

Nonsubscription has the same meaning as in 17 U.S.C. 114(j).

Performance means each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener), but excludes the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program

segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Does not contain an entire sound recording, other than ambient music that is background at a public event, and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Public broadcaster means a Covered Entity under subpart D of this part.

Qualified auditor means an independent Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

Transmission has the same meaning as in 17 U.S.C. 114(j).

■ 4. Revise subpart B, consisting of § 380.10, to read as follows:

Subpart B—Commercial Webcasters and Noncommercial Webcasters

§ 380.10 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *Royalty fees.* For the year 2016, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the following rates:

(1) Commercial Webcasters: $0.0022 per performance for subscription services and $0.0017 per performance for nonsubscription services.

(2) *Noncommercial webcasters.* $500 per year for each channel or station and $0.0017 per performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

(b) *Minimum fee.* Licensees must pay the Collective a minimum fee of $500 each year for each channel or station. The Collective must apply the fee to the Licensee's account as credit towards any additional royalty fees that Licensees may incur in the same year. The fee is payable for each individual channel and each individual station maintained or operated by the Licensee and making Eligible Transmissions during each calendar year or part of a calendar year during which it is a Licensee. The maximum aggregate minimum fee in any calendar year that a Commercial Webcaster must pay is $50,000. The minimum fee is nonrefundable.

(c) *Annual royalty fee adjustment.* The Copyright Royalty Judges shall adjust the royalty fees each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index (for all consumers and for all items) (CPI–U) published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. To account more accurately for cumulative changes in the CPI–U over the rate period, the calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI–U from the CPI–U published in November, 2015 (237.336), according to the formula $(1 + (Cy - 237.336)/237.336) \times R_{2016}$, where C_y is the CPI–U published by the Secretary of Labor before December 1 of the preceding year, and R_{2016} is the royalty rate for 2016 (*i.e.,* $0.0022 per subscription performance or $0.0017 per nonsubscription performance). By way of example, if the CPI–U published in November 2016 is 242.083, the adjusted rate for nonsubscription services in 2017 will be computed as $(1 + (242.083 - 237.336)/237.336) \times \$0.0017$ and will equal $0.00173 ($0.0017 when rounded to the nearest fourth decimal place). If the CPI–U published in November 2017 is 249.345, the rate for nonsubscription services for 2018 will be computed as $(1 + (249.345 - 237.336)/237.336) \times \$0.0017$ and will equal $0.00179 ($0.0018 when rounded to the nearest fourth decimal place). The Judges shall publish notice of the adjusted fees in the **Federal Register** at least 25 days before January 1. The adjusted fees shall be effective on January 1.

(d) *Ephemeral recordings royalty fees.* The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All ephemeral recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions are included in the 5%.

■ 5. In § 380.22, revise paragraphs (b)(1) through (3) and (c) to read as follows:

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

* * * * *

(b) * * *

(1) The Noncommercial Educational Webcaster shall, for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subparts A and B applicable to Noncommercial Webcasters;

(2) The Minimum Fee paid by the Noncommercial Educational Webcaster for such calendar year will be credited to the amounts payable under the provisions of Part 380 Subparts A and B applicable to Noncommercial Webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of each month, notify the Collective if it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on a channel or station during that month; pay the Collective any amounts due under the provisions of Part 380 Subparts A and B applicable to Noncommercial Webcasters; and provide the Collective a statement of account pursuant to part 380, subpart A.

(c) *Royalties for other Noncommercial Educational Webcasters.* A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) of this section shall pay royalties in accordance, and that otherwise comply, with the provisions of subparts A and B of this part applicable to Noncommercial Webcasters.

* * * * *

■ 6. In § 380.23, revise paragraph (b)(1) to read as follows:

§ 380.23 Terms for making payment of royalty fees and statements of account.

* * * * *

(b) *Designation of the Collective.* (1) The Copyright Royalty Judges designate SoundExchange, Inc., as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

* * * * *

Subpart D—Public Broadcasters

■ 7. Revise the heading of Subpart D to read as set forth above.

■ 8. In § 380.33, revise paragraph (b)(1) to read as follows:

§ 380.33 Terms for making payment of royalty fees and statements of account.

* * * * *

(b) *Designation of the Collective.* (1) The Copyright Royalty Judges designate SoundExchange, Inc., as the Collective to receive statements of account and royalty payments for Covered Entities under this subpart and to distribute royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

* * * * *

Dated: April 19, 2016.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Jesse M. Feder,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Approved By:

David S. Mao,

Librarian of Congress.

[FR Doc. 2016–09707 Filed 4–29–16; 8:45 am]

BILLING CODE 1410–72–P

FEDERAL REGISTER

Vol. 81 Monday,
No. 84 May 2, 2016

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 648

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Framework Adjustment 55 and Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Fishing Year 2016; Recreational Management Measures; Final Rules

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 151211999–6343–02]

RIN 0648–BF62

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Framework Adjustment 55

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

ACTION: Final rule.

SUMMARY: This final rule approves and implements Framework Adjustment 55 to the Northeast Multispecies Fishery Management Plan. This rule sets 2016–2018 catch limits for all 20 groundfish stocks, adjusts the groundfish at-sea monitoring program, and adopts several sector measures. This action is necessary to respond to updated scientific information and achieve the goals and objectives of the Fishery Management Plan. The final measures are intended to help prevent overfishing, rebuild overfished stocks, achieve optimum yield, and ensure that management measures are based on the best scientific information available.

DATES: Effective on May 1, 2016, except for the amendment to § 648.85(a)(3)(iii)(A), which is effective October 31, 2016.

ADDRESSES: Copies of Framework Adjustment 55, including the Environmental Assessment, the Regulatory Impact Review, and the Initial Regulatory Flexibility Analysis prepared in support of the proposed rule are available from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the Internet at: *http://www.nefmc.org/management-plans/northeast-multispecies* or *http://www.greateratlantic.fisheries.noaa.gov/sustainable/species/multispecies.*

Copies of each sector's final operations plan and contract, and the Fishing Year 2015–2020 Northeast Multispecies Sector Operations Plans and Contracts Programmatic Environmental Assessment, are available from the NMFS Greater Atlantic Regional Fisheries Office: John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930, and by email to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Aja Szumylo, Fishery Policy Analyst, phone: 978–281–9195; email: *Aja.Szumylo@noaa.gov.*

SUPPLEMENTARY INFORMATION:

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1. Summary of Approved Measures

This action approves and implements the management measures in Framework Adjustment 55 to the Northeast Multispecies Fishery Management Plan (FMP). The measures implemented in this final rule include:

- 2016–2018 specifications for all 20 groundfish stocks;
- 2016 shared U.S./Canada quotas for Georges Bank (GB) yellowtail flounder and Eastern GB cod and haddock;
- Modifications to the industry-funded sector at-sea monitoring program;
- Approval of a new sector;
- Modifications to the sector approval process;
- Adjustments to selective trawl gear requirements;
- Removal of the Gulf of Maine (GOM) cod prohibition for recreational anglers; and
- A mechanism for sectors to transfer GB cod quota from the Eastern U.S./Canada Area to the western area.

This action also implements a number of other measures that are not part of Framework 55, but that were considered under our authority specified in the Northeast Multispecies FMP. We are including these measures in Framework 55 for expediency purposes, and because these measures are related to the catch limits implemented in Framework 55. The additional measures implemented in this action are:

- *Management measures necessary to implement sector operations plans*—this action approves one new sector regulatory exemption and annual catch entitlements for 19 sectors for the 2016 fishing year.
- *Management measures for the common pool fishery*—this action implements initial 2016 fishing year trip limits for the common pool fishery.
- *Other regulatory corrections*—this action makes several administrative revisions to the regulations to clarify their intent, correct references, remove unnecessary text, and make other minor edits. Each correction is described in section ''10. Regulatory Corrections Under Regional Administrator Authority.''

2. Status Determination Criteria

The Northeast Fisheries Science Center (NEFSC) conducted operational stock assessment updates in 2015 for all 20 groundfish stocks. The final report for the operational assessment updates is available at: *http://www.nefsc.noaa.gov/groundfish/operational-assessments-2015/.* This action revises status determination criteria, as necessary, and provides updated numerical estimates of these criteria, in order to incorporate the results of the 2015 stock assessments. Table 1 provides the updated numerical estimates of the status determination criteria, and Table 2 summarizes changes in stock status based on the 2015 assessment updates. Stock status did not change for 15 of the 20 stocks, worsened for 2 stocks (Southern New England/Mid-Atlantic (SNE/MA) yellowtail flounder and GB winter flounder), improved for 1 stock (Northern windowpane flounder), and became more uncertain for 2 stocks (GB cod and Atlantic halibut).

Status determination relative to reference points is no longer possible for GB cod and Atlantic halibut. The assessment peer review panel determined that available information for both stocks indicates they are still in poor condition and that stock size has not increased. Therefore, the panel recommended the status remain overfished for both stocks, consistent with the information from previous assessments. However, in the absence of fishing mortality estimates to compare to overfishing reference points, the

panel recommended that the overfishing status be unknown for both stocks.

Although the review panel concluded that the overfishing status should be unknown for GB cod and halibut, the final NMFS determinations for these stocks are different from the review panel's recommendations. NMFS has developed a national approach to addressing common status determination situations for the purposes of completing the annual report to Congress on the Status of U.S. Fisheries and the Fisheries Stock Sustainability Index. For cases like GB cod and Atlantic halibut, where the stock assessment update is not accepted by the peer review process, NMFS bases the status determination on the most recent accepted assessment. Based on this approach, the stock status for GB cod will remain overfished, with overfishing occurring, consistent with the determination from the 2013 GB cod benchmark assessment. The status for Atlantic halibut will remain overfished, with overfishing not occurring, consistent with the 2012 assessment update for this stock. These status determinations will remain until an assessment can provide new reference points and/or numerical estimates of existing status determination criteria.

The numerical estimates for the status determination criteria for both stocks is still not available based on the results of the 2015 assessment updates, as reflected in Table 1. In the draft Framework 55 EA available to the Council when selecting preferred alternatives and taking final action, numerical estimates were not provided consistent with these results. However, following initial submission of Framework 55 to NFMS for review, and after the close of the public comment period on the proposed rule (81 FR 15003; March 21, 2016) and analysis, the Council changed the numerical estimates provided in the document to those from the previous 2013 GB cod assessment. Presumably, this change was made to provide estimates consistent with the assessment review panel's recommendation that the previous assessment is the best scientific information available for determining stock status. However, this change to the document was made after the Council took final action on Framework 55, and after close of the public comment period on the proposed rule and analysis, and is not consistent with our standard approach for developing numerical estimates for status determination criteria. When the stock assessment is not accepted, NMFS retains the status determination from the previous assessment because there are no new, or updated, numerical estimates of status determination criteria available to reliably evaluate whether stock status has changed. However, NMFS does not consider the numerical estimates of the status determination criteria from the previous assessment valid because the assessment update was not accepted.

The stock status changes for GB cod and halibut do not affect the rebuilding plans for these stocks. The rebuilding plan for GB cod has an end date of 2026, and the rebuilding plan for halibut has an end date of 2056. Although numerical estimates of status determination criteria are currently not available, to ensure that rebuilding progress is made, catch limits will continue to be set at levels that the Council's Scientific and Statistical Committee (SSC) determines will prevent overfishing. Additionally, at whatever point the stock assessment for GB cod and halibut can provide biomass estimates, these estimates will be used to evaluate progress towards the rebuilding targets.

TABLE 1—NUMERICAL ESTIMATES OF STATUS DETERMINATION CRITERIA

Stock	Biomass target (mt) (SSB_{MSY} or proxy)	Maximum fishing mortality threshold (F_{MSY} or proxy)	MSY (mt)
GB Cod	NA	NA	NA
GOM Cod:			
M = 0.2 Model	40,187	0.185	6,797
M_{ramp} Model	59,045	0.187	10,043
GB Haddock	108,300	0.39	24,900
GOM Haddock	4,623	0.468	1,083
GB Yellowtail Flounder	NA	NA	NA
SNE/MA Yellowtail Flounder	1,959	0.35	541
CC/GOM Yellowtail Flounder	5,259	0.279	1,285
American Plaice	13,107	0.196	2,675
Witch Flounder	9,473	0.279	1,957
GB Winter Flounder	6,700	0.536	2,840
GOM Winter Flounder	NA	0.23 (exploitation rate)	NA
SNE/MA Winter Flounder	26,928	0.325	7,831
Acadian Redfish	281,112	0.038	10,466
White Hake	32,550	0.188	5,422
Pollock	105,226	0.277	19,678
Northern Windowpane Flounder	1.554 kg/tow	0.45	700
Southern Windowpane Flounder	0.247 kg/tow	2.027	500
Ocean Pout	4.94 kg/tow	0.76	3,754
Atlantic Halibut	NA	NA	NA
Atlantic Wolffish	1,663	0.243	244

SSB = Spawning Stock Biomass; MSY = Maximum Sustainable Yield; F = Fishing Mortality; M = Natural Mortality; GOM = Gulf of Maine; SNE = Southern New England; MA = Mid-Atlantic; CC = Cape Cod.

Note. A brief explanation of the two assessment models for GOM cod is provided in section ''4. Catch Limits for the 2016–2018 Fishing Years.''

TABLE 2—SUMMARY OF CHANGES TO STOCK STATUS

Stock	Previous assessment		2015 assessment	
	Overfishing?	Overfished?	Overfishing?	Overfished?
GB Cod	Yes	Yes	Yes	Yes.
GOM Cod	Yes	Yes	Yes	Yes.
GB Haddock	No	No	No	No.
GOM Haddock	No	No	No	No.
GB Yellowtail Flounder	Unknown	Unknown	Unknown	Unknown.
SNE/MA Yellowtail Flounder	No	No	Yes	Yes.
CC/GOM Yellowtail Flounder	Yes	Yes	Yes	Yes.
American Plaice	No	No	No	No.
Witch Flounder	Yes	Yes	Yes	Yes.
GB Winter Flounder	No	No	Yes	Yes.
GOM Winter Flounder	No	Unknown	No	Unknown.
SNE/MA Winter Flounder	No	Yes	No	Yes.
Acadian Redfish	No	No	No	No.
White Hake	No	No	No	No.
Pollock	No	No	No	No.
Northern Windowpane Flounder	Yes	Yes	No	Yes.
Southern Windowpane Flounder	No	No	No	No.
Ocean Pout	No	Yes	No	Yes.
Atlantic Halibut	No	Yes	No	Yes.
Atlantic Wolffish	No	Yes	No	Yes.

3. 2016 Fishing Year U.S./Canada Quotas

Management of Transboundary Georges Bank Stocks

As described in the proposed rule, eastern GB cod, eastern GB haddock, and GB yellowtail flounder are jointly managed with Canada under the United States/Canada Resource Sharing Understanding. This action adopts shared U.S./Canada quotas for these stocks for fishing year 2016 based on 2015 assessments and the recommendations of the Transboundary Management Guidance Committee (TMGC) (Table 3). For a more detailed discussion of the TMGC's 2016 catch advice, see the TMGC's guidance document at: *http://www.greateratlantic.fisheries.noaa.gov/sustainable/species/multispecies/index.html.*

TABLE 3—2016 FISHING YEAR U.S./CANADA QUOTAS (MT, LIVE WEIGHT) AND PERCENT OF QUOTA ALLOCATED TO EACH COUNTRY

Quota	Eastern GB cod	Eastern GB haddock	GB yellowtail flounder
Total Shared Quota	625	37,000	354
U.S. Quota	138 (22%)	15,170 (41%)	269 (76%)
Canada Quota	487 (78%)	21,830 (59%)	85 (24%)

The regulations implementing the U.S./Canada Resource Sharing Understanding require that any overages of the U.S. quota for eastern GB cod, eastern GB haddock, or GB yellowtail flounder be deducted from the U.S. quota in the following fishing year. If catch information for the 2015 fishing year indicates that the U.S. fishery exceeded its quota for any of the shared stocks, we will reduce the respective U.S. quotas for the 2016 fishing year in a future management action, as close to May 1, 2016, as possible. If any fishery that is allocated a portion of the U.S. quota exceeds its allocation and causes an overage of the overall U.S. quota, the overage reduction would only be applied to that fishery's allocation in the following fishing year. This ensures that catch by one component of the fishery does not negatively affect another component of the fishery.

4. Catch Limits for the 2016–2018 Fishing Years

Summary of Catch Limits

This action adopts catch limits for all 20 groundfish stocks for the 2016–2018 fishing years based on the 2015 operational assessment updates. Catch limit increases are adopted for 10 stocks; however, for a number of stocks, the catch limits adopted in this action are substantially lower than the catch limits set for the 2015 fishing year (with decreases ranging from 14 to 67 percent). The catch limits implemented in this action, including overfishing limits (OFLs), acceptable biological catches (ABCs), and annual catch limits (ACLs), can be found in Tables 4 through 11. A summary of how these catch limits were developed, including the distribution to the various fishery components, was provided in the proposed rule and is not repeated here. Additional information on the development of these catch limits is also provided in the Framework 55 EA and its supporting appendices. We have adjusted the groundfish sub-ACL for GB cod for 2017 and 2018 in Tables 6 and 7 to correct a transcription error in the proposed rule. The sub-ACL for 2017 and 2018 was incorrectly listed as 608 mt, but should have been listed as 997 mt. Although the 2017 and 2018 groundfish sub-ACL was listed incorrectly, the components of the groundfish sub-ACL, namely the preliminary sector sub-ACL (975 mt) and the preliminary common pool sub-ACL (22 mt), were correct in the proposed rule.

The sector and common pool catch limits implemented in this action are based on potential sector contributions for fishing year 2016 and fishing year

2015 sector rosters. 2016 sector rosters will not be finalized until May 1, 2016, because individual permit holders have until the end of the 2015 fishing year (April 30, 2016) to drop out of a sector and fish in the common pool fishery for 2016. Therefore, it is possible that the sector and common pool catch limits in this action may change due to changes in the sector rosters. If changes to the sector rosters occur, updated catch limits will be announced as soon as possible in the 2016 fishing year to reflect the final sector rosters as of May 1, 2016. Sector-specific allocations for each stock can be found in section ''8. Sector Administrative Measures.''

TABLE 4—FISHING YEARS 2016–2018 OVERFISHING LIMITS AND ACCEPTABLE BIOLOGICAL CATCHES (MT, LIVE WEIGHT)

[Total ABC provided for 2016 to show limit prior To deduction of Canadian catch for GB Cod, GB haddock, GB yellowtail flounder, GB winter flounder, white hake, and Atlantic halibut]

Stock	2016			2017		2018	
	OFL	Total ABC	U.S. ABC	OFL	U.S. ABC	OFL	U.S. ABC
GB Cod	1,665	1,249	762	1,665	1,249	1,665	1,249
GOM Cod	667	500	500	667	500	667	500
GB Haddock	160,385	77,898	56,068	258,691	48,398	358,077	77,898
GOM Haddock	4,717	3,630	3,630	5,873	4,534	6,218	4,815
GB Yellowtail Flounder	Unk	354	269	Unk	354	.....	.....
SNE/MA Yellowtail Flounder	Unk	267	267	Unk	267	Unk	267
CC/GOM Yellowtail Flounder	555	427	427	707	427	900	427
American Plaice	1,695	1,297	1,297	1,748	1,336	1,840	1,404
Witch Flounder	521	460	460	732	460	954	460
GB Winter Flounder	957	755	668	1,056	668	1,459	668
GOM Winter Flounder	1,080	810	810	1,080	810	1,080	810
SNE/MA Winter Flounder	1,041	780	780	1,021	780	1,587	780
Redfish	13,723	10,338	10,338	14,665	11,050	15,260	11,501
White Hake	4,985	3,816	3,754	4,816	3,624	4,733	3,560
Pollock	27,668	21,312	21,312	32,004	21,312	34,745	21,312
N. Windowpane Flounder	243	182	182	243	182	243	182
S. Windowpane Flounder	833	623	623	833	623	833	623
Ocean Pout	220	165	165	220	165	220	165
Atlantic Halibut	210	158	124	210	124	210	124
Atlantic Wolffish	110	82	82	110	82	110	82

Unk = Unknown; CC = Cape Cod; N = Northern; S = Southern.

Note: An empty cell indicates no OFL/ABC is adopted for that year. These catch limits will be set in a future action.

TABLE 5—FISHING YEAR 2016 CATCH LIMITS

[mt, live weight]

Stock	Total ACL	Total groundfish fishery	Preliminary sector	Preliminary common pool	Recreational fishery	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
GB Cod	730	608	595	13	.....	.....	.....	.....	23	99
GOM Cod	473	437	273	8	157	.....	.....	.....	27	10
GB Haddock	53,309	51,667	51,209	458	.....	521	.....	.....	561	561
GOM Haddock	3,430	3,344	2,385	31	928	34	.....	.....	26	26
GB Yellowtail Flounder	261	211	207	4	.....	.....	42	5	NA	3
SNE/MA Yellowtail Flounder	255	182	145	37	.....	.....	39	.....	5	29
CC/GOM Yellowtail Flounder	409	341	325	16	.....	.....	.....	.....	43	26
American Plaice	1,235	1,183	1,160	23	.....	.....	.....	.....	26	26
Witch Flounder	441	370	361	8	.....	.....	.....	.....	12	59
GB Winter Flounder	650	590	584	6	.....	.....	.....	.....	NA	60
GOM Winter Flounder	776	639	604	35	.....	.....	.....	.....	122	16
SNE/MA Winter Flounder	749	585	514	71	.....	.....	.....	.....	70	94
Redfish	9,837	9,526	9,471	55	.....	.....	.....	.....	103	207
White Hake	3,572	3,459	3,434	25	.....	.....	.....	.....	38	75
Pollock	20,374	17,817	17,705	112	.....	.....	.....	.....	1,279	1,279
N. Windowpane Flounder	177	66	na	66	.....	.....	.....	.....	2	109
S. Windowpane Flounder	599	104	na	104	.....	.....	209	.....	37	249
Ocean Pout	155	137	na	137	.....	.....	.....	.....	2	17
Atlantic Halibut	119	91	na	91	.....	.....	.....	.....	25	4
Atlantic Wolffish	77	72	na	72	.....	.....	.....	.....	1	3

TABLE 6—FISHING YEAR 2017 CATCH LIMITS

[mt, live weight]

Stock	Total ACL	Total groundfish fishery	Preliminary sector	Preliminary common pool	Recreational fishery	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
GB Cod	1,197	997	975	22	.....	.....	.....	.....	37	162
GOM Cod	473	437	273	8	157	.....	.....	.....	27	10
GB Haddock	46,017	44,599	44,204	395	.....	450	.....	.....	484	484
GOM Haddock	4,285	4,177	2,979	39	1,160	42	.....	.....	33	33
GB Yellowtail Flounder	343	278	273	5	.....	.....	55	7	NA	4
SNE/MA Yellowtail Flounder	255	187	145	37	.....	.....	39	.....	5	29
CC/GOM Yellowtail Flounder	409	341	325	16	.....	.....	.....	.....	43	26
American Plaice	1,272	1,218	1,195	23	.....	.....	.....	.....	27	27
Witch Flounder	441	370	361	8	.....	.....	.....	.....	12	59
GB Winter Flounder	650	590	584	6	.....	.....	.....	.....	NA	60
GOM Winter Flounder	776	639	604	35	.....	.....	.....	.....	122	16
SNE/MA Winter Flounder	749	585	514	71	.....	.....	.....	.....	70	94
Redfish	10,514	10,183	10,124	59	.....	.....	.....	.....	111	221
White Hake	3,448	3,340	3,315	24	.....	.....	.....	.....	36	72
Pollock	20,374	17,817	17,705	112	.....	.....	.....	.....	1,279	1,279
N. Windowpane Flounder	177	66	na	66	.....	.....	.....	.....	2	109
S. Windowpane Flounder	599	104	na	104	.....	.....	209	.....	37	249
Ocean Pout	155	137	na	137	.....	.....	.....	.....	2	17
Atlantic Halibut	119	91	na	91	.....	.....	.....	.....	25	4
Atlantic Wolffish	77	72	na	72	.....	.....	.....	.....	1	3

TABLE 7—FISHING YEAR 2018 CATCH LIMITS

[mt, live weight]

Stock	Total ACL	Total groundfish fishery	Preliminary sector	Preliminary common pool	Recreational fishery	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
GB Cod	1,197	997	975	22	.....	.....	.....	.....	37	162
GOM Cod	473	437	273	8	157	.....	.....	.....	27	10
GB Haddock	74,065	71,783	71,147	636	.....	724	.....	.....	779	779
GOM Haddock	4,550	4,436	3,163	39	1,231	45	.....	.....	35	35
GB Yellowtail Flounder	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
SNE/MA Yellowtail Flounder	255	179	142	37	.....	.....	38	.....	5	29
CC/GOM Yellowtail Flounder	409	341	325	16	.....	.....	.....	.....	43	26
American Plaice	1,337	1,280	1,256	24	.....	.....	.....	.....	28	28
Witch Flounder	441	370	361	8	.....	.....	.....	.....	12	59
GB Winter Flounder	650	590	584	6	.....	.....	.....	.....	NA	60
GOM Winter Flounder	776	639	604	35	.....	.....	.....	.....	122	16
SNE/MA Winter Flounder	749	585	514	71	.....	.....	.....	.....	70	94
Redfish	10,943	10,598	10,537	61	.....	.....	.....	.....	115	230
White Hake	3,387	3,281	3,257	24	.....	.....	.....	.....	36	71
Pollock	20,374	17,817	17,705	112	.....	.....	.....	.....	1,279	1,279
N. Windowpane Flounder	177	66	na	66	.....	.....	.....	.....	2	109
S. Windowpane Flounder	599	104	na	104	.....	.....	209	.....	37	249
Ocean Pout	155	137	na	137	.....	.....	.....	.....	2	17
Atlantic Halibut	119	91	na	91	.....	.....	.....	.....	25	4
Atlantic Wolffish	77	72	na	72	.....	.....	.....	.....	1	3

TABLE 8—COMMON POOL TRIMESTER TOTAL ALLOWABLE CATCHES FOR FISHING YEARS 2016–2018

[mt, live weight]

Stock	2016			2017			2018		
	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3
GB Cod	3.3	4.9	5.0	5.4	8.0	8.2	5.4	8.0	8.2
GOM Cod	2.1	2.7	2.8	2.1	2.7	2.8	2.1	2.7	2.8
GB Haddock	123.5	151.0	183.0	106.6	130.3	158.0	171.6	209.8	254.3
GOM Haddock	8.4	8.1	14.6	10.5	10.1	18.2	11.1	10.7	19.3
GB Yellowtail Flounder	0.8	1.2	2.1	1.0	1.6	2.8			
SNE/MA Yellowtail Flounder	8.2	14.4	16.4	8.1	14.3	16.2	8.0	14.1	16.0
CC/GOM Yellowtail Flounder	5.5	5.5	4.7	5.5	5.5	4.7	5.5	5.5	4.7
American Plaice	5.4	8.1	9.1	5.6	8.4	9.3	5.9	8.8	9.8
Witch Flounder	2.3	2.6	3.6	2.3	2.6	3.6	2.3	2.6	3.6
GB Winter Flounder	0.5	1.4	3.9	0.5	1.4	3.9	0.5	1.4	3.9
GOM Winter Flounder	12.8	13.2	8.7	12.8	13.2	8.7	12.8	13.2	8.7
Redfish	13.7	17.0	24.2	14.7	18.2	25.9	15.3	19.0	26.9
White Hake	9.5	7.8	7.8	9.2	7.5	7.5	9.0	7.4	7.4
Pollock	31.4	39.3	41.5	31.4	39.3	41.5	31.4	39.3	41.5

Note: An empty cell indicates that no catch limit has been set yet for these stocks. These catch limits will be set in a future management action.

TABLE 9—COMMON POOL INCIDENTAL CATCH CAPS FOR FISHING YEARS 2016–2018

[mt, live weight]

Stock	Percentage of common pool sub-ACL (%)	2016	2017	2018
GB Cod	2	0.26	0.43	0.43
GOM Cod	1	0.08	0.08	0.08
GB Yellowtail Flounder	2	0.08	0.11	
CC/GOM Yellowtail Flounder	1	0.16	0.16	0.16
American Plaice	5	1.13	1.17	1.22
Witch Flounder	5	0.42	0.42	0.42
SNE/MA Winter Flounder	1	0.71	0.71	0.71

TABLE 10—COMMON POOL INCIDENTAL CATCH TOTAL ALLOWABLE CATCHES DISTRIBUTION TO EACH SPECIAL MANAGEMENT PROGRAM

[Percentage]

Stock	Regular B days-at-sea (%)	Closed Area I hook gear haddock (%)	Eastern U.S./CA haddock (%)
GB Cod	50	16	34
GOM Cod	100		
GB Yellowtail Flounder	50		50
CC/GOM Yellowtail Flounder	100		
American Plaice	100		
Witch Flounder	100		
SNE/MA Winter Flounder	100		
White Hake	100		

TABLE 11—COMMON POOL INCIDENTAL CATCH TOTAL ALLOWABLE CATCHES FOR EACH SPECIAL MANAGEMENT PROGRAM

[mt, live weight]

Stock	Regular B days-at-sea			Closed Area I hook gear haddock			Eastern U.S./Canada haddock		
	2016	2017	2018	2016	2017	2018	2016	2017	2018
GB Cod	0.13	0.22	0.22	0.04	0.07	0.07	0.09	0.15	0.15
GOM Cod	0.08	0.08	0.08	n/a	n/a	n/a	n/a	n/a	n/a
GB Yellowtail Flounder	0.04	0.05	0.00	n/a	n/a	n/a	0.04	0.05	0.00
CC/GOM Yellowtail Flounder	0.16	0.16	0.16	n/a	n/a	n/a	n/a	n/a	n/a
American Plaice	1.13	1.17	1.22	n/a	n/a	n/a	n/a	n/a	n/a
Witch Flounder	0.42	0.42	0.42	n/a	n/a	n/a	n/a	n/a	n/a
SNE/MA Winter Flounder	0.71	0.71	0.71	n/a	n/a	n/a	n/a	n/a	n/a

5. Default Catch Limits for the 2018 and 2019 Fishing Years

Framework 53 established a mechanism for setting default catch limits in the event a future management action is delayed. If final catch limits have not been implemented by the start of a fishing year on May 1, then default catch limits are set at 35 percent of the previous year's catch limit, effective through July 31 of that fishing year. If this value exceeds the Council's recommendation for the upcoming fishing year, the default catch limit must be reduced to an amount equal to the Council's recommendation. Because groundfish vessels are not able to fish if final catch limits have not been implemented, this measure was established to prevent disruption to the groundfish fishery. Additional description of the default catch limit mechanism is provided in the preamble to the Framework 53 final rule (80 FR 25110; May 1, 2015).

This rule announces default catch limits for the 2018 fishing year for GB yellowtail flounder, and for the 2019 fishing year for all remaining groundfish stocks. Default catch limits for the 2018 fishing year for GB yellowtail flounder were inadvertently omitted in the proposed rule, but are included here because the Council only recommended specifications for the 2016 and 2017 fishing year for this stock. The GB yellowtail flounder default specifications will become effective May 1, 2018, through July 31, 2018, unless otherwise replaced by final specifications. Similarly, for the remaining groundfish stocks, default specifications will become effective May 1, 2019, through July 31, 2019, unless otherwise replaced by final specifications. The default catch limits for 2018 GB yellowtail flounder are summarized in Table 12, and the default catch limits for 2019 for all other stocks are summarized in Table 13.

The preliminary sector and common pool sub-ACLs in Table 12 and 13 are based on existing 2015 sector rosters, and will be adjusted based on rosters from the 2017 or 2018 fishing years. In addition, prior to the start of the 2018 or 2019 fishing years, we will evaluate whether any of the default catch limits announced in this rule exceed the Council's recommendations for 2018 for GB yellowtail flounder, or for 2019 for the remaining groundfish stocks. If necessary, we will announce adjustments prior to implementing the default specifications.

The midwater trawl fishery is the only non-groundfish fishery with an inseason accountability measure for its groundfish allocation. When the GOM or GB haddock catch cap specified for the default specifications period is caught, the directed herring fishery would be closed for all herring vessels fishing with midwater trawl gear for the remainder of the default specifications time period, unless final specifications were set prior to July 31. For other non-groundfish fisheries that receive a groundfish allocation (*e.g.,* scallop, small-mesh), the default measures will not affect fishing operations because these fisheries do not have inseason accountability measures.

TABLE 12—FISHING YEAR 2018 DEFAULT SPECIFICATIONS FOR GB YELLOWTAIL FLOUNDER

[mt, live weight]

Stock	U.S. ABC	Total ACL	Groundfish sub-ACL	Preliminary sector sub-ACL	Preliminary common pool sub-ACL
GB Yellowtail Flounder	39	39	32	31	1

TABLE 13—FISHING YEAR 2019 DEFAULT SPECIFICATIONS

[mt, live weight]

Stock	U.S. ABC	Total ACL	Groundfish sub-ACL	Preliminary sector sub-ACL	Preliminary common pool sub-ACL	Midwater trawl fishery
GB Cod	583	437	465	455	10	.....
GOM Cod	233	175	204	127	4	.....
GB Haddock	125,327	27,264	5,007	4,963	44	51
GOM Haddock	2,176	1,685	1,552	1,107	14	16
SNE/MA Yellowtail Flounder	.....	93	66	52	14	.....
CC/GOM Yellowtail Flounder	315	149	119	113	5	.....
American Plaice	644	491	448	439	9	.....
Witch Flounder	334	161	129	126	3	.....
GB Winter Flounder	511	264	233	231	2	.....
GOM Winter Flounder	378	284	224	212	12	.....
SNE/MA Winter Flounder	555	273	205	180	25	.....
Redfish	5,341	4,025	3,709	3,688	21	.....
White Hake	1,657	1,268	1,168	1,160	8	.....
Pollock	12,161	7,459	6,236	6,196	39	.....
N. Windowpane Flounder	85	64	64	.....	64	.....
S. Windowpane Flounder	292	218	218	.....	218	.....
Ocean Pout	77	58	58	.....	58	.....
Atlantic Halibut	74	55	55	.....	55	.....
Atlantic Wolffish	39	29	29	.....	29	.....

6. Groundfish At-Sea Monitoring Program Adjustments

This action adjusts the groundfish sector at-sea monitoring (ASM) program to ensure the likelihood that discards for all groundfish stocks are monitored at a 30-percent coefficient of variation (CV) while making the program more cost-effective. Due to changes in the 2015 revision to the Standardized Bycatch Reporting Methodology (SBRM) Amendment (80 FR 37182; June 30, 2015) that limit Agency discretion in how Congressional funding is used to provide observer coverage, we are unable to pay for industry's portion of ASM costs for the 2016 fishing year. A description of the existing industry-funded ASM program, and historic determination of ASM coverage levels, is included in the preamble to the proposed rule and is not repeated here.

ASM Program Adjustments

This final rule modifies the method used to set the target coverage level for the industry-funded ASM program based on 5 years of experience with ASM coverage operations for groundfish sectors and evaluation of the accumulated discard data. These adjustments provide for setting target coverage levels sufficient to meet the 30-percent CV requirement while making the program more cost effective and smooth the fluctuations in the annual coverage level to provide additional stability for the fishing industry. The changes in this action remove ASM coverage for a certain subset of sector trips, use more years of discard information to predict ASM coverage levels, and base the target coverage level on the predictions for stocks that would be at a higher risk for an error in the discard estimate.

None of the adjustments implemented in this action remove our obligation under Amendment 16 and Framework 48 to ensure sufficient ASM coverage to achieve a 30-percent CV for all stocks, nor do they change our requirement to monitor catch sufficiently to prevent overfishing. The changes result in a target coverage level of 14 percent for the 2016 fishing year, including SBRM coverage paid in full by the Northeast Fisheries Observer Program (NEFOP). Assuming NEFOP covers 4 percent of trips as it has in recent years, this action results in sectors paying for ASM on approximately 10 percent of their vessels' trips in 2016.

We have determined that all of the adjustments to the ASM program in Framework 55 are consistent with the Northeast Multispecies FMP, including Amendment 16 and Framework 48, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and its National Standards, and other applicable law. Amendment 16 stated that the primary goal of at-sea monitors is to verify area fished, catch, and discards by species and gear type. Amendment 16's overall goals included achieving goals of economic efficiency and minimizing adverse economic impacts on fishing communities to the extent practicable. Framework 48 clarified the objectives of the ASM program and included these goals. It further elaborated that target ASM coverage levels must balance the goals and objectives of groundfish monitoring programs, the National Standards, and the requirements of the Magnuson-Stevens Act, including, but not limited to, costs to us and sector vessels. In making our determination of the annual ASM coverage level, we must take into account the National Standards, in particular National Standards 1, 2, 5, 7, 8, and 9. These National Standards specifically speak to preventing overfishing; using the best scientific information available; minimizing costs and avoiding duplications where practicable; efficiency in the use of fishery resources; taking into account impacts on fishing communities and minimizing adverse economic impacts to the extent practicable; and minimizing bycatch to the extent practicable. The adjustments in Framework 55 are consistent with Amendment 16, Framework 48, and the National Standards. They further refine our ability to address groundfish monitoring objectives while setting a more efficient target ASM coverage level.

The measures included in this action are reasonable, narrowly-focused adjustments to the method used to calculate the target ASM coverage level for 2016 and future fishing years. Rather than specifying a fixed ASM coverage target for all future years, this action refines the process we use for predicting the level of ASM coverage necessary in a given year to achieve the 30-percent CV requirement. While these adjustments result in a lower target ASM coverage level for the 2016 fishing year compared to previous years, there is no guarantee that the changes will result in reduced target coverage levels in future fishing years (*i.e.,* using the same methods approved here could result in higher coverage in 2017 or 2018 than in recent years).

We are only able to determine whether the target coverage level reaches the 30-percent CV for all stocks in hindsight, after a fishing year is over. Thus, while a target ASM coverage level is expected to generate a 30-percent CV on discard estimates for each stock, there is no guarantee that the required coverage level will be met or result in a 30-percent CV across all stocks due to changes in fishing effort and observed fishing activity that may happen in a given fishing year. However, during the 2010–2014 fishing years, the target coverage level was in excess of the coverage level that would have been necessary to reach at least a 30-percent CV for almost every stock.

We expect the 2016 target coverage level to achieve results consistent with prior years based on applying the 2016 target coverage level to the 2010–2014 fishing year data. For example, over the five years from 2010–2014, coverage levels of 14 percent would have achieved a 30-percent CV or better for 95 out of the 100 monitored stocks (*i.e.,* 20 stocks $\times$ 5 years). For two of the years, 2010 and 2012, all of the stocks would have achieved a 30-percent CV or better. The lowest 30-percent CV achievement overall would have occurred in fishing year 2014, when 17 of the 20 groundfish stocks would have met the 30-percent CV under the 2016 target coverage level. The three stocks that would not have achieved the 30-percent CV included redfish, GOM winter flounder, and SNE/MA yellowtail flounder. Our application of the 2016 target coverage level to 2010–2014 data, however, showed that stocks not achieving the 30-percent CV typically did not recur. Moreover, the only stock that would not have achieved a 30-percent CV for more than one of the five years (2 times) was SNE/MA yellowtail flounder. However, the 14-percent coverage level is projected to achieve the necessary 30-percent CV requirement for SNE/MA yellowtail flounder in 2016. Were a higher coverage level necessary to achieve the 30-percent CV requirement for this stock, coverage would have been set equal to that level.

Further, the risk of not achieving the required CV level for these stocks is mitigated by a number of factors. For example, a sizeable portion of the SNE/MA yellowtail flounder ACL has been caught over the last three years (58–70 percent), but less than 10 percent of total catch was made up of discards. Redfish and GOM winter flounder were underutilized over the last three fishing years (less than 50 percent of the ACL caught) and less than 10 percent of their total catch was made up of discards. Thus, even in the unexpected event of not achieving a 30-percent CV, the risk to these stocks of erring in the discard estimates is very low.

Further, the ASM program is only a portion of overall sector monitoring. The ASM program provides a basis for sector discard estimation. For most allocated stocks, discards are only a small portion of total catch. To monitor total sector catch, not just discards, NMFS and sector managers rely on a number of data sources, including NEFOP data, vessel monitoring systems (VMS), vessel trip reports, VMS catch reports, and dealer reports, all subject to extensive reconciliation processes. In addition, due to joint and severable liability of sector members for certain violations, including illegal discarding and misreporting of catch, there is a strong incentive for sector members to self-enforce monitoring and reporting requirements to ensure the sector has the most accurate information available. To account for any lack of absolute precision and accuracy in estimating overall catch by sector vessels, uncertainty buffers are included when establishing commercial groundfish fishery catch limits. In light of these requirements, and based on the available analyses of groundfish monitoring programs, we conclude that the sector monitoring requirements overall, including the adjustments to the method used to set the ASM coverage level in conjunction with other available data, are sufficient to monitor sector allocations and prevent overfishing.

Removal of Standard That 80 Percent of Discarded Pounds be Monitored at a 30-Percent CV

From 2012 to 2015, we set coverage levels to ensure that at least 80 percent of the discarded pounds of all groundfish stocks were estimated at a 30-percent CV or better to maintain the same statistical quality achieved in the 2010 fishing year. We applied this standard during years when Congress appropriated funds to pay for industry costs for the ASM program (2010 and 2011), and in other years when we were able to fund industry's costs for ASM (2012—2014, and part of 2015). In some years, applying this standard resulted in higher coverage levels than if the standard were not applied. However, this additional criterion was not necessary to satisfy the CV requirement of the ASM program, or to accurately monitor sector catches, and was not required by the Northeast Multispecies FMP. This action clarifies the Council's intent that target ASM coverage levels for sectors should be set using only realized stock-level CVs, and should not be set using the additional administrative standard of monitoring 80 percent of discard pounds at a 30-percent CV or better.

Removing ASM Coverage Requirement for Extra-Large Mesh Gillnet Trips

This Council action removes the ASM coverage requirement for sector trips using gillnets with extra-large mesh (10 inches (25.4 cm) or greater) in the SNE/MA and Inshore GB Broad Stock Areas. A majority of catch on these trips is of non-groundfish stocks such as skates, monkfish, and dogfish, with minimal or no groundfish catch. As a result, applying the same level of coverage on these trips as targeted groundfish trips does not contribute to improving the overall precision and accuracy of sector discard estimates, and would not be an efficient use of the limited resources for the ASM program. These trips will still be subject to SBRM coverage through NEFOP, and monitoring coverage levels would be consistent with non-sector trips that target non-groundfish species.

This measure is intended to reduce ASM costs to sectors with members that take this type of extra-large mesh gillnet trip. Reducing ASM coverage for these trips allows resources to be used to monitor trips that catch more groundfish, which could improve discard estimates for directed groundfish trips. All other sector trips will still be required to meet the 30-percent CV standard at a minimum. Changes in stock size or fishing behavior on these trips could change the amount of groundfish bycatch in future fishing years. However, data from 2012 to 2014 shows that groundfish catch has represented less than 5 percent of total catch on a majority of trips, and large changes are not expected. We will continue to evaluate this measure in the future to make sure bycatch levels remain low.

Because this subset of trips will have a different coverage level than other sector trips in the SNE/MA and Inshore GB Broad Stock Areas, we will create a separate discard strata for each stock caught on extra-large gillnet trips in order to ensure the different coverage levels do not bias discard estimates. At this time, no adjustments to the current notification procedures appear necessary to implement this measure. Sector vessels already declare gear type and Broad Stock Area to be fished in the Pre-Trip Notification System, which will allow us to easily identify trips that are exempt from ASM coverage.

To minimize the possibility that this measure could be used to avoid ASM coverage, only vessels declared into the SNE/MA and/or Inshore GB Broad Stock Areas using extra-large mesh gillnets will be exempt from the ASM coverage requirement. Vessels using extra-large mesh gillnet declaring into the GOM or Offshore GB Broad Stock Areas will not be exempt from the ASM coverage requirement. In addition, a vessel is already prohibited from changing its fishing plan for a trip once a waiver from coverage has been issued.

Framework 48 implemented a similar measure exempting the subset of sector trips declared into the SNE/MA Broad Stock Area on a monkfish Day-At-Sea (DAS) and using extra-large mesh gillnets from the standard ASM coverage level. The Framework 48 measure gave us the authority to specify some lower coverage level for these trips on an annual basis when determining coverage levels for all other sector trips. Since this measure was implemented at the start of the 2013 fishing year, the ASM coverage level for these trips has been set to zero, and these trips have only been subject to NEFOP coverage. The measure adopted in this action supersedes the Framework 48 measure because it entirely removes the ASM coverage requirement from these trips.

Using Multiple Years of Data To Determine ASM Total Coverage Levels

Currently, data from the most recent fishing year are used to predict the target ASM coverage level for the upcoming fishing year. For example, data from the 2013 groundfish fishing year were used to set the target ASM coverage level for the 2015 fishing year. When a single year of data is used to determine the target coverage level, the entire coverage level is driven by the variability in discards in a single stock. This variability is primarily due to inter-annual changes in management measures and fishing activity. Though the target ASM coverage level has ranged from 22 to 26 percent for the last four fishing years, there is the potential that variability could result in large fluctuations of target ASM coverage levels in the future, and result in target coverage levels that are well above the level necessary to meet the 30-percent CV for most stocks. For example, available analyses indicates that, using the status quo methodology, the ASM coverage level would be 41 percent in 2016 compared to the current 2015 rate of 24 percent. Based on a 2016 target coverage level of 41 percent, the coverage level that would have been necessary to meet a 30-percent CV in 2014 would be exceeded by 15–39 percent for 19 of the 20 stocks.

The measure adopted in this action will use information from the most recent three full fishing years to predict target ASM coverage levels for the upcoming fishing year. For example, data from the 2012 to 2014 fishing years were used to predict the target ASM

coverage level for the 2016 fishing year. Now that five full years of discard data are available, using multiple years of data is expected to smooth inter-annual fluctuations in the level of coverage needed to meet a 30-percent CV that might result from changes to fishing activity and management measures. This measure is intended to make the annual determination of the target ASM coverage level more stable. For example, the percent coverage necessary to reach a 30-percent CV for redfish varied widely for the last 3 years (5 percent in 2012; 10 percent in 2013, and 37 percent in 2014). Additional stability in predicting the annual target ASM coverage level is beneficial in the context of the industry-funded ASM program. Wide inter-annual fluctuations in the necessary coverage level make it difficult for groundfish vessels to plan for the costs of monitoring, and for ASM service providers to adjust staffing to meet variable demands for monitoring coverage. The ability for ASM service providers to successfully meet staffing needs, including maintaining the appropriate staff numbers and retaining quality monitors, increases the likelihood of achieving the target coverage level each year.

Filtering the Application of the 30-Percent CV Standard for Determining Target Coverage

The measure adopted in this action will filter the application of the 30-percent CV standard for determining target coverage levels consistent with existing goals for the ASM program. Stocks that meet all of the following criteria will not be used as the predictor for the annual target ASM coverage level for all groundfish stocks: (1) Not overfished; (2) Overfishing is not occurring; (3) Not fully utilized (less than 75 percent of sector sub-ACL harvested); and (4) Discards are less than 10 percent of total catch.

None of the adjustments in this Framework, including this measure, eliminates the 30-percent CV standard or removes the Agency's requirement to prevent overfishing. Rather, this measure is intended to reflect the Council's policy that the target ASM coverage level should be based on stocks that are overfished, are subject to overfishing, or are more fully utilized—that is, stocks for which it is critical to attempt to fully account for past variability in discard estimates. Because stocks that meet all four of the filtering criteria are healthy and not fully utilized, there is a lower risk in erring in the discard estimate. Additionally, using these stocks to predict the target coverage could lead to coverage levels that are not necessary to accurately monitor sector catch.

For the 2016 fishing year, preliminary analysis shows that, under the status quo methodology for determining the ASM target coverage level, redfish would drive the target coverage level at 37 percent. However, redfish is a healthy stock, and current biomass is well above the biomass threshold. Redfish also meets all of the filtering criteria—the stock is currently not overfished, overfishing is not occurring, only 45 percent of the sector sub-ACL was harvested in 2014, and only 3 percent of total catch was made up of discards. Also, because of the high year-to-year variability in the coverage necessary to achieve the 30-percent CV standard for redfish, we expect the target coverage level of 14 percent to meet the 30-percent CV requirement for 2016.

Clarification of Groundfish Monitoring Goals and Objectives

As described in the preamble to the proposed rule, Framework Adjustment 48 revised and clarified the goals and objectives of groundfish monitoring programs to include, among other things, improving the documentation of catch, reducing the cost of monitoring, and providing additional data streams for stock assessments. However, Framework 48 did not prioritize these goals and objectives. This rulemaking clarifies that, consistent with Amendment 16, the primary goal of the sector ASM program is to verify area fished, catch and discards by species, and by gear type, and that when the Agency sets the target coverage rate, it should consider achieving this goal in the most cost effective manner practicable, which is consistent with Magnuson-Stevens Act requirements and Amendment 16's overall goal. This clarification of the program goals would not affect the target ASM coverage levels.

7. Other Framework 55 Measures

Formation of Sustainable Harvest Sector II

This action approves the formation of a new sector, Sustainable Harvest Sector II, for operation in the 2016 fishing year. Allocations for Sustainable Harvest Sector II are included in section ''8. Sector Measures for the 2016 Fishing Year'' based on enrollment information submitted for this sector as of March 15, 2016. All permits enrolled in this sector, and the vessels associated with those permits, have until April 30, 2016, to withdraw from the sector and fish in the common pool for the 2016 fishing year. Final 2016 sector allocations, based upon final rosters, will be announced as soon as possible after the start of the 2016 fishing year.

Modification of the Sector Approval Process

This action modifies the sector approval process so that new sectors no longer have to be approved through an FMP amendment or framework adjustment. Under the process implemented in this final rule, new sectors must submit operations plans to both the Council and NMFS no later than September 1 of the fishing year prior to the fishing year they intend to begin operations. For example, if a new sector wishes to operate for the 2017 fishing year starting on May 1, 2017, it must submit its operations plan to the Council and NMFS no later than September 1, 2016.

Once NMFS receives operations plans for any proposed sectors, it will notify the Council in writing of its intent to consider approving new sectors. NMFS will present the submitted sector operations plans and any supporting analysis for the new sector at a Groundfish Committee meeting and a Council meeting. After its review, the Council will submit comments to NMFS in writing and indicate whether it endorses the formation of the new sector. NMFS will then make a final determination about new sector consistent with the Administrative Procedure Act. NMFS will not initiate a rulemaking to make final determinations on the formation of the new sector without the Council's endorsement.

This modified process is intended to shorten the timeline for, and increase the flexibility of, the sector approval process, while maintaining the same opportunities for Council approval and public involvement that the current process provides. No other aspects of the sector formation process, including the content of sector operations plan submissions, change as a result of this measure.

Modification to the Definition of the Haddock Separator Trawl

This action modifies requirements for the haddock separator trawl to improve the enforceability of this selective trawl gear. In many haddock separator trawls, the separator panel is made with the same mesh color as the net, which makes it difficult for enforcement to identify whether the gear is properly configured during vessel inspections. This rule requires the separator panel to be a contrasting color to the portions of the net that it separates in order to make

the panel highly visible. The new requirement is intended to improve identification of the panel during vessel inspections, which is expected to allow for faster inspections and more effective enforcement. This modification does not affect rope or Ruhle trawls. We are delaying effectiveness of this measure by 6 months, until October 31, 2016 to allow affected fishermen time to replace their separator panels with contrasting netting.

Removal of Gulf of Maine Cod Recreational Possession Limit

This final rule removes the prohibition on recreational possession of GOM cod that was established as part of the protection measures implemented for this stock in Framework 53. We currently set recreational management measures for GOM cod and haddock in consultation with the Council, and have the authority to modify bag limits, size limits, and seasons. The Framework 53 prohibition on the recreational possession of GOM cod was implemented as a permanent provision in the Northeast Multispecies FMP. In removing the permanent prohibition on recreational possession of GOM cod, this measure returns the authority to us to set the recreational bag limit for GOM cod. We are implementing the 2016 recreational management measures for GOM cod and haddock in a separate, concurrent rulemaking to ensure the recreational fishery does not exceed its allocations for these stocks.

Distribution of Eastern/Western GB Cod Sector Allocations

This rule allows sectors to ''convert'' their eastern GB cod allocation into western GB cod allocation using the same process previously implemented for GB haddock in Framework Adjustment 51 (77 FR 22421; April 22, 2014). This measure is intended to prevent the Western U.S./Canada Area from prematurely closing to a sector before its overall GB cod allocation has been caught, and provides additional flexibility for sectors to harvest their GB cod allocations.

Sectors are allowed to convert eastern GB cod allocation into western GB cod allocation at any time during the fishing year, and up to 2 weeks into the following fishing year to cover any overage during the previous fishing year. A sector's proposed allocation conversion would be referred to, and approved by, NMFS based on general issues, such as whether the sector is complying with reporting or other administrative requirements, including weekly sector reports, or member vessel compliance with Vessel Trip Reporting requirements. Based on these factors, we would notify the sector if the conversion is approved or disapproved. Consistent with the existing GB haddock transfer provision, we intend to use member vessel compliance with Vessel Trip Reporting requirements as the basis for approving, or disapproving, a reallocation of eastern GB quota to the Western U.S./Canada Area. If we include additional criteria in the future as the basis for approving or disapproving reallocation of these requests, we will do so consistent with the Administrative Procedure Act. This is identical to the process used for reviewing, and approving, quota transfer requests between sectors.

The responsibility for ensuring that sufficient allocation is available to cover the conversion is the responsibility of the sector. This measure would also extend to state-operated permit banks. Any conversion of eastern GB cod allocation into western GB cod allocation may be made only within a sector, or permit bank, and not between sectors or permit banks. In addition, once a portion of eastern GB cod allocation has been converted to western GB cod allocation, that portion of allocation remains western GB cod for the remainder of the fishing year. Western GB cod allocation may not be converted to eastern GB cod allocation. This measure does not change the requirement that sector vessels may only catch their eastern GB cod allocation in the Eastern U.S./Canada Area, and may only catch the remainder of their GB cod allocation in the Western U.S./Canada Area.

The total catch limit for GB cod includes the U.S. quota for eastern GB cod, so this measure does not jeopardize the total ACL for GB cod, or the U.S. quota for the eastern portion of the stock. A sector would also still be required to stop fishing in the Eastern U.S./Canada Area once its entire eastern GB cod allocation was caught, or in the Western U.S./Canada Area once it's western GB cod allocation was caught, or at least until it leased in additional quota. This ensures sufficient accountability for sector catch that will help prevent overages of any GB cod catch limit. Although we are approving this measure, we recommend that the Council occasionally review this measure in the future to ensure that it is still appropriate, particularly if there is a drastic change in the stock assessment for GB cod or its eastern management unit.

8. Sector Measures for the 2016 Fishing Year

This action also includes measures necessary to implement sector operations plan, including sector regulatory exemptions and annual catch entitlements, for all 19 sectors for the 2016 fishing year. In past years, sector operations measures have been approved through a separate, concurrent rulemaking, but are included in this rulemaking for efficiency.

Sector Operations Plans and Contracts

A total of 19 sectors are approved to operate in the 2016 fishing year, including:

- Seventeen sectors that had operations plans previously approved for the 2016 fishing year (see the Final Rule for 2015 and 2016 Sector Operations Plans and 2015 Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements; 80 FR 25143; May 1, 2015);
- Sustainable Harvest Sector II, discussed in section ''7. Other Framework 55 Measures,'' which was approved for formation as part of Framework 55; and
- Northeast Fishery Sector 12, which has not operated since 2013, but submitted an operations plan that is approved for the 2016 fishing year.

Copies of the operations plans and contracts, and the EA, for all approved sectors are available at: *http://www.regulations.gov* and from NMFS (see **ADDRESSES**).

Sector Allocations

Based on anticipated 2016 sector enrollment as of March 15, 2016, we have projected sector allocations for the 2016 fishing year in this final rule. All permits enrolled in a sector, and the vessels associated with those permits, have until April 30, 2016, to withdraw from a sector and fish in the common pool for the 2016 fishing year. We will publish final sector annual catch entitlements (ACEs) and common pool sub-ACL totals, based upon final rosters, as soon as possible after the start of the 2016 fishing year, and again after the start of the 2017 and 2018 fishing years.

The sector allocations in this final rule are based on the 2016 fishing year specifications described above under ''3. Catch Limits for the 2016–2018 Fishing Years.'' We calculate the sector's allocation for each stock by summing its members' potential sector contributions (PSC) for a stock, as shown in Table 14. The information presented in Table 14 is the total percentage of the commercial sub-ACL each sector would receive for

the 2016 fishing year, based on preliminary 2016 fishing year rosters. Tables 15 and 16 show the allocations each sector would receive for the 2016 fishing year, based on their preliminary 2016 fishing year rosters. At the start of the fishing year, after sector enrollment is finalized, we provide the final allocations, to the nearest pound, to the individual sectors, and we use those final allocations to monitor sector catch. While the common pool does not receive a specific allocation, the common pool sub-ACLs have been included in each of these tables for comparison.

We do not assign an individual permit separate PSCs for the Eastern GB cod or Eastern GB haddock; instead, we assign a permit a PSC for the GB cod stock and GB haddock stock. Each sector's GB cod and GB haddock allocations are then divided into an Eastern ACE and a Western ACE, based on each sector's percentage of the GB cod and GB haddock ACLs. For example, if a sector is allocated 4 percent of the GB cod ACL and 6 percent of the GB haddock ACL, the sector is allocated 4 percent of the commercial Eastern U.S./Canada Area GB cod TAC and 6 percent of the commercial Eastern U.S./Canada Area GB haddock TAC as its Eastern GB cod and haddock ACEs. These amounts are then subtracted from the sector's overall GB cod and haddock allocations to determine its Western GB cod and haddock ACEs. Framework 51 implemented a mechanism that allows sectors to ''convert'' their Eastern GB haddock allocation into Western GB haddock allocation (79 FR 22421; April 22, 2014) and fish that converted ACE in Western GB. This rule approves a similar measure for GB cod under ''6. Other Framework 55 Measures.''

At the start of the 2016 fishing year, we will withhold 20 percent of each sector's 2016 fishing year allocation until we finalize fishing year 2015 catch information. In the past, we have typically finalized the prior year's catch during the summer months. We expect to finalize 2015 catch information consistent with this past practice. We will allow sectors to transfer ACE from the 2015 fishing year for two weeks of the fishing year following our completion of year-end catch accounting to reduce or eliminate any 2015 fishing year overages. If necessary, we will reduce any sector's 2016 fishing year allocation to account for any remaining overages in the 2015 fishing year. We will notify the Council and sector managers of this deadline in writing and will announce this decision on our Web site at: *http://www.greateratlantic.fisheries.noaa.gov/.*

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Table 14. Cumulative PSC (percentage) each sector would receive by stock for fishing year 2016.*

Sector	†GB Cod	GOM Cod	†GB Haddock	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	‡CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	‡SNE/MA Winter Flounder	Redfish	White Hake	Pollock
GB Cod Fixed Gear Sector (FGS)	28.55	2.61	6.34	1.87	0.01	0.37	3.04	0.98	2.14	0.03	13.46	2.34	2.79	5.73	7.42
Maine Coast Community Sector (MCCS)	0.25	5.82	0.04	2.86	0.00	0.77	0.93	7.57	5.07	0.01	1.85	0.32	2.92	5.82	5.81
Maine Permit Bank	0.13	1.15	0.04	1.12	0.01	0.03	0.32	1.16	0.73	0.00	0.43	0.02	0.82	1.65	1.69
Northeast Coastal Community Sector (NCCS)	0.18	0.99	0.14	0.39	0.84	0.72	0.80	0.31	0.30	0.05	1.34	0.29	0.46	0.86	0.52
Northeast Fishery Sector (NEFS) 1	0.00	0.03	0.00	0.00	0.00	0.00	0.04	0.01	0.01	0.00	0.05	0.00	0.00	0.00	0.00
NEFS 2	5.77	19.70	10.64	17.78	1.86	1.73	19.92	9.54	13.57	3.21	19.39	3.50	15.05	6.94	12.95
NEFS 3	0.88	12.19	0.10	7.56	0.04	0.07	7.10	2.23	1.78	0.01	7.71	0.42	0.91	3.59	4.97
NEFS 4	4.14	9.60	5.34	8.27	2.16	2.35	5.46	9.29	8.49	0.69	6.24	1.28	6.64	8.06	6.16
NEFS 5	0.54	0.00	0.86	0.00	1.35	23.04	0.21	0.46	0.62	0.47	0.02	13.36	0.02	0.11	0.05
NEFS 6	2.87	2.96	2.92	3.86	2.70	5.26	3.73	3.89	5.20	1.50	4.55	1.94	5.31	3.91	3.31
NEFS 7	1.25	0.80	1.35	0.59	3.41	2.47	2.27	0.74	0.94	1.28	2.38	0.80	0.36	0.56	0.45
NEFS 8	6.59	0.16	6.11	0.08	10.64	5.21	2.93	2.19	2.60	21.18	0.71	9.02	0.55	0.51	0.64
NEFS 9	13.17	3.01	11.24	7.39	25.19	8.71	10.61	9.71	9.41	32.56	2.94	17.94	9.05	6.38	6.36
NEFS 10	0.34	2.41	0.16	1.36	0.00	0.53	4.54	1.10	1.75	0.01	9.22	0.50	0.33	0.62	0.70
NEFS 11	0.41	12.81	0.04	3.11	0.00	0.02	2.56	2.09	2.07	0.00	2.17	0.02	1.99	4.76	9.04
NEFS 12	0.63	2.98	0.09	1.05	0.00	0.01	7.95	0.50	0.57	0.00	7.65	0.22	0.23	0.30	0.82
NEFS 13	12.11	0.91	19.95	1.04	34.49	21.00	8.51	8.38	9.14	17.80	3.01	16.54	4.23	2.07	2.59
New Hampshire Permit Bank	0.00	1.14	0.00	0.03	0.00	0.00	0.02	0.03	0.01	0.00	0.06	0.00	0.02	0.08	0.11
Sustainable Harvest Sector 1	3.28	7.06	3.08	5.88	1.21	0.60	5.55	6.61	5.73	6.02	7.11	2.39	6.57	9.56	8.37
Sustainable Harvest Sector 2	0.29	0.35	0.40	0.07	2.21	2.24	1.14	0.72	0.62	0.46	1.33	1.11	0.26	0.34	0.27
Sustainable Harvest Sector 3	16.73	10.80	30.49	34.70	12.40	7.46	8.39	30.82	27.18	13.91	3.42	17.29	40.99	37.49	27.20
Sectors Total	**98.12**	**97.47**	**99.34**	**99.03**	**98.54**	**82.59**	**96.02**	**98.32**	**97.92**	**99.20**	**95.05**	**89.28**	**99.49**	**99.34**	**99.43**
Common	1.88	2.53	0.66	0.97	1.46	17.41	3.98	1.68	2.08	0.80	4.95	10.72	0.51	0.66	0.57

* The data in this table are based on preliminary fishing year 2016 sector rosters submitted March 15, 2016; sectors roster will be finalized on April 30, 2016. Final allocations may differ as a result.
† For fishing year 2016, 18.9 percent of the GB cod ACL would be allocated for the Eastern U.S./Canada Area, while 28.46 percent of the GB haddock ACL would be allocated for the Eastern U.S./Canada Area.
‡ SNE/MA Yellowtail Flounder refers to the SNE/Mid-Atlantic stock. CC/COM Yellowtail Flounder refers to the Cape Cod/GOM stock.

Table 15. ACE (in 1,000 lbs), by stock, for each sector for fishing year 2016.*#^

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB YT Flounder	SNE/MA YT Flounder	CC/GOM YT Flounder	American Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	87	296	16	2120	5102	100	0	2	23	26	17	0	190	30	585	437	2915
MCCS	1	3	36	14	34	152	0	3	7	197	41	0	26	4	612	444	2282
Maine Permit Bank	0	1	7	15	36	60	0	0	2	30	6	0	6	0	173	126	665
NCCS	1	2	6	46	111	21	4	3	6	8	2	1	19	4	96	65	202
NEFS 1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0
NEFS 2	18	60	122	3559	8563	947	9	7	150	249	111	42	273	45	3160	529	5088
NEFS 3	3	9	75	33	80	403	0	0	53	58	15	0	109	5	191	274	1952
NEFS 4	13	43	59	1784	4293	441	10	10	41	242	69	9	88	17	1395	614	2420
NEFS 5	2	6	0	286	689	0	6	96	2	12	5	6	0	172	5	9	19
NEFS 6	9	30	18	978	2352	205	13	22	28	101	42	20	64	25	1115	299	1298
NEFS 7	4	13	5	452	1088	31	16	10	17	19	8	17	34	10	75	43	179
NEFS 8	20	68	1	2043	4916	4	49	22	22	57	21	275	10	116	116	39	251
NEFS 9	40	136	19	3760	9047	394	117	36	80	253	77	423	41	231	1901	486	2499
NEFS 10	1	4	15	55	132	73	0	2	34	29	14	0	130	6	68	47	274
NEFS 11	1	4	79	13	31	166	0	0	19	54	17	0	31	0	419	363	3551
NEFS 12	2	7	18	31	76	56	0	0	60	13	5	0	108	3	48	23	324
NEFS 13	37	125	6	6673	16054	55	160	88	64	219	75	231	42	213	889	158	1018
New Hampshire Permit Bank	0	0	7	0	0	2	0	0	0	1	0	0	1	0	4	6	44
Sustainable Harvest Sector 1	10	34	44	1030	2479	313	6	2	42	172	47	78	100	31	1379	729	3286
Sustainable Harvest Sector 2	1	3	2	134	323	4	10	9	9	19	5	6	19	14	55	26	105
Sustainable Harvest Sector 3	51	173	67	10196	24530	1848	58	31	63	804	222	181	48	223	8607	2859	10683
Sectors Total	299	1017	602	33225	79935	5275	458	344	722	2564	799	1290	1339	1151	20894	7576	39056
Common	6	20	16	219	528	52	7	73	30	44	17	10	70	138	107	50	224

* The data in this table are based on preliminary fishing year 2016 sector rosters submitted March 15, 2016; sectors roster will be finalized on April 30, 2016. Final allocations may differ as a result.
# Numbers are rounded to the nearest thousand lbs. In some cases, this table shows an allocation of 0, but that sector may be allocated a small amount of that stock in tens or hundreds pounds.
^ The data in the table represent the total allocations to each sector. NMFS will withhold 20 percent of a sector's total ACE at the start of the fishing year.

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Table 16. ACE (in metric tons), by stock, for each sector for fishing year 2016.*#^

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB YT Flounder	SNE/MA YT Flounder	CC/GOM YT Flounder	American Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	39	134	7	962	2314	45	0	1	10	12	8	0	86	14	266	198	1322
MCCS	0	1	16	6	16	69	0	1	3	90	19	0	12	2	278	201	1035
Maine Permit Bank	0	1	3	7	16	27	0	0	1	14	3	0	3	0	78	57	302
NCCS	0	1	3	21	50	9	2	1	3	4	1	0	9	2	43	30	92
NEFS 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
NEFS 2	8	27	55	1614	3884	430	4	3	68	113	50	19	124	20	1433	240	2308
NEFS 3	1	4	34	15	36	183	0	0	24	26	7	0	49	2	87	124	885
NEFS 4	6	19	27	809	1947	200	5	4	19	110	31	4	40	7	633	279	1098
NEFS 5	1	3	0	130	313	0	3	44	1	5	2	3	0	78	2	4	9
NEFS 6	4	13	8	444	1067	93	6	10	13	46	19	9	29	11	506	135	589
NEFS 7	2	6	2	205	494	14	7	5	8	9	3	8	15	5	34	19	81
NEFS 8	9	31	0	927	2230	2	22	10	10	26	10	125	5	53	53	18	114
NEFS 9	18	62	8	1706	4104	179	53	16	36	115	35	192	19	105	862	221	1133
NEFS 10	0	2	7	25	60	33	0	1	15	13	6	0	59	3	31	22	124
NEFS 11	1	2	36	6	14	75	0	0	9	25	8	0	14	0	190	165	1611
NEFS 12	1	3	8	14	34	25	0	0	27	6	2	0	49	1	22	10	147
NEFS 13	17	57	3	3027	7282	25	73	40	29	99	34	105	19	97	403	72	462
New Hampshire Permit Bank	0	0	3	0	0	1	0	0	0	0	0	0	0	0	2	3	20
Sustainable Harvest Sector 1	5	15	20	467	1124	142	3	1	19	78	21	36	45	14	626	331	1491
Sustainable Harvest Sector 2	0	1	1	61	147	2	5	4	4	9	2	3	8	6	25	12	48
Sustainable Harvest Sector 3	23	79	30	4625	11126	838	26	14	29	365	101	82	22	101	3904	1297	4846
Sectors Total	135	461	273	15071	36258	2393	208	156	327	1163	362	585	607	522	9478	3436	17715
Common	3	9	7	99	239	23	3	33	14	20	8	5	32	63	48	23	102

* The data in this table are based on preliminary fishing year 2016 sector rosters submitted March 15, 2016; sectors roster will be finalized on April 30, 2016. Final allocations may differ as a result.

#Numbers are rounded to the nearest metric ton, but allocations are made in pounds. In some cases, this table shows a sector allocation of 0 metric tons, but that sector may be allocated a small amount of that stock in pounds.

^ The data in the table represent the total allocations to each sector. NMFS will withhold 20 percent of a sector's total ACE at the start of the fishing year.

Sector Carryover From the 2015 to 2016 Fishing Year

Sectors can carry over up to 10 percent of the unused initial allocation for each stock into the next fishing year. However, the maximum available carryover may be reduced if up to 10 percent of the unused sector sub-ACL, plus the total ACL for the upcoming fishing year, exceeds the total ABC. Based on the catch limits implemented in this action, we evaluated whether the total potential catch in the 2016 fishing year would exceed the ABC if sectors carried over the maximum 10-percent of unused allocation from 2015 to 2016 (Table 17). Table 17 corrects errors presented in that table in the proposed rule, and provides analysis of maximum carryover for pollock, which was omitted from the table in the proposed rule. Under this scenario, total potential catch would exceed the 2016 ABC for all stocks except for GOM haddock and GB haddock. As a result, we expect we will need to adjust the maximum amount of unused allocation that a sector can carry forward from 2015 to 2016 (down from 10 percent). However, it is possible that not all sectors will have 10 percent of unused allocation at the end of the 2015 fishing year. We will make final adjustments to the maximum carryover possible for each sector based on the final 2015 catch for the sectors, each sector's total unused allocation, and the cumulative PSCs of vessels/permits participating in the sector. We will announce this adjustment as close to May 1, 2016, as possible.

Based on the catch limits adopted in this rule, the *de minimis* carryover amount for the 2016 fishing year will be set at the default one-percent of the 2016 overall sector sub-ACL. The overall *de minimis* amount will be applied to each sector based on the cumulative PSCs of the vessel/permits participating in the sector. If the overall ACL for any allocated stock is exceeded for the 2016 fishing year, the allowed carryover harvested by a sector minus its specified *de minimis* amount, will be counted against its allocation to determine whether an overage, subject to an accountability measure (AM), occurred.

TABLE 17—EVALUATION OF MAXIMUM CARRYOVER ALLOWED FROM THE 2015 TO 2016 FISHING YEARS

[mt, live weight]

Stock	2016 U.S. ABC	2016 Total ACL	Potential carryover (10% of 2015 sector sub-ACL)	Total potential catch (2016 total ACL + potential carryover	Difference between total potential catch and ABC
GB Cod	762	730	175	905	143
GOM cod	500	473	20	493	−7
GB Haddock	56,068	53,309	2,157	55,466	−602
GOM Haddock	3,630	3,430	95	3,525	−105
SNE Yellowtail Flounder	267	255	46	301	34
CC/GOM Yellowtail Flounder	427	409	44	453	26
Plaice	1,297	1,235	138	1,373	76
Witch Flounder	460	441	60	501	41
GB Winter Flounder	668	650	187	837	169
GOM Winter Flounder	810	776	37	813	3
SNE/MA Winter Flounder	780	749	115	864	84
Redfish	10,338	9,837	1,097	10,934	596
White Hake	3,754	3,572	431	4,003	249
Pollock	21,312	20,374	1,363	21,737	425

Note. Carry over of GB yellowtail flounder is not allowed because this stock is jointly managed with Canada.

Sector Exemptions

Because sectors elect to receive an allocation under a quota-based system, the Northeast Multispecies FMP grants sector vessels several ''universal'' exemptions from the FMP's effort controls. These universal exemptions apply to: Trip limits on allocated stocks; the GB Seasonal Closure Area; NE multispecies DAS restrictions; the requirement to use a 6.5-inch (16.5-cm) mesh codend when fishing with selective gear on GB; and portions of the GOM Cod Protection Closures. The Northeast Multispecies FMP prohibits sectors from requesting exemptions from permitting restrictions, gear restrictions designed to minimize habitat impacts, and reporting requirements. In addition to the ''universal'' exemptions approved under Amendment 16 to the FMP, all 19 sectors are granted 19 additional exemptions from the NE multispecies regulations for the 2016 fishing year. These exemptions were previously approved in the sector operations rulemaking for the 2015 and 2016 fishing years. Descriptions of the current range of approved exemptions are included in the preamble to the Final Rule for 2015 and 2016 Sector Operations Plans and 2015 Contracts (80 FR 25143; May 1, 2015) and are not repeated here.

We are approving an additional sector exemption intended to complement the Framework 55 measure that removes the ASM coverage requirement for sector trips using 10-inch (25.4-cm) mesh, or larger, gillnet gear and fishing exclusively in the inshore GB and SNE/MA broad stock areas (described in section ''6. Groundfish At-Sea Monitoring Program Adjustments''). The sector exemption allows vessels on these ASM-excluded sector trips to also target dogfish using 6.5-inch (16.5-cm) mesh gillnet gear within the footprint and season of either the Nantucket Shoals Dogfish Exemption Area (June 1 to October 15), the Eastern Area of the Cape Cod Spiny Dogfish Exemption Area (June 1 to December 31), or the Southern New England Dogfish Gillnet Exemption Area (May 1 to October 31). Allowing sectors to participate in these exempted fisheries for dogfish while simultaneously being excluded from ASM coverage on extra-large mesh sector trips (*i.e.,* take trips using both greater than 10-inch (25.4-cm) mesh and 6.5-inch (16.5-in) mesh) is intended to maximize the viability and profitability of their businesses. The GB Fixed Gear Sector requested this exemption, and we will grant this exemption to any sectors that modify their operations plans to include this exemption. In this rule, we have also implemented regulatory text to detail the process for amending sector operations plans during the fishing year

in section ''10. Regulatory Corrections under Regional Administrator Authority.''

We intend to monitor the use of this exemption using the existing vessel trip report (VTR) requirement. Vessels are currently required to send separate VTRs for each statistical area in which fishing occurred on a trip, and for each gear type used on a trip. Thus, consistent with the current regulations, vessels must submit a VTR to document catch on the extra-large mesh portion of the trip, and a separate VTR for the portion of the trip in which deploy the vessel deploys 6.5-inch (16.5-in) mesh gillnet gear within the footprint and season of the existing dogfish exempted areas. We will closely monitor this exemption to evaluate whether additional reporting measures are necessary, and will propose any changes to reporting requirements related to this measure consistent with the Administrative Procedure Act. While sector trips using this exemption will still be exempt from ASM coverage, any legal-sized allocated groundfish stocks caught during these trips must be landed and the associated landed weight (dealer or VTR) will be deducted from the sector's ACE.

9. 2016 Fishing Year Annual Measures Under Regional Administrator Authority

The Northeast Multispecies FMP gives us authority to implement certain types of management measures for the common pool fishery, the U.S./Canada Management Area, and Special Management Programs on an annual basis, or as needed. This action implements a number of these management measures for the 2016 fishing year. These measures are not part of Framework 55, and were not specifically considered by the Council. We are implementing them in conjunction with Framework 55 measures in this final rule for expediency purposes, and because they relate to the catch limits considered in Framework 55.

Common Pool Trip Limits

The initial fishing year 2016 DAS possession limits and maximum trip limits for common pool vessels are included in Tables 18 and 19. These possession limits were developed after considering changes to the common pool sub-ACLs and sector rosters from 2015 to 2016, catch rates of each stock during 2015, and other available information. During the fishing year, we will adjust possession and trip limits, as necessary, to facilitate harvest or prevent overages, of common pool catch limits.

We have corrected an error in the per DAS limit for CC/GOM yellowtail flounder in Table 18. Table 19 in the proposed rule listed the CC/GOM yellowtail flounder limit as 75 lb (34 kg) per DAS. The limit should have been listed as 750 lb (340 kg) per DAS. After re-evaluating the common pool allocation, and in response to public comment, we are also setting the initial GOM haddock trip limit at 200 lb (91 kg) per DAS, up to 600 lb (272 kg) per trip. We have determined that this higher initial trip limit is warranted given the 175-percent increase in the 2016 GOM haddock common pool sub-ACL, and will provide increased opportunity for common pool vessels to target GOM haddock.

TABLE 18—INITIAL COMMON POOL POSSESSION AND TRIP LIMITS FOR THE 2016 FISHING YEAR

Stock	2016 trip limit
GB Cod (outside Eastern U.S./Canada Area)	500 lb (227 kg) per DAS, up to 2,500 lb per (1,134 kg) per trip.
GB Cod (inside Eastern U.S./Canada Area)	100 lb (45 kg) per DAS, up to 500 lb (227 kg) per trip.
GOM Cod	25 lb (11 kg) per DAS up to 100 lb (45 kg) per trip.
GB Haddock	100,000 lb (45,359 kg) per trip.
GOM Haddock	200 lb (91 kg) per DAS up to 600 lb (272 kg) per trip.
GB Yellowtail Flounder	100 lb (45 kg) per trip.
SNE/MA Yellowtail Flounder	250 lb (113 kg) per DAS, up to 500 lb (227 kg) per trip.
CC/GOM Yellowtail Flounder	750 lb (340 kg) per DAS up to 1,500 lb (680 kg) per trip.
American plaice	1,000 lb (454 kg) per trip.
Witch Flounder	250 lb (113 kg) per trip.
GB Winter Flounder	250 lb (113 kg) per trip.
GOM Winter Flounder	2,000 lb (907 kg) per trip.
SNE/MA Winter Flounder	2,000 lb (907 kg) per DAS, up to 4,000 lb (1,814 kg) per trip.
Redfish	Unlimited.
White hake	1,500 lb (680 kg) per trip.
Pollock	Unlimited.
Atlantic Halibut	1 fish per trip.
Windowpane Flounder	Possession Prohibited.
Ocean Pout.	
Atlantic Wolffish.	

TABLE 19—INITIAL COD TRIPS LIMITS FOR HANDGEAR A, HANDGEAR B, AND SMALL VESSEL CATEGORY PERMITS FOR THE 2016 FISHING YEAR

Permit	2016 trip limit
Handgear A GOM Cod	25 lb (11 kg) per trip.
Handgear A GB Cod	300 lb (136 kg) per trip.
Handgear B GOM Cod	25 lb (11 kg) per trip.
Handgear B GB Cod	25 lb (11 kg) per trip.
Small Vessel Category	300 lb (136 kg) of cod, haddock, and yellowtail flounder combined. Maximum of 25 lb (11 kg) of GOM cod and 100 lb (45 kg) of GOM haddock within the 300-lb combined trip limit.

Closed Area II Yellowtail Flounder/Haddock Special Access Program

This action allocates zero trips for common pool vessels to target yellowtail flounder within the Closed Area II Yellowtail Flounder/Haddock Special Access Program (SAP) for fishing year 2016. Common pool vessels can still fish in this SAP in 2016 to target haddock, but must fish with a haddock separator trawl, a Ruhle trawl, or hook gear. Vessels are not allowed to fish in this SAP using flounder trawl nets. This SAP is open from August 1, 2016, through January 31, 2017.

We have the authority to determine the allocation of the total number of trips into the Closed Area II Yellowtail Flounder/Haddock SAP based on several criteria, including the GB yellowtail flounder catch limit and the amount of GB yellowtail flounder caught outside of the SAP. The Northeast Multispecies FMP specifies that no trips should be allocated to the Closed Area II Yellowtail Flounder/Haddock SAP if the available GB yellowtail flounder catch is insufficient to support at least 150 trips with a 15,000-lb (6,804-kg) trip limit (or 2,250,000 lb (1,020,600 kg)). This calculation accounts for the projected catch from the area outside the SAP. Based on the 2016 fishing year GB yellowtail flounder groundfish sub-ACL of 465,175 lb (211,000 kg), there is insufficient GB yellowtail flounder to allocate any trips to the SAP, even if the projected catch from outside the SAP area is zero. Further, given the low GB yellowtail flounder catch limit, catch rates outside of this SAP are more than adequate to fully harvest the 2016 GB yellowtail flounder allocation.

10. Regulatory Corrections Under Regional Administrator Authority

The following changes are being made using Magnuson-Stevens Act section 305(d) authority to clarify regulatory intent, correct references, inadvertent deletions, and other minor errors.

In § 648.87(b)(4)(i)(G), text is revised to clarify that NMFS will determine the adequate level of insurance that monitoring service providers must provide to cover injury, liability, and accidental death to cover at-sea monitors, and notify potential service providers.

In § 648.87(c)(2)(i)(A), the definition of the Fippennies Ledge Area is added after being inadvertently deleted in a previous action.

In § 648.87(c)(4), regulatory text is added to detail the process for amending sector operations plans during the fishing year.

Comments and Responses on Measures Proposed in the Framework 55 Proposed Rule

We received 35 comments during the comment period on the Framework 55 proposed rule. Public comments were submitted by the Council, two state officials and one state office, five non-governmental organizations, seven sectors, six commercial fishing organizations, seven commercial fishermen, four recreational fishermen, and two individuals. We requested specific comment on whether the Council's proposed measures in Framework 55 are consistent with the Northeast Multispecies FMP, as adjusted by Amendment 16 and Framework 48, the Magnuson-Stevens Act and its National Standards, and other applicable law. Responses to the comments received are below, and, when possible, responses to similar comments on the proposed measures have been consolidated.

Status Determination Criteria

Comment 1: The Council commented that the proposed rule did not accurately summarize the assessment peer review's conclusion that the overfishing status for GB cod and Atlantic halibut is unknown.

Response: The proposed rule noted that, based on the results of the 2015 assessment update for GB cod, the stock remains overfished and that overfishing is occurring. For halibut, the proposed rule noted the stock remains overfished and that overfishing is not occurring. These final NMFS stock status determinations differ slightly from the conclusions of the assessment peer review panel. Clarification of these determinations for GB cod and halibut is provided in section ''2. Status Determination Criteria,'' and is not repeated here.

2016 Fishing Year Shared U.S./Canada Quotas

Comment 2: Environmental Defense Fund (EDF) supported the proposed 2016 fishing year shared U.S./Canada quotas for eastern GB cod, eastern GB haddock, and GB yellowtail flounder.

Response: We agree, and this final rule implements these quotas for the 2016 fishing year. The 2016 shared U.S./Canada quotas are based on the results of the 2015 TRAC assessment, which represents the best scientific information available. These quotas are also consistent with the recommendations of the TMGC and the SSC.

Catch Limits for the 2016–2018 Fishing Years

Comment 3: EDF supported all of the proposed catch limits for the 2016–2018 fishing years.

Response: We agree, and are implementing these catch limits for the 2016–2018 fishing years. These catch limits are based on the 2015 stock assessments for these stocks, which represent the best scientific information available, and are consistent with the SSC's recommendations and conservation objectives. Assessment updates are scheduled for 2017 for most groundfish stocks, which will provide the opportunity to update the 2018 catch limits implemented in this final rule, if warranted.

Comment 4: Conservation Law Foundation (CLF) opposed the proposed 2016–2018 catch limits. CLF commented that catch limits have failed to effectively control fishing mortality for most groundfish stocks, and that the proposed 2016–2018 catch limits will not prevent overfishing.

Response: We disagree. As noted above, the catch limits in Framework 55 are consistent with the best scientific information available, conservation objectives of the Northeast Multispecies FMP, and applicable law. In each year since Amendment 16 was implemented in 2010, ACLs have not been exceeded for a majority of groundfish stocks, with the exception of the windowpane flounder stocks in most of these years, and GOM haddock in 2013. When ACLs have been exceeded, we have implemented accountability measures (AMs) to prevent overfishing. We continue to use the best scientific information available from our stock assessments, trawl surveys, and catch history to set catch limits for groundfish stocks. In response to stock assessments, quotas for many poor-performing groundfish stocks have been substantially reduced. For example, the catch limit for GOM cod has been reduced by 95 percent since Amendment 16 was implemented. Although there are uncertainties in the stock assessments, the SSC uses some strategies (*e.g.,* holding the ABC constant for a 3-year period if the stock is in poor condition) to account for this uncertainty. Further, although 2018 catch limits are adopted in this action, assessment updates are scheduled for most groundfish stocks for fall 2017. These assessment updates will provide the opportunity to update the 2018 catch limits adopted in this action and ensure that catch limits continue to be set consistent with conservation and

management objectives of the Northeast Multispecies FMP.

Comment 5: The Associated Fisheries of Maine (AFM) and Massachusetts state representative Antonio Cabral expressed concern for the GB cod catch limit and the economic impacts this quota reduction will have on groundfish vessels. State Representative Cabral suggested that the current 2015 catch limit should remain in place. AFM also commented that the SSC should have been provided with projections for stock growth under the status quo model in addition to the approach recommended by the assessment peer review panel.

Response: We are adopting the Council's recommended GB cod ABC of 1,249 mt for the 2016–2018 fishing years. This ABC is a 95-percent reduction compared to 2015, and available analysis indicates that GB cod, as well as other key groundfish stocks, will likely constrain the fishery in 2016. However, catch limits must first meet conservation objectives and satisfy applicable Magnuson-Stevens Act requirements to end overfishing and rebuild fish stocks, even if they result in negative economic impacts. The Council selected the ABC recommended by the SSC, which is the highest possible ABC allowed that will end overfishing and allow some stock rebuilding.

The 2015 assessment review panel agreed that, in the event the 2015 assessment update for any stock was not accepted, an alternative assessment approach to specify catch advice would be based on the most recent 3-year average quota or catches. The assessment model for GB cod was rejected as a basis for catch advice. However, the assessment peer review panel was concerned that the status quo catch may not be appropriate for GB cod given current stock status and resource survey trends. As a result, the peer review panel recommended using an approach that reduced recent average catch by the same proportion as the most recent survey trend. The Council's Groundfish Plan Development Team (PDT) provided the SSC with advice based on this approach and the SSC used this approach, which represents the best scientific information available, in developing its recommendation of 1,249 mt for the 2016 to 2018 fishing years.

Comment 6: AFM commented that the U.S. assessment for GB cod and the TRAC assessment for eastern GB cod should use the same assumptions because it is a single stock.

Response: In advance of the 2015 groundfish assessments, we anticipated conflicting results between the U.S. assessment for the entire GB cod stock and the joint U.S.-Canada assessment for the shared portion of this stock. The discrepancy is due to the use of different models and natural mortality assumptions for each assessment, and would have resulted in a U.S.-Canada estimate for the shared portion of the stock that was larger than the U.S. estimate for the entire GB cod stock. During the July 2015 TRAC assessment, the model for the shared portion of the GB cod stock was accepted. However, the U.S. assessment for the total GB cod stock was rejected due to a strong retrospective pattern during the September 2015 groundfish assessments and instead, the 2016 catch recommendation was based on a recent average catch approach, described in the response to Comment 5.

Since the 2015 assessments, we have continued to work with Canadian managers and scientists to resolve the differences in the assumptions used in both assessments. The TRAC has been directed to provide 2017 catch advice that better balances the different assumptions used in the GB cod and eastern GB cod assessment models. We are also planning to assess the structure of the cod stocks (GB and GOM) in 2017. The results of this analysis will help determine how many stocks there are, based on the biology of the stock, and inform discussions on the assumptions used in the GB cod and eastern GB cod assessment models. All of this analysis will ultimately support future benchmark assessments for the resulting cod stocks.

Comment 7: NEFS XIII and one commercial fisherman commented that the Council should set GB cod management measures for party/charter boats that reflect the large reductions in allocations that have been imposed on the commercial fleet. The commercial fisherman suggested a two- to five-fish bag limit and a spawning closure for April, May and June.

Response: Management measures for the GB cod recreational fishery were not considered by the Council in Framework 55. Amendment 16 only adopted recreational allocations and AMs for GOM cod and haddock, and did not establish recreational allocations or AMs for any other groundfish stocks. Amendment 16 specified that a recreational allocation would only be made if recreational catch, after accounting for recreational state waters catch, is less than 5 percent of total removals. At the time Amendment 16 was developed and implemented, recreational catches of GB cod did not meet this standard, and no allocation was made. For the purposes of catch accounting, Amendment 16 specified that recreational catch of GB cod would be included in the other sub-component, which is the portion of the U.S. ABC expected to be harvested by unidentified non-groundfish fishery components. The other sub-component is not considered an allocation, and the fisheries included in this component are not subject to specific AMs.

The majority of other subcomponent catch from 2010–2014 was recreational landings; however, the Council has not yet considered whether a recreational allocation for GB cod may be necessary. Creation of a recreational allocation for this stock would have to be developed through the Council in a future management action.

Comment 8: AFM, the Northeast Seafood Coalition (NSC), and the Sustainable Groundfish Association (SGA) expressed concern for the witch flounder ABC of 460 mt. AFM commented in opposition to the witch flounder ABC. All three organizations noted that a higher ABC, equal to the SSC's recommendation, could have been adopted. Both AFM and NSC also noted that the difference in stock growth between the three witch flounder ABC alternatives (399 mt; 460 mt; and 500 mt) is not statistically significant.

Response: We are adopting the Council's recommended witch flounder ABC of 460 mt for the 2016–2018 fishing years. A description of the SSC and Council discussions regarding the witch flounder ABC, and the development of various catch alternatives, is included in the preamble to the proposed rule and Appendix I of the Framework 55 EA, and is not repeated here.

The SSC's ABC recommendation is a limit that the Council may not exceed when developing its final ABC recommendation. However, this does not, and should not, preclude the Council from selecting an ABC that is lower than the SSC's catch advice. Although the Council could have selected a higher ABC equal to the SSC's recommendation of 500 mt, the Council recommended a slightly lower ABC (460 mt) to balance the need to provide flexibility for groundfish vessels while reducing the risk of overfishing. The Council recommended this ABC after consideration of stock growth, the probability of overfishing, and the economic impacts of the various ABC alternatives. An ABC of 460 mt complies with Magnuson-Stevens Act requirements, including achieving optimum yield and taking into account the needs of fishing communities, without compromising conservation objectives to prevent overfishing and rebuild the stock.

As noted in the proposed rule, a benchmark assessment for witch flounder is scheduled for fall of 2016. Assessment results would likely be available in time to re-specify witch flounder catch limits for the 2017 fishing year, if necessary. Thus, although a 3-year constant ABC is adopted in this action, the limits may only be in place for 1 year and will be replaced if updated information shows it is necessary.

NSC correctly noted that the preamble to the proposed rule did not correctly reference the December 2015 Council motion for the SSC to reconsider the witch flounder ABC. The preamble inadvertently included text from the Council's larger discussion leading to the final motion that discussed consideration of incidental non-target catch of witch flounder. However, the proposed rule included the correct ABC of 460 mt, and the error does not affect the rationale for the catch limit adopted in this final rule.

Comment 9: NSC and the Fisheries Survival Fund (FSF) commented that the 2015 assessment update for SNE/MA yellowtail flounder should have been rejected, but supported the SSC's alternative ABC approach and the final ABC recommendation. FSF also questioned why the GB cod assessment was rejected but the SNE/MA yellowtail assessment was not. NSC supports additional scientific examination of the datasets, model formulation, and source of the retrospective error in this assessment.

Response: We are adopting a 267-mt ABC for SNE/MA yellowtail flounder for the 2016–2018 fishing years, as recommended by the Council and SSC. A description of the SSC discussion regarding the SNE/MA yellowtail flounder ABC is included in the preamble to the proposed rule, and is not repeated here.

When developing its ABC recommendations for SNE/MA yellowtail flounder, the SSC discussed the disparate treatment of the GB cod and SNE/MA yellowtail flounder assessment. The SSC noted that, although the decisions for each assessment seem inconsistent, there are important differences between the assessments that justified these respective decisions. For example, the magnitude of the retrospective bias for SNE/MA yellowtail flounder (106 percent) was substantially less than for GB cod (240 percent). In addition, the SNE/MA yellowtail flounder assessment performed better than the GB cod assessment by other diagnostic measures. We agree that these are reasonable distinctions that support the SSC's decisions. The SSC's discussion is summarized in more detail in the SSC's November 17, 2017, memorandum to the Council on 2016–2018 groundfish ABCs, included in Appendix I to the Framework 55 EA.

Although the SNE/MA yellowtail flounder assessment update was not rejected, as supported by the commenters, the SSC acknowledged the poor condition of the stock, substantial uncertainty in the assessment, and procedural issues with the assessment terms of reference in recommending a 3-year ABC of 267 mt. This ABC is based on a combination of the assessment catch projections and an estimate of 2015 catch, which appropriately balances the new understanding of this stock's status and uncertainty in the assessment, while allowing as much flexibility as practicable for groundfish and scallop vessels.

Because SNE/MA yellowtail flounder is now overfished, a rebuilding program must be developed for the stock. We will work with the Council to develop an appropriate rebuilding program, particularly in light of some of the difficulties that the assessment results presented in developing 2016–2018 catch advice.

Comment 10: Two recreational fishermen opposed to the 60-percent increase in the GOM winter flounder ABC. One commented that the stock is not healthy enough to justify a 60-percent quota increase. Both commented that the recreational fishery will be harmed if the quota increase causes more commercial fishing effort. One suggested a commercial moratorium to allow the stock to rebuild.

Response: GOM winter flounder catch limits are based on the 2015 assessment for the stock. Overfishing is not occurring, but biomass reference points are unavailable for this stock. The assessment model relies on resource survey data, so current biomass and fishing mortality estimates, as well as catch advice, tend to vary with interannual variations in the survey. After declines in the survey indices for the last 5 years (2009–2013), there was an increase in survey catch in 2014, which resulted in the increase in catch advice.

The assessment review panel expressed concern that the recent biomass estimates substantially decreased despite relatively low catch, and noted that reasons for this apparent decline are unknown. In spite of the uncertainties in the assessment, it was approved as a basis for catch advice. Because catch advice fluctuates with area-swept assessments, the assessment review panel recommended stabilizing catch advice by averaging the area-swept fall and spring survey. This results in an ABC of 745 mt. The PDT provided the SSC with this option, but the SSC ultimately chose an ABC consistent with 75% F_{MSY}.

NMFS disagrees that a commercial moratorium is necessary to limit catch of GOM winter flounder. While this is a relatively large ABC increase compared to 2015, recent catches have been well below the overfishing threshold. In addition, available catch information suggests that a majority of GOM winter flounder catch comes from the same statistical areas as the majority of GOM cod catch. We expect that the low catch limit for GOM cod will continue to limit catch of GOM winter flounder.

Comment 11: One commercial fisherman suggested that NMFS increase allowed landings of Atlantic halibut to three fish per trip for limited access permits because it could convert discards to landings, maximize value of quota, and support the collection of biological samples for this stock.

Response: Framework 55 did not consider adjustments to the Atlantic halibut trip limit. Adjustments of the trip limit for halibut are outside of the scope of this action. Any changes to the trip limit would have to be developed through the Council process in a future management action.

Comment 12: A number of commenters expressed concern about specific assessments and about the assessment process in general. Several commenters proposed alternative data sources or assessment models.

Response: The Framework 55 proposed rule did not propose or solicit public comment on assessment methods or processes. NMFS can only approve, partially approve, or disapprove the status determination criteria and catch limits proposed in this action based on an evaluation of their compliance with the Magnuson-Stevens Act, the Northeast Multispecies FMP, and other applicable law.

The 2015 assessment updates replicated the methods recommended in the most recent benchmark decisions, as modified by any subsequent operational assessments or updates, with the intention of simply adding years of data. Only minor flexibility in the assessment assumptions was allowed to address emerging issues. Thus, the commenters' suggestions for alternative data sources or assessment models would not have been appropriate for the 2015 assessment updates.

The NEFSC has made significant efforts over the past few years to

increase transparency and promote an understanding of the assessment process. These efforts include outreach meetings, data workshops, and providing informational materials in advance of the peer review meetings. We encourage the commenters to continue to engage with the NEFSC to ensure that their concerns and suggestions are raised as early in the process as possible.

Comment 13: The Council identified a transcription error in the groundfish sub-ACL for GB cod for 2017 and 2018 in its February 19, 2016, submission of the Framework 55 EA. This error is also reflected in Tables 6 and 7 in the proposed rule.

Response: We have corrected this error in Tables 6 and 7 under section ''4. Catch Limits for the 2016–2018 Fishing Years.'' The groundfish sub-ACL was incorrectly listed as 608 mt for both years. It should have been listed as 997 mt.

Default Catch Limits for the 2019 Fishing Year

Comment 14: The Council noted that the transcription error in the GB cod sub-ACL (see Comment 13) was carried into the default specifications for the 2019 fishing year. The Council also noted that the proposed rule inadvertently omitted default specifications for 2018 for GB yellowtail flounder.

Response: We have corrected the omission of the GB yellowtail flounder default specifications under section ''5. Default Catch Limits for the 2018 and 2019 Fishing Years.'' Default catch limits for the 2018 fishing year for GB yellowtail flounder were inadvertently omitted in the proposed rule because the Council only recommended specifications for the 2016 and 2017 fishing year for this stock. This error has been corrected here. The transcription error in the GB cod groundfish sub-ACL did not affect the 2019 default specifications presented in the proposed rule for this stock.

Groundfish At-Sea Monitoring Program Adjustments

Comment 15: AFM, the SHS, New Hampshire Governor Margaret Wood Hassan, the Gloucester Fisheries Commission (GFC), the SGA, the Northeast Seafood Coalition, NEFS II, NEFS VII, NEFS VIII, NEFS XII, NEFS XIII, and the Massachusetts Office of the Attorney General commented in support of the changes to the ASM program.

Response: We agree, and are implementing the full set of proposed changes to the ASM program. This action does not specify a fixed ASM coverage target for all future years, and is not approving a lower target ASM coverage level in perpetuity. Rather, using information gained from past ASM coverage levels, this action refines the process we use for predicting the level of ASM coverage necessary in a given year to achieve the required 30-percent CV. In comparison to previous years, the refinements made in this action could lead to lower or higher ASM coverage target rates in future years.

Based on these changes, this rule also announces our determination that the target ASM coverage level is 14 percent (ASM + NEFOP observer coverage) for the 2016 fishing year. This level of coverage provides a reliable estimate of overall catch by sectors to monitor annual catch levels in the most cost-effective means practicable. This interpretation is justified in light of the requirement for conservation and management measures to be consistent with all National Standards, specifically, National Standards 2, 5, 7, and 8, which speak, respectively, to the need to use the best scientific information available; efficiency in the use of fishery resources; the need to minimize costs and avoid unnecessary duplication, where practicable; and the need to take into account impacts on fishing communities and minimize adverse economic impacts, to the extent practicable. We have conducted analyses, and considered both precision and accuracy issues in determining the appropriate level of coverage that provides a reliable estimate of overall catch while reducing the cost burden to sectors and NMFS. A more detailed summary of the supporting analyses, and an explanation and justification supporting our determination that an at-sea coverage level of 14 percent (10 percent ASM + 4 percent NEFOP) is sufficient is contained in the EA.

Comment 16: The Georges Bank Cod Fixed Gear Sector, the SGA, and The Nature Conservancy (TNC) commented in support of the alternative to exempt extra-large mesh gillnet trips in Broad Stock Areas 2 and 4 from ASM coverage. The NSC, the GFC, NEFS II, NEFS VII, NEFS VIII, NEFS XII, NEFS XIII also support this measure, provided that this change does not increase coverage levels on other sector trips.

Response: We agree, and are adopting this alternative as proposed. These trips have negligible groundfish catch and are receiving the same level of coverage as other sector trips, with no resultant benefit to the overall precision and accuracy of groundfish discard estimates. By exempting these trips from ASM coverage, those resources can be directed to cover trips with meaningful catches of groundfish and, thereby, improve the estimates of groundfish discards.

These extra-large mesh gillnet sector trips will be excluded from the trips considered in setting and monitoring ASM coverage levels. However, we are not yet able to determine how removing the ASM coverage requirement from certain trips will impact the overall variability of the remaining population of sector trips, or how it will affect the coverage necessary to meet the 30-percent CV requirement in future years. The economic impact section of the EA (Section 7.4) discusses this uncertainty, and notes that, if ASM coverage were to be shifted onto other components of the fleet, there would be no overall cost savings to sectors. Nonetheless, we are approving this measure because it prioritizes limited resources and monitoring coverage for trips that actually catch groundfish.

Comment 17: Many commenters questioned the appropriateness of the ASM program's 30-percent CV precision standard. EDF, Oceana, and TNC urge NMFS to disapprove the ASM measures in Framework 55, and implement higher coverage levels they contend are necessary to precisely and accurately monitor catch and discards. They encourage us to continue to work with the Council to develop measures to monitor the fishery based on the best available science and to assure accountability to prevent overfishing. Cape Cod Commercial Fishermen's Alliance and Penobscot East Resource Center did not comment in detail on the groundfish monitoring program adjustments proposed in Framework 55, but expressed their view that it is necessary to work towards an effective and affordable groundfish monitoring program that meets the goals and objectives of the Northeast Multispecies FMP.

Response: We are approving the measures in Framework 55. Framework 55 only includes administrative modifications to the ASM program using information gained from ASM program performance in the past 5 years, and was narrowly focused on adjusting the method used to set the target coverage level for the industry-funded ASM program. The Council has identified groundfish monitoring as a priority for 2016, and the PDT is already working on analysis to inform more extensive changes to the groundfish monitoring program (*e.g.,* possibly adjusting the 30-percent CV precision standard) in a future action. We note that to administer the monitoring program each year, we set target ASM

coverage levels to achieve monitoring program requirements. Consistent with this practice, we would have implemented a 17-percent target ASM coverage level had Framework 55 been disapproved, using several of the administrative approaches analyzed in this action, namely the removal of our internal standard of monitoring 80 percent of discards at a 30-percent CV and using multiple years of data to determine target ASM coverage levels. We support the Council's efforts to evaluate groundfish monitoring programs through our membership on the Groundfish PDT, the Groundfish Committee, and the Council.

Comment 18: TNC opposed changes to the method used to set the target coverage level for the industry-funded ASM program, citing the executive summary in the draft EA, which stated that we will likely miss the 30-percent CV standard.

Response: We clarify that we are approving a method to set the target ASM coverage level, but we are not changing the requirements to achieve the 30-percent CV precision standard and meet the goals and objectives of the monitoring program. As stated in the preamble to the proposed rule, we expect that the Framework 55 changes in the method used to set the ASM target coverage level will result in target coverage levels that will meet the 30-percent CV precision standard and will reliably estimate catch. We also expect that the 2016 target coverage level of 14 percent announced in this action will achieve results consistent with prior years.

The commenter cites an inaccurate portrayal of the intent of the measures contained in the text of the draft version of the EA. The text states that we will likely miss the 30-percent CV standard, but these measures were always intended to meet the 30-percent CV standard and the monitoring goals and objectives of the FMP. We released an advance draft of the EA to support the publication of the proposed rule prior to completing our full review process. We are not required to finalize the EA at the proposed rule stage, but have routinely published draft EAs in the past to allow the public time to consider and comment on the full range of potential impacts of actions under consideration in our region. We have clarified our intent for these measures in our development the final EA. Our proposed rule and this final rule provide the analysis for our conclusion that we expect the method used to set the target ASM coverage level, and the 14-percent 2016 target coverage level, to meet the 30-percent CV precision standard specified in the Northeast Multispecies FMP. We have not changed our requirement to ensure that the target coverage level will achieve the required CV standard. If the target coverage level resulting from this method was too low to ensure we would achieve the 30-percent CV standard, we would set a different target coverage level to achieve that standard.

Comment 19: Oceana, EDF, and TNC questioned the effectiveness of the 30-percent CV standard as a mechanism for setting monitoring levels, and commented that this precision standard may not accurately determine sector catch and ACE utilization. These commenters noted the worsening retrospective patterns in the assessments, and that overfishing occurred every year that the ASM program met the 30-percent CV standard, even as reported landings and discards stayed below ACE levels. EDF highlighted that lower coverage levels will undermine stock assessments and lead to overfishing, which violates National Standard 1. EDF and Oceana noted that the changes included in Framework 55 violate our obligation under the Magnuson-Stevens Act to ''assess and specify the present . . . condition of the fishery'' and ''assess the amount and type of bycatch'' occurring in the fishery. EDF also asserted that additional reporting mechanisms meant to support the ASM program, such as vessel and dealer reports, and enforcement mechanisms, are not working.

Response: Framework 55 does not alter Amendment 16's primary goal for ASM monitoring to verify area fished, catch, and discards by species, by gear type. Rather, it underscores it. Framework 55 further clarifies that Amendment 16's goals and objectives as identified in Framework 48 must meet this goal by the most cost-efficient means practicable. This is consistent with the Magnuson-Steven Act requirement to take into account cost considerations without compromising conservation. To effectuate this goal, the specific ASM measures included in Framework 55 are narrowly focused on adjusting the method used to set the target coverage level for the industry-funded ASM program in order to meet the 30-percent CV requirement, among the other existing goals and objectives of the program. During the development of Framework 55, we advised the Council that any larger changes to the ASM program would likely require an amendment rather than a framework adjustment.

Framework 48's goals and objectives for the ASM program include performing periodic reviews of the monitoring program's effectiveness. Framework 55 does not change this goal, and we agree with the commenters that review should include evaluating the groundfish monitoring program beyond this action, including whether the 30-percent CV standard is the most appropriate way to set ASM coverage levels. NMFS, and now industry, are both devoting considerable financial resources to achieving this precision standard, and it is important to fully consider whether this expenditure is appropriate to meet the groundfish monitoring goals and objectives. Further evaluation is also warranted in light of the 2015 assessment results, potential changes in the fishery since 2010, and now that the sector program has been operational for over 5 years. As noted in previous responses to comments, this evaluation must occur through the Council, and is already underway.

We agree with the commenters that an evaluation of the ASM program must include a review of its performance for providing data for stock assessments and reducing management and/or biological uncertainty, along with all of the other goals and objectives identified by Framework 48. The CV standard, however, only sets the level of precision that will be achieved through catch sampling. A precision standard for at-sea monitoring by itself cannot account for the entirety of scientific and management uncertainty. For example, we recognize that overfishing is still occurring for many groundfish stocks despite the fact that we have met the CV standard, and ACL overages have not occurred. A 2013 NMFS publication (Methot, R. 2013) discusses this possibility, and explains ''that scientific and management uncertainty mean that simply setting targets below limits does not necessarily prevent the stock from experiencing overfishing'' (p. 63). The overfishing status of a stock can be based on an estimate of fishing mortality compared to the threshold, or catch being greater than OFL. However, because the fishing mortality threshold and the OFL are based on estimates, they cannot perfectly reflect what is happening to the fish stock. Further, overfishing can be caused by a number of factors, including a lack of effective management controls and scientific uncertainty in fishing mortality estimates or environmental factors. As is the case with many groundfish stocks, new scientific information and updated assessments have changed the perception of stock status from when catch limits were specified.

As the commenters point out, achieving a certain level of precision

around the discard estimate does not guarantee that overfishing will not occur. Rather, the suite of management measures used for any fishery is designed to minimize the probability that overfishing occurs. Assuming that the ACLs are set correctly, the groundfish sector program includes an array of accountability measures beyond monitoring, such as restricted gear areas and common pool trip limits. These measures are regularly evaluated and adjusted in response to updated scientific information to ensure they are meeting their intended goal. The buffer between the OFL and ABC can also be adjusted to better account for scientific uncertainty, and the SSC frequently uses this approach to set groundfish catch limits. We will continue to use the information in the assessments to adjust catch limits and management measures to prevent overfishing.

EDF and Oceana noted that the changes included in Framework 55 violate our obligation under the Magnuson-Stevens Act to ''assess and specify the present . . . condition of the fishery'' and ''assess the amount and type of bycatch'' occurring in the fishery. However this requirement is satisfied by the Greater Atlantic Region SBRM, not the ASM program. The sector ASM program is a separate program with distinct goals. Providing additional data for stock assessments is one of the goals of groundfish monitoring programs and is considered when evaluating the ASM program and setting the target coverage level. This statement is not meant to diminish the information benefits the ASM program provides for stock assessments, but is meant to clarify that the changes to the ASM program in Framework 55 are not in violation of our SBRM requirements under the Magnuson-Stevens Act.

Last, we do not use the CV standard alone to reliably estimate catch. There are many reporting requirements that vessels adhere to, and there are strong incentives for vessels to report accurately. Enforcing reporting requirements is currently a high priority for the Northeast Division of the NOAA Office of Law Enforcement, and the threat of a civil or criminal enforcement action creates a strong incentive for compliance. There is also a strong incentive for sectors to promote internal compliance, because a sector and the fishing businesses in a sector can be held jointly and severally liable for overages and misreporting of catch, including both landings and discards. The percent of overall catch composed of discards has a larger impact on monitoring ACLs than the 30-percent CV standard. Landings remain the largest portion of catch for allocated stocks and are reported by dealers, vessels, and sectors.

Despite uncertainty that exists in assessments and the degree of imprecision in monitoring inherent in the 30-percent CV standard, we will continue to use the information in the assessments to adjust catch limits and management measures to prevent overfishing. National Standard Guidelines recognize that scientific and management uncertainty exists and requires consideration of, and accounting for, such uncertainty when setting catch limits.

To that end, significant additional uncertainty buffers are established in the setting of ACLs that help make up for any lack of absolute precision and accuracy in estimating overall catch by sector vessels. Although the commenters focus on uncertainties in assessments that merit consideration when evaluating the information provided by the ASM program in future actions, the commenters provide no concrete evidence of a link between Framework 55's coverage target adjustments to our ability to adequately monitor sector catch and provide information sufficient for assessments. We conclude that sector monitoring requirements overall, including the adjustments to the method used to set the ASM coverage level, are sufficient to monitor sector ACE and prevent overfishing.

Comment 20: Oceana, EDF, TNC, and PERC expressed fear that the ASM coverage level for 2016 will be too low, will incentivize illegal discards, and will create harmful bias. Oceana and EDF cited numerous Groundfish PDT analyses that identified the likelihood of observer bias (*i.e.,* behavioral differences between fishing trips with or without an observer). EDF argued that lease prices and recent cod discard rates are evidence that discarding is high in the groundfish fishery, and is likely resulting in catch in excess of the annual catch limits.

Response: The ASM portion of sector monitoring program relies on the assumption that calculated discard rates on observed trips can be applied to unobserved trips. However, if vessel operators discard fish at higher rates when there are no observers on board, then catch (and overall mortality of fish) will be higher than estimated. For the 2013–2015 fishing years, we have published a summary report explaining and justifying the ASM coverage level needed to monitor catch levels for each year (*http://www.greateratlantic.fisheries.noaa.gov/aps/monitoring/nemultispecies.html*). The summary report includes the most recent considerations of accuracy related to the ASM program, both completed during the 2012 fishing year. Oceana and EDF both cite the major analyses on accuracy done in support of ASM coverage levels, namely a NMFS analysis evaluating the possibility of an observer effect in monitoring discards in the groundfish fishery, and a NMFS analysis on the probability of exceeding catch limits based on a hypothetical increase in the rate of discarding on unobserved trips. Overall, the available analyses suggest that potential biases in ASM data do not negate the utility of the discard estimates provided by the program.

EDF cites our analysis of at-sea monitoring requirements for the Northeast multispecies sector fishery, but draws the unsupported conclusion that discarding increases on unobserved trips. An analysis contained in that report examined if there were indications of an observer effect on groundfish trips that could result in either systematic or localized biases, which would suggest that observer data used to generate discard estimates may not be representative. This study evaluated whether differences in performance occur when a vessel carried an observer and when it did not. The study found evidence for some differences in fishing behavior between observed and unobserved groundfish trips; however, the analysis could not conclude whether the apparent differences would necessarily result in discard rates on unobserved trips that are different (higher or lower) than on observed trips. If the discard rate is unchanged, then the apparent differences would not affect total discard estimates.

Oceana cited another NFMS analysis, included in the same ASM summary report, which found that even if there is some bias that increases unreported discards, the discard rate for the groundfish sector trips studied would need to be five to ten times higher on unobserved trips to appreciably increase the risk for total catch to exceed the ABC or OFL. None of the analyses conducted to date suggest behavioral differences on observed versus unobserved trips of this magnitude. Neither commenter provides evidence of the magnitude of potential discarding. The analysis concluded that, given that landings are below the total sector ACLs, setting a monitoring coverage level that meets the 30-percent CV requirement at the stock level provides a reasonable level of certainty that observer bias would have to be much larger than plausible before the risk of exceeding the OFL would exceed

5 percent. Based on the discussion in these analyses, we have not recommended an adjustment to the target ASM coverage level, or to other monitoring requirements, to address bias in this and past fishing years because there is no scientific information available at this time to estimate a reliable adjustment factor.

None of the commenters provided information showing that a reduction in the target coverage level will coincide with or cause increased bias involving increased discards on unobserved trips, or the magnitude of any such increased discards. EDF commented that there is an economic incentive for a vessel to fish differently when an observer is on board. There may be economic incentives to discard stocks with low catch limits to avoid reaching those limits. It is unclear, however, whether and how this incentive changes as target monitoring levels increase or decrease, or when a vessel is required to pay for an at-sea monitor's services and warrants further review when evaluating the ASM program. For example, at the June 2015 Council meeting during the development of Framework 55, EDF commented that observer bias was due to NMFS subsidizing ASM costs for industry since 2010. Because sectors have not had to pay for ASM, EDF noted the incentive for bias exists to catch less on observed trips. This argument posits that the bias incentive occurs when fishermen do not pay for ASM services, presumably because they can better afford a trip that avoids discarding and results in less catch. Based on this argument, one may equally infer that, when industry pays for ASM, their economic incentive to fish differently on monitored trips may change. In the absence of any studies or analysis to support these conclusions, or that show the magnitude of any such incentives and changed behavior, we have no reasonable basis for setting different coverage target rates or using a different method than provided for in this action. We have determined that changes to the method used to set the target ASM coverage level, and the resulting 14-percent coverage level set for fishing year 2016, are expected to reach a 30-percent CV, and will provide accurate and precise enough discard estimates to monitor sector ACEs and ACLs.

Finally, EDF and TNC argue that the low GOM cod catch and ACE lease price in the 2015 fishing year is evidence that vessels are illegally discarding GOM cod on unobserved trips. This allegation is based on many assumptions about the abundance, distribution, and catchability of GOM cod, and the ability of vessels to avoid GOM cod. EDF and TNC ignore the simplest logical deduction, that if the stock assessment has accurately characterized the abundance of GOM cod as truly low and the population as highly concentrated, and that vessels are successfully avoiding GOM cod, then we would expect to see a decline in catch and resultant decrease in ACE leasing price.

Amendment 16 specified that ASM coverage levels should be less than 100 percent, which requires estimating the discard portion of catch, and thus total catch. While it is required that the overall ASM coverage level must meet at least a 30-percent CV precision standard, that level of coverage also must minimize effects of potential monitoring bias to the extent practicable while maintaining as much flexibility as possible to enhance fleet viability. In order to assure perfect accuracy (*i.e.,* zero bias), 100-percent observer coverage would be required. However, complete coverage is not only prohibited by Amendment 16, but would be expensive, not in the public interest, and inconsistent with National Standards 5, 7, and 8.

Ultimately, the target ASM coverage level should meet the 30-percent CV standard and provide confidence that the overall catch estimate is accurate enough to ensure that sector fishing activities are consistent with National Standard 1 requirements to prevent overfishing while achieving on a continuing basis optimum yield from each fishery. We have determined that applying the method we approve in this action to set the 2016 target coverage level of 14 percent will meet this goal. Our determination incorporates all of our sector monitoring and reporting requirements, including obligations on sectors to self-monitor and self-report, which is linked to Agency monitoring. For the most part, the commenters have generally asserted that this system and level of monitoring is not adequate without providing any specific justification or information to support their assertion. As noted in other responses, this action does not specify a fixed ASM coverage target for all future years, and only refines the process we use for predicting the level of ASM coverage necessary in a given year to achieve the 30-percent CV requirement. In comparison to previous years, the refinements made in this action could lead to lower, or higher, ASM coverage target rates in future years.

We agree that it would be beneficial to complete additional analysis of the potential sources of bias. However, it is difficult to quantify bias, or make definitive conclusions on these types of analyses, because data must be used to infer activity that may not be observed or documented. Available analyses suggest that bias is not likely to undermine our ability to monitor ACLs. We support the continued improvement of available analyses, especially in light of the recent declines in groundfish catch limits, and expect that as additional data become available, these types of analyses will improve.

Comment 21: EDF commented that the only accountability measure in the groundfish fishery is the pound-for-pound payback provision.

Response: Framework 55 did not address groundfish accountability measures, and this comment is outside the scope of this action. Nonetheless, we disagree that the only accountability measure in the groundfish fishery is the pound-for-pound payback provision. That provision is only one of a complex set of proactive and reactive accountability measures designed to prevent overfishing. These measures were implemented in Amendment 16, and modified through a number of subsequent framework adjustments. The accountability measures include inseason closures and possession limit adjustments, area closures, and selective gear requirements in addition to the pound-for-pound payback provision. These measures are required to comply with the Magnuson-Stevens Act and reflect the spectrum of AMs recognized in the National Standard 1 guidelines.

Comment 22: CLF suggests abandoning ASM and relying instead on only VTRs.

Response: We disagree. We have determined the adjustments to the method used to calculate the target ASM coverage level will result in coverage levels that will provide information comparable to past years. In addition, we expect the 14-percent target ASM coverage level approved in this action will achieve the 30-percent CV requirement. As noted elsewhere in our responses, the ASM program is only one component of a larger sector monitoring system designed to ensure that sector catch stays below ACLs. As a result, the overall system, including NEFOP coverage, ASM, VTRs, dealer reports, and other factors, provides benefits over relying only on VTRs for catch monitoring.

Comment 23: EDF comments that low levels of monitoring will have a direct negative impact on enforcement.

Response: We disagree that ASM levels will negatively affect enforcement. ASM is not part of our enforcement program. At-sea monitors are aboard vessels strictly for data

collection. To the extent that the presence of at-sea monitors on fishing trips encourages compliance, it is a benefit, but is not the goal or objective of placing monitors aboard vessels.

Comment 24: EDF claims that ASM reductions will have the greatest impact on non-allocated stocks.

Response: We agree that reductions in ASM coverage levels may disproportionately affect our catch estimates for non-allocated stocks because catch for these stocks is mostly comprised of discards. However, we expect that the approved adjustments to the method used to calculate the target ASM coverage level and the resulting 14-percent target coverage level for 2016 announced in this action will achieve the required 30-percent CV on discard estimates for all groundfish stocks. Looking back at the coverage levels required to meet a 30-percent CV for the five non-allocated stocks, coverage levels under roughly 8 percent would have resulted in a 30-percent CV in each year from 2010 to 2014. In each year from 2010 to 2014, catch of Atlantic halibut, ocean pout, and wolffish was below the ACL. The Council addressed ACL overages for the windowpane flounder stocks with reactive accountability measures by requiring the use of selective trawl gear. Nonetheless, because these stocks have the potential to be most impacted by the changes in Framework 55, they will need to be a focal point of consideration of the Council's efforts to revise groundfish monitoring programs.

Comment 25: EDF recommends increasing management uncertainty buffers to account for the additional uncertainty that will result from lower ASM coverage levels. They allege that reducing ASM without adjusting uncertainty buffers violates the Magnuson-Stevens Act and is arbitrary and capricious. They assert that the Agency can no longer rely on the assumption that discarding is minimal, and that observer bias can be estimated to an effect of nearly zero as justification for not adjusting management uncertainty buffers.

Response: Each time catch limits are set, the PDT reviews the management uncertainty buffers used for each fishery component and recommends necessary adjustments. For Framework 55, the PDT reviewed the current management uncertainty buffers, as well as previous analysis completed in support of Framework 50.

Both the PDT and the Council have periodically discussed the possibility of increasing the buffers due to evidence that fishing behavior may differ on observed and unobserved trips, possibly resulting in an underestimate of discards. However, to date, there is no scientific basis for determining either the direction or magnitude of bias sufficient for the PDT to estimate the amount of suspected bias on unobserved trips. As a result the PDT has been unable to determine whether any adjustments to the existing buffers would be warranted to address potential bias. The PDT concluded that no new information is available at this time that would warrant any changes to the buffers previously adopted in Framework 50, and recommended no changes to the management uncertainty.

The commenters provide no quantitative evidence of a specific amount of unobserved discarding, and do not suggest a method to quantify bias in order to adjust the management uncertainty buffer. As stated above, we agree that it would be beneficial to complete additional analysis of the potential sources, magnitude, and direction of bias. However, it is difficult to quantify bias, or make definitive conclusions on these types of analyses, since data must be used to infer activity that may not be observed or documented. Thus, at this time, we are not able to reasonably determine an appropriate adjustment to the management uncertainty buffer than is already used. Using the best scientific information available is neither arbitrary, nor capricious, but is consistent with the National Standards.

Comment 26: Commenters make various claims about the economic analysis of the ASM program. Oceana claims that, though the adjustments in Framework 55 are built on the Council's desire to control ASM costs, the economic analysis shows that the estimated declines in groundfish revenues on groundfish trips when comparing both the ''No Action'' alternative (41 percent target ASM coverage) to the adjusted program (14 percent target ASM coverage) are virtually identical when compared to predicted groundfish revenues for the 2015 fishing year. They conclude that substantial changes to the ASM program to minimize costs are not even achieving that goal. EDF points out that the cost savings of adjusting the ASM program as proposed is overestimated because sectors are able to negotiate lower rates for ASM. Finally, EDF notes that the IRFA and economic analysis fail to analyze the cost of lower monitoring in the potential form of overfishing or on the leasing market.

Response: Oceana correctly notes that the model results indicate that gross revenues are predicted to be essentially unchanged when comparing 14 percent ASM coverage to 41 percent ASM coverage. This does not, however, reflect the change in costs or profitability of those revenues. Section 7.4 of the EA contains the economic analysis done in support of this action; details of the economic analysis are not repeated here. The model is intended to capture fishery-wide behavior changes related to both catch limits and other management changes such as ASM coverage levels, and can overestimate landings in a number of circumstances. The EA highlights that the predicted groundfish revenue is nearly identical when there is 14 percent ASM coverage ($52.4 million) and 41 percent ASM coverage ($52.3 million), and attributes this finding to the model assumptions. The economic model simulates fishing activity until all quotas have been reached in all broad stock areas, and assumes that ACE flows freely from lessor to lessee (which underestimates trips costs). Within the model, trips that become unprofitable due to ASM costs are not selected. Because of this, one might expect revenues to decline more substantially with higher ASM coverage levels. However, as more trips are unprofitable under the options with industry-funded ASM, the model is forced to select a greater number of profitable trips. With higher ASM coverage levels (and higher ASM costs), more sector trips become unprofitable. As the ACE from these trips that are no longer profitable flows to another sector member, then revenue from these trips is still realized in the model. The result is that revenues appear nearly equal between options with 14 percent and 41 percent ASM coverage. In reality, because ACE does not flow freely between sectors, and not all vessels can opt for all types of trips, higher ASM coverage levels may in fact reduce gross revenues.

The analysis in the EA assumes ASM costs are $710 per seaday, based on the cost that NMFS was able to negotiate with service providers. As EDF points out, sectors were successfully able to negotiate lower seaday costs for ASM. However, the fact that sectors were able to negotiate lower costs does not diminish the significant economic impact of the industry-funded ASM program on individual fishery participants and sectors. Our economic analyses predict economic impacts for average vessels in different size classes, or the fishery as a whole, but could mask very real economic impacts at the vessel or community scale.

We disagree with the comment that the EA fails to consider the costs of lower monitoring in the form of overfishing. Section 7.4 of the EA

discusses that it is not possible to determine the overall economic benefits of ASM at this time. The EA notes that, while increased coverage can improve discard estimates, the marginal value of each percent increase in ASM coverage is unknown. We agree that additional analysis is warranted to attempt to determine the marginal benefits of the ASM program in terms of the stock biology. Until additional information is available, we will continue to implement the existing groundfish monitoring program, and will continue to set ASM coverage levels that meet the program goals and precision standards. Similarly, for the leasing market, the EA concludes that additional precision may or may not lead to changes in available ACE to a sector (*i.e.,* assumed discards were too high or too low). Thus, the marginal value of added precision from each percent increase in ASM coverage is unknown. The NEFSC conducts annual retrospective analyses of the leasing market in its groundfish fishery performance reports. The most recent version of the report, which analyzes the 2013 groundfish fishing year, is available here: *http://www.nefsc.noaa.gov/read/socialsci/pdf/groundfish_report_fy2013.pdf.*

Comment 27: EDF notes that Framework 55 fails to analyze the possibility of reducing costs to fishermen by using electronic monitoring, consistent with RFA requirements. EDF and TNC both urge NMFS to expedite the implementation of electronic monitoring and reporting programs, and that electronic monitoring would reduce uncertainty in catch data and improve stock assessments at a lower seaday cost than ASM.

Response: Last year, in collaboration with the Gulf of Maine Research Institute (GMRI), Archipelago Marine Research, Ltd., Saltwater, Inc., and EcoTrust Canada, we developed an assessment of the potential costs of an electronic monitoring program for a hypothetical Northeast multispecies fishery sector, and compared it to the costs of the existing ASM program, which it could replace or augment. We are also in the process of updating that assessment. Based on how an electronic monitoring program is designed and implemented, video review and storage costs can be substantial. Thus, we do not agree with the commenter's characterization of the potential cost savings with electronic monitoring at this time. The commenters promote the potential for lower costs with electronic monitoring than with at-sea monitors, but provide no cost estimates to substantiate the claim that it is less expensive than ASM. Electronic monitoring costs will be determined largely by the purpose and scope of particular electronic monitoring coverage and the available technology to meet those needs.

The Northeast Multispecies FMP already allows sectors to use electronic monitoring in place of at-sea monitors if the technology is deemed sufficient for a specific trip, based on gear type and area fished, if approved by NMFS. We had been working with TNC, GMRI, EcoTrust Canada, and several sectors for the last year, to implement a program that would have used electronic monitoring to monitor the fishery. We have approved an exempted fishing permit to allow a number of sector vessels to participate in an experiment using electronic monitoring in lieu of ASM to further develop a program based on electronic monitoring for sectors. NMFS will continue to support development of electronic monitoring as a potential tool where it is fitting and appropriate.

Comment 28: EDF and TNC suggests that NMFS should have considered the weighted discard proportional approach, as published by Dr. Jenny Sun, as an alternative to lowering the overall target ASM coverage level in Framework 55. EDF also notes that this method may reduce cost to small entities, and thus address requirements of the Regulatory Flexibility Act (RFA).

Response: The PDT has discussed this approach at meetings in September 2012 and from May–August 2015; however, the Council did not elect to consider this approach in past actions, or as an alternative in Framework 55, because it did not meet all of the goals and objectives in Amendment 16 and Framework 48. This approach assigns ASM coverage proportional to the weight of discards anticipated on a given trip, and does not include consideration of the 30-percent CV requirement specified in the regulations. At both times, the PDT concluded that more trips would require coverage than those included in the proposed analysis, which would erode some of the cost savings in the proposed approach. The PDT also discussed that allocating ASM coverage to focus on larger, offshore vessels that account for more of the discards would potentially lead to under-coverage of sectors with smaller, inshore vessels that are responsible for catch of species of concern, such as GOM cod and SNE/MA yellowtail flounder, as well as unallocated stocks with zero possession. The PDT, other NMFS reviewers, and several commenters have noted that the objective of the ASM program is not simply to determine the lowest cost approach to observe the most catch across the groundfish sectors in total, or to only reduce the costs of monitoring to small vessels. Rather, the objective is to achieve sampling that ensures precise and unbiased real-time estimates of catch by stock, sector, and gear. This weighted approach would also have to address cost discrepancies in imposing ASM coverage primarily on larger, offshore vessels over smaller vessels, inshore vessels.

Dr. Sun recently published a peer-reviewed article (Sun and Fine, 2016) that included additional adjustments to the approach, in which coverage is further weighted to account for stocks with high utilization. This article was published on December 29, 2015, after the Council developed and took final action on Framework 55. The Groundfish PDT received a presentation on the revised analysis at its March 30, 2016, meeting, and intends to review this approach, along with other monitoring approaches, as part of the development of the forthcoming groundfish monitoring amendment. The Council can choose to further develop this approach if it meets the Council's goals and objectives for groundfish monitoring programs. We reiterate that adopting this approach to groundfish monitoring would require a Council amendment, because it would change the objectives and standards for the groundfish monitoring program established in Amendment 16 and Framework 48.

As stated elsewhere in this rule, this action does not specify a fixed ASM coverage target for all future years, and is not approving a lower target ASM coverage level in perpetuity. Rather, this action refines the process we use for predicting the level of ASM coverage necessary in a given year to achieve the 30-percent CV required. In comparison to previous years, the refinements made in this action could lead to lower, or higher, ASM coverage target rates in future years. Thus, while the Council and our analysis considers the impacts of a reduced ASM coverage level for 2016, we do not necessarily expect that the lower coverage level will persist for future fishing years.

Comment 29: EDF and Oceana claim that the changes proposed in Framework 55 ignore National Standard 1 in favor of National Standard 7. EDF notes that costs may only be considered when two alternatives achieve similar conservation goals. EDF and TNC note the EA states that reducing ASM coverage will have negative biological impacts compared to the No Action alternative.

Response: The Framework 55 adjustments to the method used to set that target ASM coverage level achieve the required Northeast Multispecies FMP precision standards without compromising conservation goals. The 30-percent CV standard, and the requirement under Amendment 16 to sufficiently verify area fished, catch, and discards by species, by gear type, remain unaltered. Framework 48 clarified the objectives of Amendment 16's ASM program to ensure that ASM coverage levels must be consistent with the goals and objectives of groundfish monitoring programs, the National Standards, and the requirements of the Magnuson-Stevens Act, including but not limited to costs to sector vessels and NMFS. This is consistent with Amendment 16's goals of achieving economic efficiency and minimizing adverse impacts to fishing communities that are included in Framework 48's goals of reducing monitoring costs and balancing actual costs against the opportunity costs of insufficient monitoring. Framework 55 simply further clarifies that monitoring must be implemented in the most cost-efficient means practicable.

In addition, the goals of Amendment 16 and Frameworks 48 and 55, are consistent with our requirement to take into account the National Standard, and in particular National Standards 1, 2, 5, 7, 8, and 9 in making our determination of the appropriate level of ASM coverage for sectors on an annual basis. These National Standards specifically speak to preventing overfishing; using the best scientific information available; efficient use of fishery resources; minimizing costs, and avoiding duplications where practicable; taking into account impacts on fishing communities; minimizing adverse economic impacts to the extent practicable; and minimizing bycatch and bycatch mortality to the extent practicable.

We agree that the EA characterizes the impacts of lower ASM coverage levels as negative compared to higher ASM coverage levels. The EA notes that positive impacts of higher ASM coverage levels could include better information for stock assessments and reduced uncertainty around discard estimates. However, any quantification of the magnitude of these types of benefits is speculative, and can only be discussed as marginal because it is not yet possible to quantify the biological outcomes relative to the information gained with each additional percentage of monitoring coverage. A similar concept is highlighted in the economic analysis in section 7.4 of the Framework 55 EA, in terms of the overall benefit of added precision in discard estimates. The EA notes that the marginal value of added precision from each percent increase in ASM coverage is unknown. Hence, the EA describes any impact potential as low.

We have generally characterized the benefits of higher monitoring coverage levels as positive compared to lower monitoring coverage levels in other actions in this region (*e.g.,* the joint New England/Mid-Atlantic Council Industry-funded Omnibus Amendment), and have largely tied this positive benefit to the potential for improvements in stock assessments and on the types of management measures that may be necessary to address bycatch. However, as we have discussed in these related analyses, there are several reasons why these types of potential downstream effects (*e.g.,* improvements to stock assessments) are considered too remote and speculative to be evaluated quantitatively.

First, this action adjusts the method used to set target ASM coverage levels. The adjustments to the method used to set target ASM coverage levels do not, by themselves, automatically allow for higher ASM coverage in future fishing years. While increases in target ASM coverage levels may be expected to improve data quality, realization of an increase in the target coverage level compared to past fishing years depends on the coverage levels generated by the changes approved in this action. As noted elsewhere in this section, in comparison to previous years, the changes in this action could lead to lower or higher ASM coverage target rates in future years. Thus, while the Council's and our analysis considers the impacts of a reduced ASM coverage level for 2016, we do not necessarily expect that the lower coverage level will persist for future fishing years.

Second, in addition to the uncertainty of what target coverage rates will be set in future years, the potential effects of increased data deriving from a method setting target coverage rates are too remote and speculative to be quantitatively evaluated in the EA because there is no way to predict the effect that an improvement in data quality would have for managing the groundfish fishery. Improvements in data quality would give assessment scientists and fishery managers more confidence in the data. However, there is no way to predict the type of new information that would arise from future catch estimations (*e.g.,* higher or lower discard estimates). Because changes in direction of catch estimation cannot be predicted at this time, there is no way to predict whether changes in management would be required to address any potential issues that may arise.

Thus, while acknowledging that it is not possible to quantify the biological benefit for higher coverage, the EA makes conclusions concerning environmental impacts from lower or higher coverage based on the idea that more information from monitoring tends to reduce uncertainty in setting catch limits and assessments. However, by this principle alone, and without consideration of other factors, one would be required to conclude that coverage rates should never be reduced, and should always be increased if possible. To underscore the imprudence of following this logic, in similar fashion one could conclude that fishing should always be reduced because less fishing mortality generally benefits fish stocks. The National Standards, Amendment 16, and Frameworks 48 and 55 require consideration of other factors, however. Specifically, we must consider the efficient use of resources for monitoring catch limits and preventing overfishing. In this instance, we have considered the target coverage rate required to monitor catch rates in the most efficient manner practicable. While one may conclude that a generally higher coverage rate may provide more catch information that would potentially reduce uncertainty, any potential benefit to fish stocks in the future from more information is more attenuated than the sufficiency of the information for the immediate task of monitoring of catch limits and the cost benefits that come from the efficient use of monitoring resources to achieve that purpose. We are required by law to consider these other factors when determining a rate of coverage that meets conservation requirements.

Comment 30: EDF claims that the Agency failed to explain its decision to depart from the 80-percent of discard pounds observed at a 30-percent CV standard, and that it is arbitrary and capricious for the Agency to remove this standard without explaining why.

Response: We disagree that we failed to explain our decision to depart from this discretionary, administrative standard. As discussed in the proposed rule, and in the Summary of Analyses Conducted To Determine At-Sea Monitoring Requirements for Multispecies Sectors for Fishing Year 2015 (available here: *http://www.greateratlantic.fisheries.noaa.gov/aps/monitoring/nemultispecies.html*), we had previously concluded that it is desirable to maintain a 30-percent CV or better for at least 80 percent of the

discarded pounds in the fishery. We applied this standard in the initial years that the ASM program operated for a number of reasons. First, the program was new, and we lacked experience and data. In the initial years that the program was implemented, when we did not have coverage information from previous years, this standard was chosen to guide setting target ASM coverage levels to achieve results consistent with the initial monitoring year, when the realized observer coverage was highest. When Federal funding was available to cover industry costs for the ASM program, we could justify applying a discretionary standard that resulted in higher coverage levels than required by the program because it did not impose an additional economic burden on industry.

During the development of Framework 55, using coverage information that was unavailable when the administrative standard was first adopted, the PDT reevaluated this administrative standard, and determined that it was not necessary to accomplish the goals of the ASM program. As noted in the proposed rule, this standard is not necessary to satisfy the CV requirement of the ASM program to accurately monitor sector catches, or meet the other monitoring program goals, and it was not required by the Northeast Multispecies FMP. Further, imposing a standard that results in coverage higher than necessary to meet the program goals would not be consistent with National Standards 5, 7, and 8, which relate to efficiency in the use of fishery resources; minimizing costs and avoiding duplications where practicable; efficiency in the use of fishery resources; and taking into account impacts on fishing communities and minimizing adverse economic impacts to the extent practicable. Removing this administrative standard makes the method used to set the target ASM coverage level more efficient, while still addressing groundfish monitoring program objectives.

Comment 31: Oceana claims that enlarging the data set used to include the volatile, anomalous period from 2012 to 2014 is inappropriate for setting coverage levels. Oceana asserted that we failed to provide evidence supporting the claim that this longer period is a better foundation for forecasting monitoring than most recent complete year. They go on to say that using an averaged approach ignores the fact that the dynamics of the fishery have led to a different stock driving the ASM coverage level in each year to date. They assert that using multiple years of data violates National Standard 2 because it would amount to using an unrepresentative sample of the data. Finally, they claim that the multiyear approach is not able to respond to emergent trends in the fishery in a timely fashion. They assert that NMFS must retain the ability to respond to changes in fishing behavior quickly to ensure accurate and precise fishery monitoring.

Response: We disagree. Currently, the coverage level for year 3 is set prior to the end of year 2, using data from year 1 because that is the most recent complete set of data available. Because of this need to plan ahead using older data, relying on a single year of data does not necessarily give us a more accurate representation of current or future conditions than using three years of data. Looking at 5 years of data from fishing years 2010–2014, it is clear that the stock with the greatest variability in discards, and greatest need for ASM coverage, not only varies from year to year, but the species requiring the most ASM coverage in year 3 has never been accurately predicted by year 1 data.

Section 7.1 of the Framework 55 EA compares the performance of basing the target coverage level on 1 year of data to 2- and 3-year averages to evaluate their ability to predict the coverage level necessary to achieve a 30-percent CV in 2014. To predict the target coverage level using 1 year of data, the 2012 target coverage level was used to predict the coverage necessary to achieve a 30-percent CV for 2014. For the 2-year average, data for 2011–2012 was used. For the 3-year average, data from 2010–2013 was used. Overall, the 3-year average performed relatively well compared to using a single year, or 2-year average. The EA acknowledges that, because the ASM program only started in 2010, there are a limited number of years of data available to make this comparison, and that more years of data and analysis are necessary to make the final conclusion regarding the most appropriate approach. Therefore, using multiple years of data may reveal true trends while minimizing non-significant fluctuations, which provides for additional stability for industry consistent with National Standards 5 and 8.

In addition, averages are routinely used in fisheries management to smooth interannual variability. In the Greater Atlantic Region, the recreational fisheries for GOM cod, GOM haddock, summer flounder, scup, and black sea bass base the determination of whether catch has exceeded the recreational sub-ACL by comparing the 3-year moving average of recreational catch to the 3-year moving average of the recreational sub-ACL. For overfished skate species, the 3-year average of the appropriate weight per tow from the trawl survey index is used as a proxy for stock biomass, and is a trigger to indicate whether the additional management measures are necessary to promote stock rebuilding. We have determined that using three years of data will minimize unnecessary fluctuations in the target ASM coverage level while meeting our need to reliably estimate discards.

Comment 32: Oceana commented that exempting extra-large mesh gillnet trips from ASM coverage in Broad Stock Areas 2 and 4 could increase uncertainty around bycatch estimates for protected resources in locations that are especially prone to protected species interactions.

Response: First, the Greater Atlantic Region has observer programs explicitly funded to support Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) information requirements. The MMPA and ESA observers are allocated across fisheries based on the estimated likelihood of protected resources interactions. Allocation of observers related to these acts is separate from the allocations of observers under our region's SBRM program and the ASM program.

We agree that ASM has provided a wealth of information about protected species interactions in commercial fishing gear, particularly in the extra-large mesh gillnet fisheries. The full discussion of the protected species impacts of this alternative is provided in the EA in Section 7.3.3.1.4, and is not repeated in full here. In terms of data collection, the EA notes that removing the ASM coverage requirement for these trips may reduce the amount of information available on protected species interactions in extra-large mesh gillnet gear. From 2010–2014, the number of hauls observed through the ASM program in the extra-large mesh fishery exceeded the number of hauls observed by traditional NEFOP observers, constituting 60 percent of all observed extra-large mesh hauls. Moreover, ASM documented 63 percent of all protected species interactions in the extra-large mesh fisheries. Data collected on protected species interactions through ASM has also reduced uncertainty in bycatch estimates for almost all gear types used in the groundfish fishery. The EA characterizes this potential reduction in information benefits on protected resources interactions in extra-large mesh gear as an indirect, low negative impact on protected resources.

In spite of the information collection benefits the ASM program has provided

for protected resources, gathering this information is not included in the ASM program goals and objectives. Thus, any benefits of the ASM program in terms of protected resources information are ancillary to the program goal. We acknowledge that removing the ASM coverage on extra-large mesh gillnet trips may increase uncertainty in protected resources interactions for this gear type. However, now that industry is paying for the costs of monitoring, it is not reasonable to expect for them to pay for the costs of information collection above and beyond the amount required to support the program goals. In addition, discards of all groundfish stocks are still required to meet the 30-percent CV standard, even if certain trips are excluded from coverage.

Comment 33: In regards to the alternative that filters the application of the 30-percent CV standard, Oceana asserts that exempting a population from ASM coverage requirements is not permitted in the Northeast Multispecies FMP. They note the proposed rule itself states that none of the proposed adjustments remove the obligation under Amendment 16 and Framework 48 to ensure sufficient ASM coverage to achieve a 30-percent CV.

Response: We agree that none of the measures in Framework 55 remove our obligation to achieve a 30-percent CV on all stocks. The measures in this action adjust the process we use for predicting the level of ASM coverage necessary in a given year to achieve the 30-percent CV. The filtering alternative does not exempt stocks from meeting the 30-percent CV standard. Instead, it enacts the Council's policy preference to not use stocks that are healthy and less than fully utilized to predict for the target ASM coverage level for the upcoming year. We are still required to set coverage at a level that is sufficient to achieve the 30-percent CV standard for all stocks and would set a target rate sufficient to achieve this standard and meet the program goals and objectives.

Comment 34: Oceana and TNC question NMFS's ability to effectively apply filtering criteria given uncertainty in stock status and catch data. TNC noted that it is inappropriate to set coverage levels based on a current assessment's understanding of stock status when it is likely the stock status will change with next assessment.

Response: Consistent with National Standard 2, we base our management decisions, including determinations of stock status and annual catch limits, on the most recent assessment information, which is considered the best scientific information available. Because the information from the stock assessments and catch data is used as the basis for most other management decisions for groundfish stocks, including annual quota setting and implementation of proactive and reactive accountability measures for each stock, it is entirely appropriate to also base evaluation of the filtering criteria on this information. We cannot base management decisions on the potential that a future stock assessment may indicate that stock status may change. Further, neither commenter provided data to support the assertion that the information we use to make management decisions are so uncertain or of such poor quality as to render it unusable. For these reasons, we have determined it is consistent with National Standard 2 to evaluate the filtering criteria using the most recent available catch data and most recent stock assessment information.

The filtering alternative is designed to be conservative. It does not exempt stocks from coverage necessary to meet the 30-percent CV requirement. Rather, it removes healthy stocks with low utilization and low discards as predictors for the target ASM coverage level. In addition, target ASM coverage levels are evaluated and updated on an annual basis in order to incorporate the most recent available data. This means that, if new stock status or catch information indicates that a stock no longer meets all of the criteria, then the stock must be used as a predictor for target ASM coverage levels for the upcoming fishing year. For example, if, in setting the coverage level for 2017, 2015 redfish catch data indicated that over 75 percent of the groundfish sub-ACL was caught, or more than 10 percent of 2015 catch were comprised of discards, the stock would not be removed a predictor for the 2017 ASM target coverage level. Further, we are required to set target coverage at a level that is sufficient to achieve the 30-percent CV standard and other groundfish monitoring program objectives.

Comment 35: TNC asserts that declining target coverage levels since 2010 are especially concerning, given that from 2010 to 2014, realized coverage levels have been less than the target set at the beginning of the year.

Response: We disagree with the TNC's concern. Though realized coverage has been less than the target coverage in past fishing years, we have still consistently achieved the 30-percent CV requirement for the vast majority of groundfish stocks in each fishing year. While a target ASM coverage level is expected to generate a 30-percent CV on discard estimates, there is no guarantee that the required coverage level will be met or result in a 30-percent CV across all stocks due to changes in fishing effort and observed fishing activity that may happen in a given fishing year. Due to fluctuations in fishing activity over the year, it is difficult to deploy observers throughout the year and ensure that target coverage levels are attained. The realized level of coverage was below the target each year, though only slightly in the 2014 fishing year. Despite this, since the start of the ASM program in 2010, the realized annual ASM coverage levels have been more than adequate to achieve the 30-percent CV requirement for a vast majority of the 20 groundfish stocks. Only two stocks had a realized CV above 30 over the past 5 years; and on only two other occasions has a stock approached a CV of 30 during this time. In the 2013 fishing year, SNE/MA yellowtail flounder had a realized CV of 31.45; and in the 2014 fishing year, redfish had a CV of 41.69. Given the biological diversity of the northeast multispecies stocks, the range of quotas, and the varying vessels and gears engaged in the fishery, this record is an indicator of success. In 2014, the high CV for redfish is attributed to a single anomalous trip, which reinforces the value of filtering stocks in future years. If we set the target ASM coverage level for the 2016 fishing year at 41 percent based on that one redfish trip in 2014, we would be unnecessarily tripling our and the industry's costs in a vain attempt to capture a rare event that is unlikely to recur and likely not representative of the groundfish fishery, and would not appreciably increase our ability to effectively monitor the sector fishery.

Comment 36: Oceana and EDF commented that the changes in this action should have been included in an FMP amendment instead of a framework because they are substantial and entirely inconsistent with the goals and objectives of the Northeast Multispecies FMP.

Response: We disagree that sector monitoring requirements cannot be revised through a framework action. Sector monitoring requirements, including coverage levels and the performance standard, are listed under sector administration provisions in Amendment 16, which is listed as a frameworkable measure in section 4.8.2 of the Amendment 16 environmental impact statement (EIS). The regulations at § 648.90(a)(2)(iii) list ASM requirements among the measures that may be modified through the biennial review process, as well as AMs, changes to other administrative measures, and any other measures currently included in the Northeast Multispecies FMP.

These changes are elaborations on Amendment 16's goals and objectives for determining appropriate monitoring levels. They do not fundamentally alter the goal of verifying area fished, catch, and discards, by gear type or the requirement to achieve the goals of economic efficiency or minimizing to the extent practicable adverse impacts on fishing communities. Similar changes in Framework 48 were found to be appropriately accomplished through a framework adjustment in *Oceana, Inc.* v. *Pritzker,* 26 F. 3d 33 (D.D.C. 2014).

We also disagree that these changes are inconsistent with the goals and objectives of the Northeast Multispecies FMP. As noted in the proposed rule and this final rule, Framework 55 does not change the 30-percent CV requirement or the monitoring program goals and objectives, and only adjusts the method used to set target coverage levels to meet this requirement. The Council deemed the regulations necessary to accomplish these adjustments as consistent with their intent in Framework 55. Thus, we have determined that these changes are lawful under the combination of allowable framework provisions of the Northeast Multispecies FMP and section 305(d) of the Magnuson-Stevens Act which authorizes NMFS to implement regulations necessary to ensure that Council measures are carried out in a manner consistent with the Act.

Comment 37: Oceana and EDF make a number of claims regarding the NEPA analysis for this action. They claim that the reduction in monitoring resulting from the ASM program changes in Framework 55 will have a significant impact on the environment, and thus should have been analyzed in an EIS instead of an EA. Regarding the EA's compliance with NEPA, the commenters raise the following concerns: The EA fails to consider a reasonable range of alternatives, including other monitoring options such as electronic monitoring; the EA fails to consider cumulative environmental impacts; the EA fails to adequately assess how changes in the realized CVs may impact assessment error, projections, and scientific and/or management uncertainty.

Response: We disagree with the commenters' assertion that Framework 55 violated NEPA because an EIS was not prepared. Consistent with NEPA, Council for Environmental Quality (CEQ) regulations, and NOAA administrative policy, NMFS and the Council collaborated to prepare an EA to evaluate the significance of the environmental impacts expected as a result of the measures in Framework 55. According to the CEQ regulations, and all available guidance on the subject, an EIS need only be prepared when an EA or other related analysis identifies significant effects on the environment or if the facts available to the action agency cannot support the conclusion required to make a finding of no significant impact (FONSI). The Framework 55 EA fully evaluated the expected direct, indirect, and cumulative impacts likely to result from the implementation of the action. The results of this assessment are provided in section 8.2 of the EA, which supports the FONSI, signed on April 13, 2016. The commenters claim that reducing monitoring levels materially reduces our ability to monitor groundfish catch limits, but provided no evidence, nor any claims, that the conclusion in the FONSI are not supported by the facts presented in the EA for this finding.

We also disagree that the EA fails to consider the cumulative environmental impacts of Framework 55. Section 7.6 of the EA explicitly provides a discussion of the expected cumulative impacts associated with this action. We have determined that this treatment of the cumulative impacts is consistent with CEQ regulations and current NOAA policy.

The overall sector monitoring program is not changed by the measures in Framework 55. Specifically, the requirement to set the target ASM coverage levels to achieve a 30-percent CV on discard estimates for groundfish stocks is not changed. We have determined that the modifications to the method used to determine the target ASM coverage level are reasonable and should result in target coverage levels that will meet the 30-percent CV requirement. While we have determined that a 2016 target ASM coverage level of 14 percent can be expected to meet the 30-percent CV target, we note again that this coverage level is not set in perpetuity. This means that, in future fishing years, higher or lower coverage levels could result from the method approved in this action, and we are still required to set target coverage levels at a rate that are expected to achieve the 30-percent CV standard. In addition, this action does not approve any other notable changes to the total sector monitoring program (*e.g.,* other monitoring and reporting requirements). Given that the limited scope of the changes to the sector monitoring program approved in Framework 55, we have determined that the FONSI is well supported.

Comment 38: Several commenters make claims regarding the timing of this action. Oceana and EDF assert that a 15-day comment period was too short to allow the public a meaningful opportunity to comment. Oceana suggested extending the comment period. EDF claims that Magnuson-Stevens Act requires NMFS to immediately (within 5 days of transmittal by the Council) initiate an evaluation of proposed regulations, and make determination within 15 days. They claim that the proposed rule should have been published in the **Federal Register** on March 14, 20 days after submission by the Council on February 19th, instead of on March 21. They also make the contradictory claim that, because NMFS published the proposed rule less than 1 month following Council submission, that there was too little time for NMFS to have conducted its own environmental analysis of the proposed changes to the Northeast Multispecies FMP.

Finally, EDF claims that the Agency may have pre-judged the outcome of the EA in order to ensure that Framework 55 measures would be published in time for May 1. They note that 1 month before Framework 55 was formally submitted, NMFS argued in a preliminary injunction hearing in the U.S. District Court for the District of New Hampshire that harm to the plaintiff was not significant because of the likelihood that NMFS would approve Framework 55 measures and reduce monitoring levels.

Response: We disagree that the 15-day comment period was not enough time to allow commenters to provide meaningful comments. The Council initiated Framework 55 at its June 2015, meeting and developed alternatives over several meetings including their September and December meetings, as well as the September 3, 2015, and the November 18, 2015, Groundfish Oversight Committee meetings. The alternatives were also discussed at numerous Groundfish PDT meetings from July–November 2015. Representatives from EDF and Oceana were present at the December Council meeting, when the Council took final action on the ASM alternatives in Framework 55. The analysis presented at the December meeting included biological and economic analyses of the alternatives. The alternatives described in the Framework 55 EA and presented in the proposed rule are unchanged from those adopted by the Council in December. Council presentations and documents throughout the development of Framework 55 included a clear outline of the expected timing of the Council and rulemaking process. The public was well aware that the intent was to implement these measures in time for the start of the 2016 groundfish fishing year on May 1, 2016. Therefore,

we conclude that the public, including Oceana and EDF, had more than adequate opportunity to consider and prepare comments on the ASM program adjustments in anticipation of the proposed rulemaking, in spite of the 15-day comment period.

We agree that there is a Magnuson-Stevens Act requirement to initiate an evaluation of proposed regulations for implementing or modifying FMPs or amendments, to determine whether they are consistent with the FMP and applicable law within 15 days, and to publish such regulations for a public comment period of 15 to 60 days. We published the proposed rule within the bounds of the comment period provided for in that provision and the final rule is expected to be published well in advance of the outside time limit specified in the same provision. We believe the publication timeline has provided a meaningful opportunity for full and fair public comment and participation.

Each year since 2013, we have published the target coverage level that we expect is sufficient to achieve the Northeast Multispecies FMP's monitoring goals. This target rate was determined using internal administrative standards we developed to ensure coverage was at a rate based on past experience where we could reasonably expect to achieve these goals. Prior to the Council's adoption of the measures in Framework 55 or approval of this final rule, we developed two of the adjustments to our administration of the ASM program that were also proposed as part of Framework 55. We would have been required to apply these administrative adjustments in the absence of Framework 55 measures as part of default changes had Framework 55 not been published in time for the beginning of the fishing year. Specifically, we planned to stop using our internal standard of monitoring 80 percent of discarded pounds at a 30-percent CV. We also planned to use multiple years of information to set the target ASM coverage level. Because these were changes to our internal mechanisms for administering the ASM program, they were outside of the Council process and did not require public comment. As we were considering these changes and expecting to implement them in time for the new fishing year, we worked with the Council to evaluate these changes in the context of a framework adjustment for the purpose of transparency, and to allow the public the maximum opportunity to participate in the development and evaluation of these changes. The measures in Framework 55 were always subject to our approval or disapproval under the Magnuson-Stevens Act. Our intent to make a subset of administrative adjustments did not pre-determine what impacts may occur and the assessment of those potential impacts of all of the Framework 55 measures. It also did not foreclose the Council's consideration of other alternatives included in Framework 55, their impacts, and an assessment of how they all interacted. Last, we expressed our concern that these adjustments complied with the Magnuson-Stevens Act, its National Standards, and the groundfish FMP's goals and objectives. For example, in our proposed rule we specifically requested comments on whether the Council's proposed revisions to the groundfish ASM program met the requirements of the Magnuson-Stevens Act, its National Standards, and the groundfish FMP to engage the public in our evaluation of the proposed measures.

Comment 39: One individual commented that industry should pay for monitoring.

Response: As described in the proposed rule, Amendment 16 requires industry to pay for ASM. For the 2010 and 2011 fishing year, there was no requirement for industry-funded ASM. NMFS assumed industry's monitoring costs for industry after the industry-funded ASM requirement became effective in the 2012 fishing year, and until March 2016. Sectors have been paying for ASM costs since March 2016, and 2016 will be the first full fishing year where industry will be responsible for its costs for ASM.

Comment 40: Two commercial fishermen commented in opposition to having small boat commercial fishermen pay for ASM, especially those fishing for dogfish and skate.

Response: We share the commenter's concern about the financial burden of industry-funded ASM. Nonetheless, ASM coverage is critical to monitoring sector ACE and meeting the goals and objectives described in Amendment 16 and Framework 48. The ASM requirement applies to all vessels participating in sectors, regardless of vessel size.

We agree that our limited monitoring resources should be focused on sector trips with groundfish catch. This action approves a measure to exempt extra-large mesh gillnet trips in SNE and Inshore GB Broad Stock Areas from ASM coverage requirement, as well as a sector exemption to allow these same vessel to target dogfish in existing dogfish exemption areas. These trips have low groundfish catch, and primarily target non-groundfish species such as dogfish and skate. As noted above, these trips will still be subject to NMFS-funded NEFOP coverage requirements, and all groundfish catch on these trips will still be deducted from a sector's ACE. We will evaluate these trips on an annual basis to ensure that groundfish catch is still minimal enough to continue exempting these trips for ASM coverage requirements.

Comment 41: One recreational fisherman commented in opposition to requiring industry-funded monitors on recreational vessels when commercial vessels are the problem.

Response: The industry-funded ASM program only applies to limited access commercial groundfish vessels enrolled in the sector program. There are currently no ASM coverage requirements in the Northeast Multispecies FMP for recreational groundfish trips.

Other Framework 55 Measures

Comment 42: AFM, SHS, and EDF supported the formation of Sustainable Harvest Sector II.

Response: We are approving the formation of Sustainable Harvest Sector II in this action.

Comment 43: SHS and EDF supported the proposed modification to the sector approval process. SHS commented that streamlining the approval process will allow industry to more quickly adapt to regulatory changes.

Response: We agree, and are approving this alternative as proposed. This measure maintains the Council's authority to approve of new sectors and the opportunity for public participation in the sector approval process, while reducing the total time necessary for sector approval.

Comment 44: The Council commented that, though clear in the proposed regulatory text, the text in the preamble to the proposed rule does not make clear that sector applications need to be simultaneously submitted to the Council and NMFS.

Response: We agree with the Council that the process is correctly described in the regulatory text, and have adjusted to description of this provision in section ''7. Other Framework 55 Measures'' to clarify the Council's intent.

Comment 45: AFM and EDF commented in support of the modification to the definition of haddock separator trawl gear.

Response: We agree. This measure will improve enforceability of this selective trawl gear. We intend to delay the effectiveness of this measure by 6

months to allow industry to replace separator panels.

Comment 46: EDF commented in support of removing the permanent prohibition on recreational possession of GOM cod.

Response: We agree. This measure returns the authority to the Regional Administrator to set the recreational bag limit for GOM cod. This will provide greater flexibility for setting annual management measures that will help the recreational fishery achieve, but not exceed, its quota for GOM cod. We have approved recreational possession limits for GOM cod for 2016 in a separate, concurrent rulemaking.

Comment 47: AFM, SHS, NSC, the SGA, and EDF commented in support of allowing sectors to ''convert'' their eastern GB cod allocation into western GB cod allocation. SHS noted the current mechanism that allows sectors to convert eastern GB haddock allocation into western GB haddock allocation, and that it is an effective tool.

Response: We agree with the commenters, and are implementing this measure as proposed. We anticipate that this measure will maximize flexibility for fishing vessels operating on GB. Eastern GB cod is a management unit of the total GB stock that is used to manage the shared U.S./Canada portion of this stock. As a result, the analysis supporting this measure concluded that there would be negligible biological impact to the stock. In our approval, we recommend that the Council occasionally review the measure in the future to ensure that it is still necessary and appropriate, particularly if there is a change in the stock assessment or the perception of stock status in the future.

Sector Measures for the 2016 Fishing Year

Comment 48: The GB Fixed Gear Sector supported the proposed sector exemption to target dogfish, noting that the exemption supports the current behavior of the fleet, and will maximize viability and profitability.

Response: We are granting this exemption as proposed. This exemption will allow greater opportunities for sector vessels to target non-groundfish species, which may help mitigate some of the negative economic impacts of recent catch limit reductions. As noted earlier in this final rule, allowing sectors to participate in these exempted fisheries for dogfish while simultaneously being excluded from ASM coverage on extra-large mesh sector trips is intended to maximize the viability and profitability of their businesses. We will continue to closely monitor catch from any trips fishing under this exemption to ensure that they continue to have low groundfish catch.

Comment 49: NSC commented in support of the Northeast Fishery Sector XII sector operations plan.

Response: We agree, and are approving the NEFS XII 2016 operations plan in this action.

Comment 50: In light of the significant quota reductions for several key groundfish stocks, AFM supports the maximum 10-percent carryover allowed by law. They noted that significant precaution is built into the ABC and ACL recommendations, and that there is no biological justification for less than the 10-percent carryover.

Response: Framework 55 did not consider adjustments to the sector carryover provision, and these types of adjustments are beyond the scope and authority relating to this action. Framework 53, which was approved and implemented at the start of the 2015 fishing year, modified the sector carryover provision that was approved and implemented in Amendment 16. This change was in response to a 2013 court ruling in *Conservation Law Foundation* v. *Pritzker, et al.* (Case No. 1:13–CV–0821–JEB). Details of this court ruling, and the corresponding changes to the sector carryover provision, are provided in the final rules for Framework 50 (78 FR 2617; May 3, 2013) and Framework 53 (80 FR 25110; May 1, 2015).

Sectors may still carry over up to 10 percent of their unused allocation as long as this amount, plus the total ACL for the upcoming fishing year, does not exceed the ABC. If the full 10-percent carryover possible would exceed the ABC, the Northeast Multispecies FMP requires that we reduce the available carryover for each sector. This provision limits the amount of carry-over to ensure that the ABC is not exceeded for a stock. For 2016, total potential catch would exceed the 2016 ABC for all groundfish stocks, except for GOM and GB haddock, if sectors carried over the maximum 10-percent of unused allocation allowed. As a result, we expect we will need to adjust the maximum amount of unused allocation that a sector can carry forward from 2015 to 2016 (down from 10 percent). The final adjustment will depend on each sector's final 2015 catch. As noted in the preamble, we will make adjustments as soon after May 1 as possible.

2016 Fishing Year Annual Measures Under Regional Administrator Authority

Comment 51: The Council requested clarification regarding the proposed GOM cod trip limit for the common pool and questioned why the trip limit is proposed to decline by 50 percent when the ACL is proposed to increase in 2016.

Response: We attempt to set trip limits that will allow fishing access for an entire trimester while preventing any overages from occurring. In 2015, the initial GOM cod trip limit was 50 lb (22.5 kg) per DAS, up to 200 lb (91 kg) per trip, for Category A DAS vessels. The initial trip limit for Handgear A and B permits was 50 lb (22.5 kg) and 25 lb (11.3 kg) per trip, respectively. Even at these low limits, by late May, about half of the Trimester 1 quota had been harvested. Therefore, in early June, we prohibited retention for all common pool vessels to reduce the likelihood of an overage and an area closure. However, by mid-June, the Trimester 1 quota was exceeded due to catch that occurred prior to the trip limit reduction. We were required to close portions of the GOM Cod Trimester TAC Area through the end of August as a result of the overage. The 2016 common pool sub-ACL for GOM cod is only expected to increase by approximately 2.5 mt from 2015, which translates to a marginal increase to the TAC for each trimester. Thus, for 2016, we are setting the initial trip limit more conservatively compared to the initial 2015 trip limit to prevent area closures and allow continued access to healthier stocks, such as GOM haddock and pollock. We will monitor common pool catch in-season, and if necessary or warranted, will make adjustments to the common pool trip limits implemented in this rule.

Comment 52: One commercial fisherman commented that the witch flounder trip limit will lead to increase in discards for the stock, and that the low catch limit is not consistent with landings seen on the waters. The commenter did not provide suggestions for an alternative trip limit.

Response: We disagree that the witch flounder trip limit is too low. The overall 2016 witch flounder catch limit is a 41-percent reduction compared to 2015. As a result, the 2015 trip limit of 1,000 lb (454 kg) per trip is likely too high to prevent overages of the common pool quota. The 250-lb (113-kg) trip limit implemented in this rule is intended to provide continued access to other healthy groundfish stocks by preventing premature closure of the trimester TAC for witch flounder. We

will monitor common pool catch in-season, and if necessary or warranted, will make adjustments to the common pool trip limits implemented in this rule.

Comment 53: One commercial fisherman commented that the CC/GOM yellowtail flounder trip limits are too low, but did not suggest an alternative trip limit. The commenter also noted that the daily trip limit listed incorrectly in proposed rule as 75 lb/day (34 kg/day), when it should have been 750 lb/day (340 kg/day).

Response: The commenter correctly identified our error in the CC/GOM yellowtail flounder trip limit in the proposed rule. The trip limit is corrected in this final rule.

Comment 54: Two commercial fishermen opposed the 100-lb (45-kg) trip limit for GOM haddock, particularly in light of the recreational bag limit of 15 fish per day. One commenter suggested that the common pool trip limit should be 200 lb (91 kg) per trip.

Response: The recreational fishery receives an allocation for GOM haddock, and annual recreational management measures are set to ensure the fishery achieves, but does not exceed, its allocation. A description of the 2016 recreational management measures, their rationale, and supporting analyses, is provided in the final rule implementing those measures, and is not repeated here.

After re-evaluating the common pool allocation, and in response to public comment, we are also setting the initial GOM haddock trip limit at 200 lb (91 kg) per DAS, up to 600 lb (272 kg) per trip. This increase is warranted given the increase to the 2016 GOM haddock common pool sub-ACL compared to 2015, as described further in section ''9. 2016 Fishing Year Annual Measures Under Regional Administrator Authority.'' We will monitor common pool catch in-season, and if necessary or warranted, will make adjustments to the common pool trip limits implemented in this rule.

Comment 55: Two commercial fishermen opposed the common pool trimester TAC system. One noted that the distribution of the quota among trimesters should be adjusted.

Response: Framework 55 did not consider adjustments to the trimester TAC system and these types of adjustments are beyond the scope and authority relating to this action. The trimester allocation of the common pool sub-ACL was developed as part of Amendment 16, and was based on landings through fishing year 2009. These distributions have been unchanged since the implementation of Amendment 16. Any changes to the existing common pool measures would have to be developed through the Council process in a future management action. However, the Council could reconsider common pool management measures, including the trimester TAC distribution, at any time provided these measures still meet necessary conservation requirements.

Changes From the Proposed Rule

This final rule contains a number of minor adjustments from the proposed rule. We clarify a discrepancy in the status determination criteria for GB cod and Atlantic halibut. This rule corrects errors in the CC/GOM yellowtail flounder common pool trip limit and the 2016 sector carry-over table, adds inadvertently omitted default specifications for GB yellowtail flounder, and correct the GB cod groundfish catch limits for 2017 and 2018. We are also implementing a higher initial 2016 GOM haddock common pool trip limit than announced in the proposed rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the management measures implemented in this final rule are necessary for the conservation and management of the Northeast groundfish fishery and consistent with the Magnuson-Stevens Act, and other applicable law.

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

This final rule does not contain policies with Federalism or ''takings'' implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

The Assistant Administrator for Fisheries finds good cause, under 5 U.S.C. 553(d)(3), to waive the 30-day delayed effectiveness of this action. This action sets 2016 catch limits for all groundfish stocks, and adopts several other measures to improve the management of the groundfish fishery. This final rule must be in effect at the beginning of the 2016 fishing year to fully capture the conservation and economic benefits of Framework 55 and sector administrative measures.

This rulemaking incorporates information from updated stock assessments for all 20 groundfish stocks. The development of Framework 55 was timed to incorporate the results of the 2015 groundfish stock assessments, which were finalized in October 2015. As a result, this rulemaking could not be completed further before this date. Therefore, in order to have this action effective at the beginning of the 2016 fishing year, which begins on May 1, 2016, it is necessary to waive the 30-day delayed effectiveness of this rule.

If this action is delayed, the coverage level for the industry-funded ASM program would be 17 percent beginning on May 1, 2016, based on default measures for 2016 published in a separate rulemaking. When combined with the default groundfish specifications (set at 35 percent of the 2015 allocations), a delay in the implementation of these measures would result in direct economic loss for the groundfish fleet due to the high costs of ASM and the low default groundfish specifications, which may restrict fishing effort or temporarily alter business plans. In addition, this action approves two new sectors for operation on May 1, 2016. These sectors would be unable to operate and their vessels would be unable to fish until this action is finalized, which would result in direct economic loss for these vessels.

The groundfish fishery already faced substantial catch limit reductions for many key groundfish stocks over the past 5 years, and this rule implements additional catch limit reductions. However, the negative economic impacts of implementing the default catch limits on May 1 would exceed any negative economic impacts anticipated from this action. Any further disruption to the fishery that would result from a delay in this final rule could worsen the severe economic impacts to the groundfish fishery. While this action includes several catch limit decreases for several stocks in poor condition, it also includes catch limits increases for a number of healthy groundfish stocks. These increases in catch limits for healthy groundfish stocks may help mitigate the economic impacts of the reductions in catch limits for other key groundfish stocks.

The allocation changes for GOM haddock and GOM cod in this action would allow for increases in the recreational possession limits for both stocks through a separate, concurrent rulemaking. A delay in this action would delay setting recreational measures for the 2016 fishing year and the economic benefits that these measures would provide. Additionally, recreational fishermen book fishing trips months in advance for the upcoming fishing year. Thus, delays in finalizing recreational measures result in additional negative impacts on the recreational fishing industry due to uncertainty and the inability to book trips.

Overall, a delay in implementation of this action would greatly diminish any benefits of these specifications and other approved measures. For these reasons, a 30-day delay in the effectiveness of this rule is impracticable and contrary to the public interest.

Final Regulatory Flexibility Analysis

Section 604 of the RFA, 5 U.S.C. 604, requires Federal agencies to prepare a Final Regulatory Flexibility Analysis (FRFA) for each final rule. The FRFA describes the economic impact of this action on small entities. The FRFA includes a summary of significant issues raised by public comments, the analyses contained in Framework 55 and its accompanying Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (IRFA), the IRFA summary in the proposed rule, as well as the summary provided below. A statement of the necessity for and for the objectives of this action are contained in Framework 55 and in the preamble to this final rule, and is not repeated here.

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

Our responses to all of the comments received on the proposed rule, including those that raised significant issues with the proposed action, or commented on the economic analyses summarized in the IRFA, can be found in the Comments and Responses section of this rule. As outlined in that section, significant issues were raised by the public with respect to the GB cod catch limits for 2016–2018 and the combined suite of groundfish ASM program adjustment. Comment 5 discussed that the GB cod catch limit, as well as catch limits for other key groundfish stocks, are expected to constrain the commercial groundfish fishery. Comment 26 discusses compares economic impacts of the No Action ASM alternative to the combined suite of ASM program adjustments, and the economic analysis in the IRFA. Comments 27 and 28 discuss alternatives to the proposed changes to the ASM program that were not considered in this action, namely electronic monitoring and an alternative approach for allocating ASM coverage. Detailed responses are provided to each of these specific comments and are not repeated here. There were no other comments directly related to the IRFA; the Chief Counsel for the Office of Advocacy of the Small Business Administration (SBA) did not file any comments. No changes to the proposed rule measures were necessary as a result of these public comments.

Description and Estimate of the Number of Small Entities to Which the Rule Would Apply

The SBA defines a small business as one that is:

- Independently owned and operated;
- Not dominant in its field of operation;
- Has annual receipts that do not exceed—
  - $20.5 million in the case of commercial finfish harvesting entities (NAIC [1] 114111)
  - $5.5 million in the case of commercial shellfish harvesting entities (NAIC 114112)
  - $7.5 million in the case of for-hire fishing entities (NAIC 114119); or
- Has fewer than—
  - 750 employees in the case of fish processors; or
  - 100 employees in the case of fish dealers.

This final rule impacts commercial and recreational fish harvesting entities engaged in the groundfish fishery, the small-mesh multispecies and squid fisheries, the midwater trawl herring fishery, and the scallop fishery. Individually-permitted vessels may hold permits for several fisheries, harvesting species of fish that are regulated by several different FMPs, even beyond those impacted by this action. Furthermore, multiple-permitted vessels and/or permits may be owned by entities affiliated by stock ownership, common management, identity of interest, contractual relationships, or economic dependency. For the purposes of the Regulatory Flexibility Act analysis, the ownership entities, not the individual vessels, are considered to be the regulated entities.

Ownership entities are defined as those entities with common ownership personnel as listed on the permit application. Only permits with identical ownership personnel are categorized as an ownership entity. For example, if five permits have the same seven persons listed as co-owners on their permit application, those seven persons would form one ownership entity that holds those five permits. If two of those seven owners also co-own additional vessels, these two persons would be considered a separate ownership entity.

On June 1 of each year, NMFS identifies ownership entities based on a list of all permits for the most recent complete calendar year. The current ownership dataset used for this analysis was created on June 1, 2015, based on calendar year 2014 and contains average gross sales associated with those permits for calendar years 2012 through 2014.

In addition to classifying a business (ownership entity) as small or large, a business can also be classified by its primary source of revenue. A business is defined as being primarily engaged in fishing for finfish if it obtains greater than 50 percent of its gross sales from sales of finfish. Similarly, a business is defined as being primarily engaged in fishing for shellfish if it obtains greater than 50 percent of its gross sales from sales of shellfish.

A description of the specific permits that are likely to be impacted by this action is provided below, along with a discussion of the impacted businesses, which can include multiple vessels and/or permit types.

Regulated Commercial Fish Harvesting Entities

Table 20 describes the total number of commercial business entities potentially regulated by this action. As of June 1, 2015, there were 1,359 commercial business entities potentially regulated by this action. These entities participate in, or are permitted for, the groundfish, small-mesh multispecies, squid, herring midwater trawl, and scallop fisheries. For the groundfish fishery, this action directly regulates potentially affected entities through catch limits and other management measures designed to achieve the goals and objectives of the Northeast Multispecies FMP. For the non-groundfish fisheries, this action includes allocations for groundfish stocks caught as bycatch in these fisheries. For each of these fisheries, there are accountability measures that are triggered if their respective allocations are exceeded. As a result, the likelihood of triggering an accountability measure is a function of changes to the ACLs each year.

TABLE 20—COMMERCIAL FISH HARVESTING ENTITIES REGULATED BY THIS ACTION

Type	Total number	Classified as small businesses
Primarily finfish	385	385
Primarily shellfish	480	462

[1] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

TABLE 20—COMMERCIAL FISH HARVESTING ENTITIES REGULATED BY THIS ACTION—Continued

Type	Total number	Classified as small businesses
Primarily for hire	297	297
No Revenue	197	197
Total	1,359	1,341

Limited Access Groundfish Fishery

This action will directly impact entities engaged in the limited access groundfish fishery. The limited access groundfish fishery consists of those enrolled in the sector program and those in the common pool. Both sectors and the common pool are subject to catch limits and accountability measures that prevent fishing in a respective stock area when the entire catch limit has been caught. Additionally, common pool vessels are subject to DAS restrictions and trip limits. All permit holders are eligible to enroll in the sector program; however, many vessels remain in the common pool because they have low catch histories of groundfish stocks, which translate into low PSCs. Low PSCs limit a vessel's viability in the sector program. In general, businesses enrolled in the sector program rely more heavily on sales of groundfish species than vessels enrolled in the common pool.

As of June 1, 2015 (just after the start of the 2015 fishing year), there were 1,068 individual limited access multispecies permits. Of these, 627 were enrolled in the sector program, and 441 were in the common pool. For fishing year 2014, which is the most recent complete fishing year, 717 of these limited access permits had landings of any species, and 273 of these permits had landings of groundfish species.

Of the 1,068 individual limited access multispecies permits potentially impacted by this action, there are 661 distinct ownership entities. Of these, 649 are categorized as small entities, and 12 are categorized as large entities. However, these totals may mask some diversity among the entities. Many, if not most, of these ownership entities maintain diversified harvest portfolios, obtaining gross sales from many fisheries and not dependent on any one. However, not all are equally diversified. This action is most likely to affect those entities that depend most heavily on sales from harvesting groundfish species. There are 61 entities that are groundfish-dependent (obtain more than 50 percent of gross sales from groundfish species), all of which are small, and all but one of which are finfish commercial harvesting businesses.

Limited Access Scallop Fisheries

The limited access scallop fisheries include Limited Access (LA) scallop permits and Limited Access General Category (LAGC) scallop permits. LA scallop businesses are subject to a mixture of DAS restrictions and dedicated area trip restrictions. LAGC scallop businesses are able to acquire and trade LAGC scallop quota, and there is an annual cap on quota/landings. The scallop fishery receives an allocation for GB and SNE/MA yellowtail flounder and southern windowpane flounder. If these allocations are exceeded, accountability measures are implemented in a subsequent fishing year. These accountability measures close certain areas of high groundfish bycatch to the scallop fishery, and the length of the closure depends on the magnitude of the overage.

Of the total commercial business entities potentially affected by this action (1,359), there are 169 scallop fishing entities. The majority of these entities are defined as shellfish businesses (166). However, three of these entities are defined as finfish businesses, all of which are small. Of the 169 total scallop fishing entities, 154 entities are classified as small entities.

Midwater Trawl Fishery

There are five categories of permits for the herring fishery. Three of these permit categories are limited access, and vary based on the allowable herring possession limits and areas fished. The remaining two permit categories are open access. Although there is a large number of open access permits issued each year, these categories are subject to fairly low possession limits for herring, account for a very small amount of the herring landings, and derive relatively little revenue from the fishery. Only the midwater trawl herring fishery receives an allocation of GOM and GB haddock. Once the entire allocation for either haddock stock has been caught, midwater trawl vessels may not fish for herring or haddock in the respective area for the remainder of the fishing year. Additionally, if the midwater trawl fishery exceeds its allocation, the overage is deducted from its allocation in the following fishing year.

Of the total commercial business entities potentially regulated by this action (1,359), there are 63 herring fishing entities. Of these, 39 entities are defined as finfish businesses, all of which are small. There are 24 entities that are defined as shellfish businesses, and 18 of these are considered small. For the purposes of this analysis, squid is classified as shellfish. Thus, because there is some overlap with the herring and squid fisheries, it is likely that these shellfish entities derive most of their revenues from the squid fishery.

Small-Mesh Fisheries

The small-mesh exempted fisheries allow vessels to harvest species in designated areas using mesh sizes smaller than the minimum mesh size required by the Northeast Multispecies FMP. To participate in the small-mesh multispecies (whiting) fishery, vessels must hold either a limited access multispecies permit or an open access multispecies permit. Limited access multispecies permit holders can only target whiting when not fishing under a DAS or a sector trip, and while declared out of the fishery. A description of limited access multispecies permits was provided above. Many of these vessels target both whiting and longfin squid on small-mesh trips, and, therefore, most of them also have open access or limited access Squid, Mackerel, and Butterfish (SMB) permits. As a result, SMB permits were not handled separately in this analysis.

The small-mesh fisheries receive an allocation of GB yellowtail flounder. If this allocation is exceeded, an accountability measure is triggered for a subsequent fishing year. The accountability measure requires small-mesh vessels to use selective trawl gear when fishing on GB. This gear restriction is only implemented for 1 year as a result of an overage, and is removed as long as additional overages do not occur.

Of the total commercial harvesting entities potentially affected by this action, there are 1,007 small-mesh entities. However, this is not necessarily informative because not all of these entities are active in the whiting fishery. Based on the most recent information, 223 of these entities are considered active, with at least 1 lb (0.45 kg) of whiting landed. Of these entities, 167 are defined as finfish businesses, all of which are small. There are 56 entities that are defined as shellfish businesses, and 54 of these are considered small. Because there is overlap with the whiting and squid fisheries, it is likely that these shellfish entities derive most of their revenues from the squid fishery.

Regulated Recreational Party/Charter Fishing Entities

The charter/party permit is an open access groundfish permit that can be requested at any time, with the limitation that a vessel cannot have a

limited access groundfish permit and an open access party/charter permit concurrently. There are no qualification criteria for this permit. Charter/party permits are subject to recreational management measures, including minimum fish sizes, possession restrictions, and seasonal closures.

During calendar year 2015, 425 party/charter permits were issued. Of these, 271 party/charter permit holders reported catching and retaining any groundfish species on at least one for-hire trip. A 2013 report indicated that, in the northeast U.S., the mean gross sales was approximately $27,650 for a charter business and $13,500 for a party boat. Based on the available information, no business approached the $7.5 million large business threshold. Therefore, the 425 potentially regulated party/charter entities are all considered small businesses.

Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements

This action contains a change to an information collection requirement, which has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0648–0605: Northeast Multispecies Amendment 16 Data Collection. This action adjusts the ACE transfer request requirement implemented through Amendment 16. This rule adds a new entry field to the ACE transfer request form to allow a sector to indicate how many pounds of eastern GB cod ACE it intends to re-allocate to the Western U.S./Canada Area. This change is necessary to allow a sector to apply for a re-allocation of eastern GB ACE in order to increase fishing opportunities in the Western U.S./Canada Area. Currently, all sectors use the ACE transfer request form to initiate ACE transfers with other sectors, or to re-allocate eastern GB haddock ACE to the Western U.S./Canada Area, via an online or paper form to the Regional Administrator. The change only adds a single field to this form, and does not affect the number of entities required to comply with this requirement. Therefore, the change is not expected to increase the time or cost burden associated with the ACE transfer request requirement. Public reporting burden for this requirement includes 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 Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The economic impact of each measure is discussed in more detail in sections 7.4 and 8.11 of the Framework 55 EA and are not repeated here. Although small entities are defined based on gross sales of ownership groups, not physical characteristics of the vessel, it is reasonable to assume that larger vessels are more likely to be owned by large entities. The economic impacts of this action are anticipated to result in aggregate gross revenue losses of approximately $8 million for the 2016 fishing year, compared to predicted revenues for the 2015 fishing year. However, the impacts of the approved catch limits would not be uniformly distributed across vessels size classes and ports. Some vessel size classes and ports are predicted to have 50- to 80-percent declines in revenues from groundfish.

Because predicted losses are expected to primarily affect small businesses, this action has the potential to place small entities at a competitive disadvantage relative to large entities. This is mainly because large entities may have more flexibility to adjust to, and accommodate, the measures. However, as discussed in more detail below, the additional declines in gross revenues expected as a result of this action will pose serious difficulties for all groundfish vessels and their crew.

Status Determination Criteria

This action updates the numerical estimates of the status determination criteria for all groundfish stocks in order to incorporate the results of the 2015 stock assessments. For many stocks, these updates result in lower values of MSY. For some of these, the lower values of MSY result in lower ACLs in the short-term, which is expected to have negative economic impacts (*i.e.,* lower net revenues). However, the updates to the status determination criteria are expected to have positive stock benefits by helping to prevent overfishing. Thus, in the long-term, the changes to status determination criteria are expected to result in higher and more sustainable landings when compared to the No Action option. All of the revisions are based on the 2015 stock assessments, and are therefore based on the best scientific information available.

Status determination criteria are formulaic based on the results of a stock assessment. As a result, the only other alternative considered for this action was the No Action option, which would not update the status determination criteria for any groundfish stocks based on the 2015 stock assessments. This option would not incorporate the best scientific information available, and would not be consistent with Magnuson-Stevens Act requirements, and, as a result, was not selected. This option would not have any immediate economic impacts. However if this option resulted in overfishing in the long-term, then it would have severe negative economic impacts for the fisheries affected by this action.

Groundfish Annual Catch Limits

This action sets catch limits for all 20 groundfish stocks. For 19 of the stocks, there is only a single catch limit alternative to the No Action alternative, described in Table 5 in the preamble. For witch flounder, there are three non-selected alternatives to the adopted ABC of 460 mt, namely 399 mt, 500 mt, and the No Action alternative. In each of these witch flounder alternatives, except for the No Action alternative, all other groundfish stock allocations would remain the same as those described in Table 5. All of the non-selected action alternatives assume a 14-percent target ASM coverage level for 2016. The No Action alternative assumes a 41-percent target ASM coverage level for 2016.

For the commercial groundfish fishery, the approved catch limits (460 mt witch flounder ABC) are expected to result in a 10-percent decrease in gross revenues on groundfish trips, or $8 million, compared to predicted gross revenues for the 2015 fishing year. The impacts of the approved catch limits would not be uniformly distributed across vessels size classes and ports. Vessels in the 30–50 ft (9–15 m) category are expected to see gross revenue increases of 2 percent. Vessels in the 50–75 ft (15–23 m) size class are expected to see revenue increases of 19 percent. The largest vessels (75 ft (23 m) and greater) are predicted to incur the largest decreases in gross revenues revenue decreases of 30 percent relative to 2015, due primarily to reductions in several GB and SNE/MA stocks (*e.g.,* GB cod, GB winter flounder, SNE/MA yellowtail flounder, SNE/MA winter flounder).

Southern New England ports are expected to be negatively impacted, with New Jersey, New York, and Rhode Island predicted to incur revenue losses

of 100 percent, 80 percent, and 62 percent, respectively, relative to 2015. These large revenue losses are also due to reductions in GB and SNE/MA stocks. Maine and Massachusetts are also predicted to incur revenue losses of 16 percent and 6 percent, respectively, as a result of the approved catch limits, while New Hampshire is expected to have small increases in gross revenues of up to 8 percent. For major home ports, New Bedford is predicted to see a 47-percent decline in groundfish revenues relative to 2015, and Point Judith expected to see a 58-percent decline. Boston and Gloucester, meanwhile, are predicted to have groundfish revenue increases of 31 and 29 percent, respectively, compared to 2015.

Two of the three non-selected alternatives would have set all groundfish allocations at the levels described in Table 5, with the exception of the witch flounder allocation. In the alternative that considered a witch flounder ABC of 399 mt, gross revenues were predicted to be the same as the approved catch limit (460-mt witch flounder ABC), namely a 10-percent decrease in gross revenues on groundfish trips, or $8 million, compared to predicted gross revenues for the 2015 fishing year. The 399-mt alternative was also expected to provide the same changes in gross revenue by vessels size class. In the alternative that considered a witch flounder ABC of 500 mt, gross revenues were predicted to be slightly lower than the approved catch limit, namely an 11-percent decrease in gross revenues on groundfish trips, or $9 million, compared to predicted gross revenues for fishing year 2015. Vessels in the 30–50 ft (9–15 m) category were expected to see gross revenue increases of 4 percent. Vessels in the 50–75 ft (15–23 m) size class were expected to see revenue increases of 15 percent. The largest vessels (75 ft (23 m) and greater) were predicted to incur the largest decreases in gross revenues revenue decreases of 28 percent relative to 2015. State and port-level impacts are also similar across the action alternatives.

Under the No Action option, groundfish vessels would be required to operate under default specifications of catch limits at 35 percent of the levels used last fishing year and would have only have 3 months (May, June, and July) to operate in the 2016 fishing year before the default specifications expire. Once the default specifications expire, there would be no ACL for a number of the groundfish stocks, and the fishery would be closed for the remainder of the fishing year. This would result in greater negative economic impacts for vessels compared to the proposed action due to lost revenues as a result of being unable to fish. The adopted action is predicted to result in approximately $69 million in gross revenues from groundfish trips. Roughly 92 percent of this revenue would be lost if no action was taken to specify catch limits. Further, if no action was taken, the Magnuson-Stevens Act requirements to achieve optimum yield and consider the needs of fishing communities would be violated.

Each of the 2016 ACL alternatives show a decrease in gross revenue when compared to the 2015 fishing year. When compared against each other, the economic analysis of the various witch flounder ABC alternatives did not show any gain in gross revenue at the fishery level, or any wide difference in vessel and port-level gross revenue, as the witch flounder ABC increased. The economic analysis consistently showed other stocks (GB cod, GOM cod, and SNE/MA yellowtail flounder) would be more constraining than witch flounder, which may partially explain the lack of predicted revenue increases with higher witch flounder ABCs. In addition, there are other assumptions in the economic analysis that may mask sector and vessel level impacts that could result from alternatives with lower witch flounder ABCs. Ultimately, the adopted alternative (460-mt witch flounder ABC) is expected to mitigate potential economic impacts to fishing communities compared to both the No Action alternative and the 399-mt witch flounder ABC alternative, while reducing the biological concerns of an increased risk of overfishing compared to the 500-mt witch flounder ABC alternative.

The catch limits approved in this action are based on the latest stock assessment information, which is considered the best scientific information available, and the applicable requirements in the Northeast Multispecies FMP and the Magnuson-Stevens Act. With the exception of witch flounder, the only other possible alternatives to the catch limits in this action that would mitigate negative impacts would be higher catch limits. Alternative, higher catch limits, however, are not permissible under the law because they would not be consistent with the goals and objectives of the Northeast Multispecies FMP, or the Magnuson-Stevens Act, particularly the requirement to prevent overfishing. The Magnuson-Stevens Act and case law prevent implementation of measures that conflict with conservation requirements, even if it means negative impacts are not mitigated. The catch limits in this action are the highest allowed given the best scientific information available, the SSC's recommendations, and requirements to end overfishing and rebuild fish stocks. The only other catch limits that would be legal would be lower than those in this action, which would not mitigate the economic impacts of the approved catch limits.

Groundfish At-Sea Monitoring Program

This action approves a set of four alternatives that, in combination, result in a 2016 target ASM coverage level of 14 percent. The four selected alternatives will: (1) Remove ASM coverage for extra-large mesh gillnet trips fishing in Broad Stock Areas 2 and/or 4; (2) remove the administrative standard that 80 percent of discards be estimated at a 30-percent CV; (3) use 3 years of discard information to predict ASM coverage levels; and (4) base the target coverage level on the predictions for stocks that would be at a higher risk for an error in the discard estimate. The No Action alternative would have resulted in a 2016 ASM coverage level of 41 percent.

The combination of ASM alternatives would result in a lower level of ASM coverage (14 percent) relative to the No Action alternative (41 percent) thereby resulting in a reduction in cost to sectors. Selecting the alternatives in combination has the maximum economic impact mitigation compared to No Action. Assuming NEFOP coverage of 4 percent for the 2016 fishing year, industry would be responsible for paying for ASM coverage on an estimated 10 percent of trips under the combined ASM alternatives, and an estimated 37 percent of trips under the No Action alternative. Assuming 20,000 days absent, and a cost of $710 per ASM seaday, the cost of ASM to sectors would be $1.4 million (20,000*.10*$710). This would represent cost savings of $3.9 million relative to the No Action alternative ($5.3 million). The $710 per ASM seaday is based on NMFS cost estimates for the ASM program. If sectors are able to negotiate lower per seaday rates for ASM coverage with service providers, these figures may be overestimates.

Each of the four selected alternatives, if approved in isolation, would have also resulted in a lower ASM coverage level relative to the No Action alternative. Using the effort and ASM cost assumptions noted above, removing ASM coverage for extra-large mesh gillnet trips fishing in Broad Stock Areas 2 and/or 4 would result in a cost savings of $64,610 relative to the No Action alternative. Remove the

administrative standard that 80 percent of discards be estimated at a 30-percent CV would result in 2016 ASM costs of $4.7 million, an estimated $0.6 million decrease relative to the No Action alternative. Using 3 years of discard information to predict ASM coverage levels would result in 2016 ASM costs of $1.8 million, a savings of $3.5 million relative to No Action. Finally, basing the target coverage level on the predictions for stocks that would be at a higher risk for an error in the discard estimate would in ASM costs of $3.1 million, an estimated $2.2 million decrease in ASM costs relative to the No Action alternative.

Formation of Sustainable Harvest Sector II

This action approves the formation of a new sector, Sustainable Harvest Sector II, for operation for the 2016 fishing year. The No Action alternative was the only alternative to the approved action, and would not approve the formation of Sustainable Harvest Sector II. Allowing the formation of the new sector increases flexibility for groundfish fishery participants within the sector management system, and is thus anticipated to have positive economic impacts.

Modification of the Sector Approval Process

This action modifies the sector approval process such that a Council framework adjustment or amendment is no longer needed to approve a new sector. The No Action alternative was the only alternative to the approved action, and would maintain the existing process for sector approval. Modifying the sector approval process decreases the administrative cost of approving a new sector, and allows more time for new sectors to prepare operations plans and analysis to support the formation of a new sector. The additional time to prepare operations plans may have minor economic benefits to fishery participants.

Modification of the Definition of the Haddock Separator Trawl

This action modifies the current definition of the haddock separator trawl to require that the separator panel contrasts in color to the portions of the net that it separates. An estimated 46 unique vessels had at least one trip that used a haddock separator trawl from 2013–2015. The costs for labor and installation of a new separator panel are estimated to range from $560 to $1,400 per panel. The No Action alternative would not modify the current definition of the haddock separator trawl. The approved action is expected to expedite Coast Guard vessel inspections when compared to the No Action alternative, which could improve enforceability of this gear type and reduce delays in fishing operations while inspections occur. In order to minimize impact of this measure, we are delaying the effective date of this requirement by 6 months to allow affected fishermen time to replace their separator panels with contrasting netting.

Removal of GOM Cod Recreational Possession Limit

For the recreational fishery, the removal prohibition on GOM cod possession, coupled with measures in the recreational rule, are expected to result in short-term positive economic impacts. The measures implemented for 2016 in that rule are expected to result in an increase in the number of trips taken by anglers, and increased catch, while staying within the recreational quotas for 2016. Under the No Action alternative, vessels would be prohibited from harvesting GOM cod, which would have negative economic impacts compared to the selected alternative.

Distribution of Eastern/Western GB Cod Sector Allocation

The action allows sectors to convert their eastern GB cod allocation to western GB cod allocation and provide sectors additional flexibility to harvest more of their total GB cod allocation. Only the No Action alternative and the selected alternative were considered. Compared to the No Action alternative, this measure is expected to have positive economic impacts on groundfish-dependent small entities that participate in the sector program due to increased operational flexibility. This measure is also expected to prevent the Western U.S./Canada Area from being closed to a sector prematurely, before the sector harvests all of its GB cod allocation, which will ultimately prevent foregone yield in the fishery. Given the sizable decreases in the GB cod catch limit for 2016, the ability of sectors to convert their eastern GB cod allocation to western GB cod may be of critical importance for allowing members to maintain fishing operations on Georges Bank through 2016. In the absence of GB cod allocation, sectors members are not permitted to fish in the Inshore and Offshore Georges Bank broad stock areas.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the Northeast multispecies fisheries, as well as the scallop and herring fisheries that receive an allocation of some groundfish stocks. In addition, copies of this final rule and guides (*i.e.,* information bulletins) are available from NMFS at the following Web site: *http://www.greateratlantic.fisheries.noaa.gov/.*

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 25, 2016.

Samuel D. Rauch III,

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

For the reasons stated in the preamble, NMFS amends 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.14, revise paragraph (k)(16)(iii)(B) to read as follows:

* * * * *

(k) * * *

(16) * * *

(iii) * * *

(B) Fail to comply with the requirements specified in § 648.81(f)(5)(v) when fishing in the areas described in § 648.81(d)(1), (e)(1), and (f)(4) during the time periods specified.

* * * * *

■ 3. In § 648.85, revise paragraph (a)(3)(iii)(A) to read as follows:

§ 648.85 Special management programs.

* * * * *

(a) * * *

(3) * * *

(iii) * * *

(A) *Haddock Separator Trawl.* A haddock separator trawl is defined as a groundfish trawl modified to a vertically-oriented trouser trawl configuration, with two extensions arranged one over the other, where a codend shall be attached only to the

upper extension, and the bottom extension shall be left open and have no codend attached. A horizontal large-mesh separating panel constructed with a minimum of 6.0-inch (15.2-cm) diamond mesh must be installed between the selvedges joining the upper and lower panels, as described in paragraphs (a)(3)(iii)(A) and (B) of this section, extending forward from the front of the trouser junction to the aft edge of the first belly behind the fishing circle. The horizontal large-mesh separating panel must be constructed with mesh of a contrasting color to the upper and bottom extensions of the net that it separates.

(*1*) *Two-seam bottom trawl nets.* For two seam nets, the separator panel will be constructed such that the width of the forward edge of the panel is 80–85 percent of the width of the after edge of the first belly of the net where the panel is attached. For example, if the belly is 200 meshes wide (from selvedge to selvedge), the separator panel must be no wider than 160–170 meshes wide.

(*2*) *Four-seam bottom trawl nets.* For four seam nets, the separator panel will be constructed such that the width of the forward edge of the panel is 90–95 percent of the width of the after edge of the first belly of the net where the panel is attached. For example, if the belly is 200 meshes wide (from selvedge to selvedge), the separator panel must be no wider than 180–190 meshes wide. The separator panel will be attached to both of the side panels of the net along the midpoint of the side panels. For example, if the side panel is 100 meshes tall, the separator panel must be attached at the 50th mesh.

* * * * *

■ 4. In § 648.87:

■ a. Revise paragraphs (a)(1) and (2), (b)(1)(i)(B)(*2*), (b)(1)(v)(B) introductory text, (b)(1)(v)(B)(*1*)(*i*),;

■ b. Add paragraph (b)(1)(v)(B)(*1*)(*ii*);

■ c. Revise paragraph (b)(4)(i)(G);

■ d. Add paragraphs (c)(2)(i)(A) and (B) and (c)(4); and

■ e. Revise paragraphs (d) and (e)(3)(iv).

The revisions read as follows:

§ 648.87 Sector allocation.

(a) *Procedure for approving/implementing a sector allocation proposal.* (1) Any person may submit a sector allocation proposal for a group of limited access NE multispecies vessels to NMFS. The sector allocation proposal must be submitted to the Council and NMFS in writing by the deadline for submitting an operations plan and preliminary sector contract that is specified in paragraph (b)(2) of this section. The proposal must include a cover letter requesting the formation of the new sector, a complete sector operations plan and preliminary sector contract, prepared as described in paragraphs (b)(2) and (b)(3) of this section, and appropriate analysis that assesses the impact of the proposed sector, in compliance with the National Environmental Policy Act.

(2) Upon receipt of a proposal to form a new sector allocation, and following the deadline for each sector to submit an operations plan, as described in paragraph (b)(2) of this section, NMFS will notify the Council in writing of its intent to consider a new sector allocation for approval. The Council will review the proposal(s) and associated NEPA analyses at a Groundfish Committee and Council meeting, and provide its recommendation on the proposed sector allocation to NMFS in writing. NMFS will make final determinations regarding the approval of the new sectors based on review of the proposed operations plans, associated NEPA analyses, and the Council's recommendations, and in a manner consistent with the Administrative Procedure Act. NMFS will only approve a new sector that has received the Council's endorsement.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(B) * * *

(*2*) *Re-allocation of haddock or cod ACE.* A sector may re-allocate all, or a portion, of its haddock or cod ACE specified to the Eastern U.S./Canada Area, pursuant to paragraph (b)(1)(i)(B)(*1*) of this section, to the Western U.S./Canada Area at any time during the fishing year, and up to 2 weeks into the following fishing year (*i.e.,* through May 14), unless otherwise instructed by NMFS, to cover any overages during the previous fishing year. Re-allocation of any ACE only becomes effective upon approval by NMFS, as specified in paragraphs (b)(1)(i)(B)(*2*)(*i*) through (*iii*) of this section. Re-allocation of haddock or cod ACE may only be made within a sector, and not between sectors. For example, if 100 mt of a sector's GB haddock ACE is specified to the Eastern U.S./Canada Area, the sector could re-allocate up to 100 mt of that ACE to the Western U.S./Canada Area.

(*i*) *Application to re-allocate ACE.* GB haddock or GB cod ACE specified to the Eastern U.S./Canada Area may be re-allocated to the Western U.S./Canada Area through written request to the Regional Administrator. This request must include the name of the sector, the amount of ACE to be re-allocated, and the fishing year in which the ACE re-allocation applies, as instructed by the Regional Administrator.

(*ii*) *Approval of request to re-allocate ACE.* NMFS shall approve or disapprove a request to re-allocate GB haddock or GB cod ACE provided the sector, and its participating vessels, are in compliance with the reporting requirements specified in this part. The Regional Administrator shall inform the sector in writing, within 2 weeks of the receipt of the sector's request, whether the request to re-allocate ACE has been approved.

(*iii*) *Duration of ACE re-allocation.* GB haddock or GB cod ACE that has been re-allocated to the Western U.S./Canada Area pursuant to this paragraph (b)(1)(i)(B)(*2*) is only valid for the fishing year in which the re-allocation is approved, with the exception of any requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section, unless otherwise instructed by NMFS.

* * * * *

(v) * * *

(B) *Independent third-party monitoring program.* A sector must develop and implement an at-sea or electronic monitoring program that is satisfactory to, and approved by, NMFS for monitoring catch and discards and utilization of sector ACE, as specified in this paragraph (b)(1)(v)(B). The primary goal of the at-sea/electronic monitoring program is to verify area fished, as well as catch and discards by species and gear type, in the most cost-effective means practicable. All other goals and objectives of groundfish monitoring programs at § 648.11(l) are considered equally-weighted secondary goals. The details of any at-sea or electronic monitoring program must be specified in the sector's operations plan, pursuant to paragraph (b)(2)(xi) of this section, and must meet the operational standards specified in paragraph (b)(5) of this section. Electronic monitoring may be used in place of actual observers if the technology is deemed sufficient by NMFS for a specific trip type based on gear type and area fished, in a manner consistent with the Administrative Procedure Act. The level of coverage for trips by sector vessels is specified in paragraph (b)(1)(v)(B)(*1*) of this section. The at-sea/electronic monitoring program shall be reviewed and approved by the Regional Administrator as part of a sector's operations plans in a manner consistent with the Administrative Procedure Act. A service

provider providing at-sea or electronic monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet the service provider standards specified in paragraph (b)(4) of this section, and be approved by NMFS in a manner consistent with the Administrative Procedure Act.

(*1*) * * *

(*i*) *At-sea/electronic monitoring.* Coverage levels must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology at the overall stock level for each stock of regulated species and ocean pout, and to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels. In making its determination, NMFS shall take into account the primary goal of the at-sea/electronic monitoring program to verify area fished, as well as catch and discards by species and gear type, in the most cost-effective means practicable, the equally-weighted secondary goals and objectives of groundfish monitoring programs detailed at § 648.11(l), the National Standards and requirements of the Magnuson-Stevens Act, and any other relevant factors. NMFS will determine the total target coverage level (*i.e.,* combined NEFOP coverage and at-sea/electronic monitoring coverage) for the upcoming fishing year using the criteria in this paragraph. Annual coverage levels will be based on the most recent 3-year average of the total required coverage level necessary to reach the required coefficient of variation for each stock. For example, if data from the 2012 through 2014 fishing years are the most recent three complete fishing years available for the fishing year 2016 projection, NMFS will use data from these three years to determine 2016 target coverage levels. For each stock, the coverage level needed to achieve the required coefficient of variation would be calculated first for each of the 3 years and then averaged (*e.g.,* (percent coverage necessary to meet the required coefficient of variation in year 1 + year 2 + year 3)/3). The coverage level that will apply is the maximum stock-specific rate after considering the following criteria. For a given fishing year, stocks that are not overfished, with overfishing not occurring according to the most recent available stock assessment, and that in the previous fishing year have less than 75 percent of the sector sub-ACL harvested and less than 10 percent of catch comprised of discards, will not be used to predict the annual target coverage level. A stock must meet all of these criteria to be eliminated as a predictor for the annual target coverage level for a given year.

(*ii*) A sector vessel that declares its intent to exclusively fish using gillnets with a mesh size of 10-inch (25.4-cm) or greater in either the Inshore GB Stock Area, as defined at § 648.10(k)(3)(ii), and/or the SNE Broad Stock Area, as defined at § 648.10(k)(3)(iv), is not subject to the coverage level specified in this paragraph (b)(1)(v)(B)(*1*) of this section provided that the trip is limited to the Inshore GB and/or SNE Broad Stock Areas and that the vessel only uses gillnets with a mesh size of 10-inches (25.4-cm) or greater. When on such a trip, other gear may be on board provided that it is stowed and not available for immediate use as defined in § 648.2. A sector trip fishing with 10-inch (25.4-cm) mesh or larger gillnets will still be subject to the annual coverage level if the trip declares its intent to fish in any part of the trip in the GOM Stock area, as defined at § 648.10(k)(3)(i), or the Offshore GB Stock Area, as defined at § 648.10(k)(3)(iii).

* * * * *

(4) * * *

(i) * * *

(G) Evidence of adequate insurance (copies of which shall be provided to the vessel owner, operator, or vessel manager, when requested) to cover injury, liability, and accidental death to cover at-sea monitors (including during training); vessel owner; and service provider. NMFS will determine the adequate level of insurance and notify potential service providers;

* * * * *

(c) * * *

(2) * * *

(i) * * *

(A) *Fippennies Ledge Area.* The Fippennies Ledge Area is bounded by the following coordinates, connected by straight lines in the order listed:

FIPPENNIES LEDGE AREA

Point	N. latitude	W. longitude
1	42°50.0′	69°17.0′
2	42°44.0′	69°14.0′
3	42°44.0′	69°18.0′
4	42°50.0′	69°21.0′
1	42°50.0′	69°17.0′

(B) [Reserved]

* * * * *

(4) Any sector may submit a written request to amend its approved operations plan to the Regional Administrator. If the amendment is administrative in nature, within the scope of and consistent with the actions and impacts previously considered for current sector operations, the Regional Administrator may approve an administrative amendment in writing. The Regional Administrator may approve substantive changes to an approved operations plan in a manner consistent with the Administrative Procedure Act and other applicable law. All approved operations plan amendments will be published on the regional office Web site and will be provided to the Council.

(d) *Approved sector allocation proposals.* Eligible NE multispecies vessels, as specified in paragraph (a)(3) of this section, may participate in the sectors identified in paragraphs (d)(1) through (25) of this section, provided the operations plan is approved by the Regional Administrator in accordance with paragraph (c) of this section and each participating vessel and vessel operator and/or vessel owner complies with the requirements of the operations plan, the requirements and conditions specified in the letter of authorization issued pursuant to paragraph (c) of this section, and all other requirements specified in this section. All operational aspects of these sectors shall be specified pursuant to the operations plan and sector contract, as required by this section.

(1) GB Cod Hook Sector.

(2) GB Cod Fixed Gear Sector.

(3) Sustainable Harvest Sector.

(4) Sustainable Harvest Sector II.

(5) Sustainable Harvest Sector III.

(6) Port Clyde Community Groundfish Sector.

(7) Northeast Fishery Sector I.

(8) Northeast Fishery Sector II.

(9) Northeast Fishery Sector III.

(10) Northeast Fishery Sector IV.

(11) Northeast Fishery Sector V.

(12) Northeast Fishery Sector VI.

(13) Northeast Fishery Sector VII.

(14) Northeast Fishery Sector VIII.

(15) Northeast Fishery Sector IX.

(16) Northeast Fishery Sector X.

(17) Northeast Fishery Sector XI.

(18) Northeast Fishery Sector XII.

(19) Northeast Fishery Sector XIII.

(20) Tristate Sector.

(21) Northeast Coastal Communities Sector.

(22) State of Maine Permit Banking Sector.

(23) State of Rhode Island Permit Bank Sector.

(24) State of New Hampshire Permit Bank Sector.

(25) State of Massachusetts Permit Bank Sector.

(e) * * *

(3) * * *

(iv) *Reallocation of GB haddock or GB cod ACE.* Subject to the terms and conditions of the state-operated permit

bank's MOAs with NMFS, a state-operated permit bank may re-allocate all, or a portion, of its GB haddock or GB cod ACE specified for the Eastern U.S./Canada Area to the Western U.S./Canada Area provided it complies with the requirements in paragraph (b)(1)(i)(B)(*2*) of this section.

* * * * *

§ 648.89 [Amended]

■ 5. In § 648.89, remove and reserve paragraph (f)(3)(ii).

[FR Doc. 2016–10051 Filed 4–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 160120042–6337–02]

RIN 0648–BF69

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Fishing Year 2016; Recreational Management Measures

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

ACTION: Final rule.

SUMMARY: This action sets the recreational management measures for Gulf of Maine cod and haddock for the 2016 fishing year. This action is intended to increase recreational fishing opportunities for cod and haddock consistent with the 2016 catch limits for these stocks, while ensuring the quotas are not exceeded. This action is expected to facilitate the recreational fishery achieving the recreational quotas for 2016.

DATES: Effective May 1, 2016.

ADDRESSES: Copies of a supplemental environmental assessment (EA) to Framework Adjustment 55 to the Northeast Multispecies Fishery Management Plan prepared by the Greater Atlantic Regional Fisheries Office and Northeast Fisheries Science Center; and the Framework 55 EA prepared by the New England Fishery Management Council for this rulemaking are available from: John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. The Framework 55 EA and supplement are also accessible via the Internet at: *http://www.greateratlantic.fisheries.noaa.gov/sustainable/species/multispecies/.* These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mark Grant, Sector Policy Analyst, phone: 978–281–9145; email: *Mark.Grant@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Statutory Authority

Under the Northeast Multispecies Fishery Management Plan (FMP), specific sub-annual catch limits (sub-ACL) for the recreational fishery are established for each fishing year for Gulf of Maine (GOM) cod and haddock. The regulations at 50 CFR 648.89(f)(3) authorize the Regional Administrator, in consultation with the New England Fishery Management Council (Council), to modify the recreational management measures for the upcoming fishing year to ensure the recreational fishery achieves, but does not exceed, the recreational fishery sub-ACLs. The proposed rule for this action published in the **Federal Register** (81 FR 11168; March 3, 2016) provides details on the consultation with the Council and how the Council developed its recommendations; that information is not repeated here.

Fishing Year 2016 Recreational Management Measures

After consulting with the Council, we are increasing recreational fishing opportunities for GOM cod and haddock. Starting May 1, 2016, anglers may retain 1 cod per day during August and September, and may keep up to 15 haddock per day for most of the fishing year. Table 1 provides the new measures effective with the start of fishing year 2016 (May 1, 2016) compared to the current measures. These measures are based on the fishing year 2016 recreational quotas, and removal of the GOM cod retention prohibition approved and implemented as part of Framework Adjustment 55 to the Northeast Multispecies FMP.

Table 1. Changes to GOM Cod and Haddock Recreational Management Measures for 2016

Stock	Current Measures			New 2016 Measures		
	Per Day Possession Limit (fish per angler)	Minimum Fish Size	Season When Possession is Permitted	Per Day Possession Limit (fish per angler)	Minimum Fish Size	Season When Possession is Permitted
GOM Cod	Possession Prohibited Year-Round			1	24 inches (61.0 cm)	August 1 – September 30
GOM Haddock	3	17 inches (43.2 cm)	May 1, 2015 – August 31, 2015 and November 1, 2015 - February 29, 2016	15	17 inches (43.2 cm)	Year Round Except March 1 - April 14

For 2016, the GOM haddock recreational sub-ACL is increasing 149 percent compared to 2015, based on continued growth of the stock biomass. Although GOM cod remains overfished and subject to overfishing, biomass has increased slightly, and the GOM cod recreational sub-ACL is increasing 30 percent compared to 2015. A more detailed summary of these catch limits, and the removal of the cod prohibition, is provided in the Framework 55 final rule and not repeated here.

Changes From Proposed Rule

On March 3, 2016, we published a proposed rule in the **Federal Register**

(81 FR 11168) to increase recreational fishing opportunities for GOM cod and haddock starting May 1, 2016. We intended to propose measures as recommended by the Council. However, that proposed rule contained inadvertent errors in the dates that GOM haddock possession would be prohibited. Instead of a March 1-April 14 closure as recommended by the Council, we inadvertently proposed a closed season of April 15-April 30. We published a correction in the **Federal Register** (81 FR 14817; March 18, 2016) and extended the comment period. This final rule implements the corrected measures, as recommended by the Council.

Analysis

Recreational catch and effort data are estimated by the Marine Recreational Information Program (MRIP). A peer-reviewed bioeconomic model, developed by the Northeast Fishery Science Center, was used to estimate 2016 recreational GOM cod and haddock mortality under various combinations of minimum sizes, possession limits, and closed seasons. Catch data and model projections suggest that the recreational fleet is not expected to exceed its fishing year 2015 catch limits for GOM cod or haddock. Further, based on the increased recreational sub-ACLs for the 2016 fishing year, analyses indicate that recreational catch for both GOM cod and haddock could be increased without undermining conservation objectives. Additional details are provided in the Supplemental EA (see **ADDRESSES**) and the proposed rule published on March 3, 2016 (81 FR 11168), and are not repeated here.

The final measures implemented by this action for the 2016 fishing year, as recommended by the Council, are expected to result in an increase in the number of trips taken by anglers, and increased catch, in comparison to retaining the 2015 measures, while staying within the recreational sub-ACLs for 2016 (Table 2).

Table 2. Estimated Angler Trips and Mortality of GOM Cod and Haddock

Year	Angler Trips (median)	GOM Haddock					GOM Cod				
		Bag Limit	Size Limit	Open Season	Total Mortality (mt, median)	Total Mortality as % of Recreational Quota	Bag Limit	Size Limit	Open Season	Total Mortality (mt, median)	Total Mortality as % of Recreational Quota
2015	117,139	3	17 inches (43.2 cm)	May 1, 2015 - August 31, 2015 and November 1, 2015 - February 29, 2016	405	44%	0	N/A	Closed	66	42%
2016	167,549 - 168125	15	17 inches (43.2 cm)	Year Round Except March 1 - April 14	707 - 709	76%	1	24 inches (61.0 cm)	August 1 through September 30	114 - 132	73 - 84%

Comments and Responses

We received 102 comments on the proposed 2016 recreational measures. One comment received was not germane to the proposed measures. We received comments from the Council, the Massachusetts Striped Bass Association, the Stellwagen Bank Charter Boat Association, and 99 individuals.

Haddock Measures

Comment 1: Seventy-five commenters generally supported the proposed recreational haddock measures.

Response: We agree and have approved the haddock measures recommended by the Council. As further discussed in the proposed rule and the supplemental EA, the measures being implemented for the 2016 fishing year are expected to result in an increase in the number of trips taken by anglers, and increased catch, in comparison to retaining the 2015 measures, while staying within the recreational quotas for 2016. These expected increases will help the recreational fishery achieve its quota for GOM haddock and have positive economic impacts.

Haddock Bag Limit

Comment 2: Three individuals commented that the haddock bag limit should be higher. One individual felt a higher bag limit was appropriate because haddock were abundant in the GOM, and two individuals asserted that a higher haddock bag limit was necessary for customers to justify the expense of a trip on a charter or party boat (for-hire vessels).

Response: We agree with the Council's recommendation that the haddock bag limit should be 15 fish due to uncertainty in the model, concerns about a dramatic change in the possession limit, and a history of catch exceeding the recreational quota when the possession limit was unlimited. The 15-fish bag limit for haddock is considered the best compromise to increase in the number of trips taken and fish caught while staying within the recreational sub-ACLs for 2016 (Table 2).

Comment 3: Seven individuals commented that the haddock bag limit should be lower. Their reasons included a preference for coupling a smaller bag limit with a larger minimum size to yield better fish, uncertainty in the stock assessment, and concern that catch would be higher than predicted because headboats would stay on one spot until every customer catches the bag limit.

Response: The GOM haddock stock is not overfished and overfishing is not occurring. The 2015 operational assessment found the population projections of the stock are reliable. There is some uncertainty in the model used to estimate 2016 recreational catch because it cannot anticipate how much effort may increase, as discussed in detail in the supplemental EA (see **ADDRESSES**). However, the model estimates that the increased bag limit and lengthened open season will substantially increase fishing effort and haddock catch compared to last year, while restraining catch within the sub-ACL (catch estimated at 76 percent of quota, see Table 2). As further explained in the response to comment 6, there is no new information available to show a population shift to larger haddock so the 17-inch (43.2-cm) minimum size has been retained because it would result in anglers achieving their bag limit more quickly, reducing overall mortality, and particularly discard mortality. In light of this information, the commenter's suggested trade-off would likely increase overall or discard mortality.

Comment 4: Two individuals commented that the 15-fish bag limit for haddock would lead to increased discards of cod.

Response: We disagree. Analysis indicates recreational cod bycatch on targeted haddock trips was significantly lower in 2015 compared to previous years. The larger bag limit for haddock is expected to encourage targeted haddock trips, and for this reason we expect anglers will continue to successfully avoid cod. Based on the final 2016 measures included in this rule, total GOM cod mortality (Table 2), including release mortality, is estimated to be only 73–84 percent of the recreational quota. GOM cod release mortality is estimated to be 86–89 mt, or approximately 55–57 percent of the recreational quota. The model predicts maintaining a 3-fish bag limit for haddock (status quo measures) would result in 62 mt of cod discard mortality. This analysis is available at: *http://s3.amazonaws.com/nefmc.org/4e.151124_FY2016_simulations_RAP_and_Committee_options_NEFSC.pdf.* Given the increase in the recreational cod quota for 2016, this modest increase in cod discard mortality is not a biological concern.

Comment 5: One commenter expressed concern that a 15-fish bag limit for haddock would encourage a black market for recreationally-caught fish because it exceeded the consumption needs of recreational anglers.

Response: Selling recreationally caught fish is illegal. Apprehended violators will be sanctioned and illegal activity will be deterred. There is no evidence that a black market for recreationally caught haddock has ever existed under varying bag limits in the past. The 15-fish bag limit for GOM haddock, while an increase from the 2015 bag limit, is lower than historical bag limits and is not expected to create a new incentive for non-compliance.

Haddock Minimum Size

Comment 6: Sixty commenters stated that the 17-inch (43.2-cm) minimum size for haddock would reduce discards of haddock.

Response: We agree. In 2015, the minimum size for recreationally caught haddock was reduced from 21 inches (53.3 cm) to 17 inches (43.2 cm). The minimum size was reduced because there were a large number of haddock in the 17-inch (43.2-cm) to 20-inch (50.8-cm) range, and a 17-inch (43.2-cm) minimum size would result in anglers achieving their bag limit more quickly, reducing overall mortality. There is no new information available to show a population shift to larger haddock so the 17-inch (43.2-cm) minimum size has been retained to reduce overall mortality, but particularly discard mortality, consistent with National Standard 9.

Comment 7: Three individuals commented that the haddock minimum size should be increased.

Response: As discussed in the response to comment 6, the minimum size for recreationally caught haddock was reduced to 17 inches (43.2 cm) in 2015 because there were a large number of haddock in the 17-inch (43.2-cm) to 20-inch (50.8-cm) range. There is no new information available to suggest a population shift to larger haddock; therefore, the 17-inch (43.2-cm) minimum size has been retained to reduce overall mortality, but particularly discard mortality.

Haddock Season

Comment 8: Three individuals commented that the haddock season should be open longer.

Response: We disagree. We have determined that the Council's recommended haddock season is more likely to achieve conservation objectives in light of weighing the benefits of having a spring open season against the risks of uncertainty in the model. In particular, we share the Council's concern about a lack of catch data from March 1 through April 14 to inform the analysis and estimate the impact of haddock fishing during that period.

Cod Measures

Comment 9: Eleven commenters generally supported the proposed recreational cod measures.

Response: We agree and have approved the cod measures recommended by the Council. As further discussed in the proposed rule and the supplemental EA, the measures being implemented for the 2016 fishing year are expected to result in an increase in the number of trips taken by anglers, increased catch, and positive economic impacts in comparison to retaining the 2015 measures, while staying within the recreational quotas for 2016.

Comment 10: The Massachusetts Striped Bass Association and one individual commented that the GOM cod stock should remain closed to recreational fishing until the stock can support a longer season.

Response: We disagree. We have determined that the Council's recommended 2-month open season is the best compromise for achieving National Standard 1's requirement to achieve optimum yield while preventing overfishing for the recreational cod fishery. The analysis described in the Supplemental EA and proposed rule show this short open season will provide benefits to the public in the form of increased recreational fishing opportunities and cod catch, with related economic benefits, without exceeding the recreational quota. Additionally, analysis suggests that this limited open season for cod will reduce cod discards by turning some of that mortality into landings.

Cod Bag Limit

Comment 11: The Stellwagen Bank Charter Boat Association and 70 individuals opposed the 1-fish bag limit and commented in support of a larger bag limit for GOM cod. One individual suggested that the cod bag limit be adjusted to turn release mortality into landings. Three individuals commented that the cod bag limit was too low to justify the expense of a trip.

Response: As described in the proposed rule and the EA prepared for Framework Adjustment 55, the GOM cod stock is overfished and subject to overfishing, but the biomass has increased slightly. Framework Adjustment 55 has increased the recreational sub-ACL to 157 mt. The analyses presented to the Recreational Advisory Panel (*http://s3.amazonaws.com/nefmc.org/4c_151117_Recreational_Measures_Presentation_RAP_NEFSC.pdf*) suggest that increasing the bag limit beyond one fish would likely cause the recreational fishery to exceed its quota. Rather than converting discarded cod to landings, an increased bag limit would lead to increased effort targeting cod and result in catch exceeding the recreational cod quota. Based on the analyses, we agree with the Council's recommendation to implement the one-fish bag limit for the months of August and September as the best way to balance recreational fishing opportunities and cod mortality.

We encourage the recreational community to fish not only for cod, but for the other plentiful species in our waters, including haddock, pollock, and redfish. Recipes for these fish are available on our Fishwatch Web site at: *http://www.fishwatch.gov/eating-seafood/recipes*.

Comment 12: In opposing the one-fish bag limit for GOM cod, the Stellwagen Bank Charter Boat Association and 59 individuals commented that in 2015 there had been many reports of cod bycatch in the GOM and excellent cod fishing in southern New England. An additional six individuals and the Stellwagen Bank Charter Boat Association also commented that cod are more abundant in the GOM. Additionally, one commenter asserted that the recreational discard mortality was incorrectly assumed to be 100 percent.

Response: Atlantic cod are managed as two distinct stocks: GOM and Georges Bank. Atlantic cod caught in southern New England are part of the Georges Bank stock, and are not part of the GOM stock. As described more fully in the Framework Adjustment 55 EA, an operational assessment of GOM cod was conducted in 2015. The review panel concluded that the updated assessment was acceptable as a scientific basis for management advice. Consistent with National Standard 2, this assessment was considered the best scientific information available upon which to base management measures. This operational assessment included the most recent information on recreational discard mortality for GOM cod (15 percent) to re-estimate recreational catch from 2004 through 2014. The assessment found that the stock is overfished, subject to overfishing, and spawning stock biomass was only 4–6 percent of the biomass target. Based on this information, and that GOM cod remains subject to a rebuilding program as part of the Northeast Multispecies FMP, the recreational measures implemented by this rule are necessary to prevent the recreational fishery from exceeding the quota.

Comment 13: One individual recommended a mid-year adjustment to increase or decrease the cod bag limit based on science or input from the for-hire fleet.

Response: Although a mid-year adjustment may be beneficial in some circumstances, this type of mid-season, real-time adjustment is not currently possible for the recreational groundfish fishery. As described in greater detail in the proposed rule and Supplemental EA, the Marine Recreational Information Program (MRIP) gathers fishing effort and catch data in two month ''waves'' (for example, wave 1 is January–February; wave 2 is March–April), and preliminary data for a given wave is generally not available until 6 weeks after the wave ends. Accurately assessing catch mid-year, modeling potential changes, and revising regulations in time to make any meaningful change prior to the end of the fishing year would not be possible.

Cod Minimum Size

Comment 14: Three individuals commented that the minimum size for cod should be lowered. One of the individuals suggested that a 19-inch (48.3-cm) minimum size and a 30-inch (76.3-cm) maximum size be implemented rather than only a minimum size.

Response: The recreational groundfish fishery has historically been managed with minimum sizes to protect juveniles and control overall mortality. As described in the proposed rule, we consulted with the Council, including the Recreational Advisory Panel and the Groundfish Oversight Committee. Analysis of potential measures for 2016 showed that cod catch and mortality increased with lower minimum sizes. Based on these analyses, the Council, the Recreational Advisory Panel, and the Groundfish Oversight Committee all recommended a 24-inch minimum size for cod. The commenter did not explain why a maximize size limit combined with a minimum size limit would better achieve the conservation objectives for cod. Therefore, we have determined that the Council's recommended minimum size by itself is expected to keep the recreational cod catch below the quota.

Cod Season

Comment 15: The Stellwagen Bank Charter Boat Association and 65 individuals commented in support of a longer open season for cod than the two months set by this final rule. A total of three individuals also commented that the open season for cod should be in the spring to reflect historical fishing patterns.

Response: We disagree with setting a longer open season and with moving the open season to spring. We agree with the Council's recommendation to open August and September for cod fishing because it protects spring-spawning cod, provides more conservation than a spring opening, and strikes a better balance between the summer season preferred by many private recreational anglers and tourists relying on for-hire vessels in the southern GOM, and the longer fall season favored by the for-hire vessels further north in the GOM looking to extend their season.

General Comments

Comment 16: One commenter felt that it was unfair for closed seasons to always occur in spring because it disadvantaged for-hire businesses.

Response: Over time, closed seasons for GOM cod and haddock have occurred during different seasons (including spring, summer, fall, and winter). As stated in the previous comment, we agree with the Council's recommendation to curtail the spring open season for GOM cod, in part, because spring is a spawning season for cod in the GOM and keeping the GOM closed to recreational vessels during spawning season provides more protection of the cod stock there. We will continue to work collaboratively with the recreational community to develop measures that best meet the needs of the fishery.

Comment 17: One individual commented that the for-hire fleet should have different regulations than private recreational anglers.

Response: We do not agree that there should be different measures between the for-hire fleet and private recreational anglers at this time because the Northeast Multispecies FMP does not specify separate goals or objectives for managing these two segments of the fishery. The Council has allocated sub-ACLs of GOM cod and haddock to the recreational fishery as a whole, but has not further divided those allocations between the private and for-hire sectors. The Recreational Advisory Panel has discussed the idea of separating the private angler and for-hire sectors of the recreational fishery, but the Council has chosen not to recommend such measures. Accordingly, we are implementing recreational measures applicable to all vessels recreational fishing for GOM cod and haddock.

Comment 18: We received many comments comparing the recreational and commercial fisheries. Commenters argued that the recreational fishery has little impact on stocks, that recreational fishermen should not be penalized for the poor status of the GOM cod stock, and that the commercial fishery (particularly draggers) was responsible for the current GOM cod stock status.

Response: Based on historical landings, approximately one third of the GOM cod and haddock annual catch limits are allocated to the recreational fishery. Preliminary estimates for fishing year 2015 catch show that the recreational fishery stayed within its allocations. However, in fishing years 2013 and 2014, the recreational fishery exceeded both its GOM cod and haddock quotas by considerable amounts. In 2014, catch of GOM haddock from recreational vessels exceeded that from commercial groundfish vessels. Recreational catch is a significant portion of the GOM cod and haddock harvest and it needs to be adequately managed in tandem with the commercial fishery to ensure that catch limits necessary to prevent overfishing these stocks and rebuild the cod stock are not exceeded. For these reasons, the recreational measures implemented by this rule are necessary to prevent the recreational fishery from exceeding its sub-ACL in fishing year 2016.

Comment 19: We received 63 comments requesting that we consider economic impacts when setting the recreational measures for 2016.

Response: The supplemental EA developed for this action considers economic impacts of these recreational measures. It estimates that the number of angler trips in 2016 will increase more than 60 percent from 2015. Based on an increased number of trips, and increased catch, we anticipate these measures will have a positive economic impact in comparison to measures currently in place for 2015. These measures are intended to mitigate the economic impacts of continued low allocations of GOM cod.

Comment 20: One individual recommended that we ban treble hooks to reduce discard mortality of cod and haddock.

Response: The Council did not recommend banning treble hooks in its consultation with us. There is no conclusive scientific evidence, at this time, that banning treble hooks would have positive conservation benefits in the GOM groundfish fishery, but there is ongoing research on this type of measure. Until we have more scientific evidence on this type of gear change, we have determined not to implement a ban on treble hooks.

Comment 21: One individual commented that recreational effort in the GOM is higher than data show and recommended additional data be collected from small recreational fishing vessels.

Response: Currently, all recreational data is collected through MRIP which estimates effort by private recreational vessels from information collected by the Coastal Household Telephone Survey. MRIP is transitioning to a mail survey design to improve the information collected. Beginning in January 2018, the transition will be complete and the mail survey will have replaced the telephone survey. Until then, both surveys are being run to calibrate the new survey and this is considered to collect the best scientific information available.

Classification

The Administrator, Greater Atlantic Region, NMFS, determined that these measures are necessary for the conservation and management of the Northeast multispecies fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

There is good cause under 5 U.S.C. 553(d)(1) and (3) to waive the requirement for an effective date 30 days after date of publication because this rule relieves a restriction by increasing recreational fishing opportunities for Gulf of Maine (GOM) cod and haddock. This rule could not have been published sooner because data to justify these measures was only recently available and there was a regulatory requirement to first consult with the Council which could be done no sooner than its December 1–3, 2015, meeting. Subsequent to that meeting NMFS was required to publish a proposed rule and accept comment on the proposed measures prior to publishing this final rule. Currently, recreational fishing vessels are prohibited from retaining any GOM cod. Additionally, the recreational bag limit for GOM haddock is three fish and the fishery is only open May through August and November through February.

The measures implemented by this final rule relieve the current restriction on the recreational fishery by increasing the GOM cod bag limit from zero to one fish and the haddock bag limit from 3 fish to 15 fish beginning on May 1, resulting in in positive economic benefits to the recreational fishery. Because the recreational fishery has been closed since February 29, 2016, it is important to immediately implement this increased bag limit to ensure that recreational anglers, and the small businesses that make up the for-hire fleet, can plan for and make the most of

the short spring and summer season when weather is best for small boats in the GOM.

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

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

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 20, 2016.

Samuel D. Rauch III,

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

For the reasons stated in the preamble, NMFS amends 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.89, revise paragraphs (b)(1), (c)(1)(ii), (c)(2), and (c)(8) to read as follows:

§ 648.89 Recreational and charter/party vessel restrictions.

* * * * *

(b) *Recreational minimum fish sizes*—(1) *Minimum fish sizes.* Unless further restricted under this section, persons aboard charter or party boats permitted under this part and not fishing under the NE multispecies DAS program or under the restrictions and conditions of an approved sector operations plan, and private recreational fishing vessels in or possessing fish from the EEZ, may not possess fish smaller than the minimum fish sizes, measured in total length, as follows:

Species	Minimum size	
	Inches	cm
Cod:		
Inside GOM Regulated Mesh Area [1]	24	61.0
Outside GOM Regulated Mesh Area [1]	22	55.9
Haddock:		
Inside GOM Regulated Mesh Area [1]	17	43.2
Outside GOM Regulated Mesh Area [1]	18	45.7
Pollock	19	48.3
Witch Flounder (gray sole)	14	35.6
Yellowtail Flounder	13	33.0
American Plaice (dab)	14	35.6
Atlantic Halibut	41	104.1
Winter Flounder (blackback)	12	30.5
Redfish	9	22.9

[1] GOM Regulated Mesh Area specified in § 648.80(a).

* * * * *

(c) * * *

(1) * * *

(ii) Each person on a private recreational fishing vessel, fishing from August 1 through September 30, may possess no more than one cod per day in, or harvested from, the EEZ when fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1); with the exception that each person on a private recreational vessel in possession of cod caught outside the GOM Regulated Mesh Area specified in § 648.80(a)(1) may transit this area with more than one such cod per person up to the possession limit specified at paragraph (c)(1)(i) of this section, provided all bait and hooks are removed from fishing rods and any cod on board has been gutted and stored.

* * * * *

(2) *Charter or party boats.* (i) Each person on a charter or party boat permitted under this part and not fishing under the NE multispecies DAS program or on a sector trip may possess unlimited cod when fishing outside of the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(ii) Each person on a charter or party boat permitted under this part, fishing from August 1 through September 30, and not fishing under the NE multispecies DAS program or on a sector trip, may possess no more than one cod per day in the GOM Regulated Mesh Area specified in § 648.80(a)(1); with the exception that each person on a charter or party boat in possession of cod caught outside the GOM Regulated Mesh Area specified in § 648.80(a)(1) may transit this area with more than one such cod up to any possession limit under paragraph (c)(2)(i) of this section, provided all bait and hooks are removed from fishing rods and any cod on board has been gutted and stored.

(iii) For purposes of counting fish, fillets will be converted to whole fish at the place of landing by dividing the number of fillets by two. If fish are filleted into a single (butterfly) fillet, such fillet shall be deemed to be from one whole fish.

(iv) Cod harvested by a charter or party boat with more than one person aboard may be pooled in one or more containers. Compliance with the possession limits will be determined by dividing the number of fish on board by the number of persons on board. If there is a violation of the possession limits on board a vessel carrying more than one person, the violation shall be deemed to have been committed by the owner or operator of the vessel.

(v) Cod must be stored so as to be readily available for inspection.

* * * * *

(8) *Haddock*—(i) *Outside the Gulf of Maine*—(A) *Private recreational vessels.* Each person on a private recreational vessel may possess unlimited haddock in, or harvested from, the EEZ when fishing outside of the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(B) *Charter or party boats.* Each person on a charter or party fishing boat permitted under this part, and not fishing under the NE multispecies DAS program or on a sector trip, may possess unlimited haddock in, or harvested from, the EEZ when fishing outside of the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(ii) *Gulf of Maine*—(A) *Private recreational vessels.* Each person on a private recreational vessel in possession of haddock caught outside the GOM Regulated Mesh Area specified in § 648.80(a)(1) may transit this area with more than the GOM haddock possession limit specified at paragraph (c)(8)(ii) of this section up to the possession limit specified at paragraph (c)(8)(i) of this section, provided all bait and hooks are removed from fishing rods and any haddock on board has been gutted and stored.

(*1*) *May through February.* Each person on a private recreational fishing vessel, fishing from May 1 through February 28 (February 29 in leap years), may possess no more than 15 haddock per day in, or harvested from, the EEZ when fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(*2*) *March 1 through April 14.* When fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1), persons aboard private recreational fishing vessels may not fish for or possess any haddock from March 1 through April 14.

(*3*) *April 15 through April 30.* Each person on a private recreational fishing vessel, fishing from April 15 through

April 30, may possess no more than 15 haddock per day in, or harvested from, the EEZ when fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(B) *Charter or party boats.* Each person on a charter or party fishing boat permitted under this part, and not fishing under the NE multispecies DAS program or on a sector trip, in possession of haddock caught outside the GOM Regulated Mesh Area specified in § 648.80(a)(1) may transit this area with more than the GOM haddock possession limit specified at paragraph (c)(8)(ii) of this section up to the possession limit specified at paragraph (c)(8)(i) of this section, provided all bait and hooks are removed from fishing rods and any haddock on board has been gutted and stored.

(*1*) *May through February.* Each person on a charter or party fishing boat permitted under this part, and not fishing under the NE multispecies DAS program or on a sector trip, fishing from May 1 through February 28 (or 29 in leap years), may possess no more than 15 haddock per day in, or harvested from, the EEZ when fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(*2*) *March 1 through April 14.* When fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1), persons aboard a charter or party fishing boat permitted under this part, and not fishing under the NE multispecies DAS program or on a sector trip, may not fish for or possess any haddock from March 1 through April 14.

(*3*) *April 15 through April 30.* Each person on a charter or party fishing boat permitted under this part, and not fishing under the NE multispecies DAS program or on a sector trip, fishing from April 15 through April 30, may possess no more than 15 haddock per day in, or harvested from, the EEZ when fishing in the GOM Regulated Mesh Area specified in § 648.80(a)(1).

(iii) For purposes of counting fish, fillets will be converted to whole fish at the place of landing by dividing the number of fillets by two. If fish are filleted into a single (butterfly) fillet, such fillet shall be deemed to be from one whole fish.

(iv) Haddock harvested in or from the EEZ by private recreational fishing boats or charter or party boats with more than one person aboard may be pooled in one or more containers. Compliance with the possession limit will be determined by dividing the number of fish on board by the number of persons on board. If there is a violation of the possession limit on board a vessel carrying more than one person, the violation shall be deemed to have been committed by the owner or operator of the vessel.

(v) Haddock must be stored so as to be readily available for inspection.

* * * * *

[FR Doc. 2016–10053 Filed 4–29–16; 8:45 am]

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A new table will be published in the first issue of each month.

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May 24	Jun 8	Jun 14	Jun 23	Jun 28	Jul 8	Jul 25	Aug 22
May 25	Jun 9	Jun 15	Jun 24	Jun 29	Jul 11	Jul 25	Aug 23
May 26	Jun 10	Jun 16	Jun 27	Jun 30	Jul 11	Jul 25	Aug 24
May 27	Jun 13	Jun 17	Jun 27	Jul 1	Jul 11	Jul 26	Aug 25
May 31	Jun 15	Jun 21	Jun 30	Jul 5	Jul 15	Aug 1	Aug 29