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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

[NRC–2017–0144]

RIN 3150–AK06

Update to Fees for Search and Review of Agency Records by NRC Personnel

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to revise the fees charged for search and review of agency records by NRC personnel in response to certain Freedom of Information Act (FOIA) requests. These revisions are being made to ensure the NRC recovers direct costs of these activities, as required by the FOIA.

DATES: This direct final rule is effective March 4, 2019, unless significant adverse comments are received by January 18, 2019. If this direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the **Federal Register**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Comments received on this direct final rule will also be considered to be comments on a companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register**.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0144. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Stephanie Blaney, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6975; email: *Stephanie.Blaney@nrc.gov.*

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0144 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0144.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2017–0144 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is using the ''direct final rule procedure'' for this rule. The rule will become effective on March 4, 2019. However, if the NRC receives significant adverse comments on this direct final rule by January 18, 2019, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register**. Absent significant modifications to the proposed revisions requiring republication, the NRC will

not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule.

For detailed instructions on filing comments, please see the **ADDRESSES** section of this document.

III. Background

The FOIA provides that any person has a right to request and obtain access to federal agency records, except to the extent that any portions of those records are exempt from public disclosure. The FOIA also authorizes agencies to issue regulations specifying a schedule of fees for the processing of those requests (5 U.S.C. 552(a)(4)(A). These fees are limited to reasonable standard charges for document search, duplication, and review, which may be charged depending on the purpose for which the records are sought and the class of requestor. The NRC's implementing FOIA regulations are found in part 9 of Title 10 of the *Code of Federal Regulations* (10 CFR). The NRC charges fees for the search and review of agency records in accordance with § 9.37, ''Fees for search and review of agency records by NRC personnel,'' (although as specified in § 9.39, ''Search and duplication provided without charge,'' the NRC will search for records in some instances without charge, and requests for waivers or reduction of fees can be sought as specified in § 9.41, ''Requests for waiver or reduction of fees''). Consistent with Office of Management and Budget (OMB) guidelines on fee schedules (52 FR 10012; March 27, 1987), the NRC recoups the direct costs of search and review by charging the hourly rates of the employees performing the task, plus 16 percent for fringe benefits. These OMB guidelines also provide that, where a homogenous or single class of personnel is used, agencies may establish reasonable average rates for the range of salary grades typically involved.

The NRC first established fees for search and review of agency records in 1987 (52 FR 49350; December 31, 1987), and last updated these fees in 2010 (75 FR 41368; July 16, 2010). Recently, as part of the agency's biennial review of fees performed under the Chief Financial Officers Act of 1990 (31 U.S.C. 902(a)(8)), the NRC determined that the search and review rates for agency clerical staff and for professional/managerial staff needed to be increased in order to ensure the NRC continues to recover the direct costs of these activities.

Section 9.37 paragraph (a) will be changed from a GG–7/step 6 salary rate to a GG–9/step 7 salary rate; and paragraph (b) will be changed from a GG–13/step 6 salary rate to a GG–14/step 7 salary rate.

IV. Discussion of Changes

The FOIA authorizes agencies to issue regulations specifying a schedule of fees for processing requests from any person who requests access to federal agency records. Consistent with OMB fee schedule guidelines, the NRC recoups the costs associated with the search and review of documents by charging the hourly rates of the employees performing the task, plus 16 percent for fringe benefits. The NRC last updated these fees in 2010. During the agency's biennial review of fees, it was determined that these fees needed to be increased in order to ensure the NRC recovers the direct costs of these activities.

V. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

VI. National Environmental Policy Act

The NRC has determined that this direct final rule is the type of action described in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this direct final rule.

VII. Paperwork Reduction Act Statement

This direct final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

VIII. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this direct final rule will not, if issued, have a significant economic impact on a substantial number of small entities. Search and review fees, which are borne by persons who voluntarily submit FOIA requests and represent only reasonable costs associated with the NRC's processing of such requests, are typically nominal. Additionally, as discussed above, the FOIA and NRC regulations provide means by which persons can request waiver or reduction of fees.

IX. Congressional Review Act

This direct final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, OMB has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects in 10 CFR Part 9

Administrative practice and procedure, Courts, Criminal penalties, Freedom of information, Government employees, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 9:

PART 9—PUBLIC RECORDS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: Atomic Energy Act of 1954, sec. 161 (42 U.S.C. 2201); Energy

Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); 44 U.S.C. 3504 note.

Subpart A also issued under 31 U.S.C. 9701.

Subpart B also issued under 5 U.S.C. 552a.

Subpart C also issued under 5 U.S.C. 552b.

■ 2. In § 9.37, revise paragraphs (a) and (b) to read as follows:

§ 9.37 Fees for search and review of agency records by NRC personnel.

* * * * *

(a) Clerical search and review at a salary rate that is equivalent to a GG–9/step 7, plus 16 percent fringe benefits;

(b) Professional/managerial search and review at a salary rate that is equivalent to a GG–14/step 7, plus 16 percent fringe benefits; and

* * * * *

Dated at Rockville, Maryland, this 3rd day of December 2018.

For the Nuclear Regulatory Commission.

Margaret M. Doane,

Executive Director for Operations.

[FR Doc. 2018–27434 Filed 12–18–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2018–0075]

RIN 3150–AK12

List of Approved Spent Fuel Storage Casks: NAC International NAC–UMS® Universal Storage System, Certificate of Compliance No. 1015, Amendment No. 6

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of January 7, 2019, for the direct final rule that was published in the **Federal Register** on October 22, 2018. This direct final rule amends the NRC's spent fuel storage regulations by revising the NAC International NAC–UMS® listing within the ''List of approved spent fuel storage casks'' to include Amendment No. 6 to Certificate of Compliance No. 1015. Amendment No. 6 revises the technical specifications of the certificate of compliance to: Remove a redundant requirement for inspection of the concrete cask and canister; revise a limiting condition of operation for heat removal to clarify that ''LCO not met'' means that the concrete heat removal system is inoperable; remove an inspection requirement that is already covered by limiting condition of operation surveillance requirements for off-normal, accident, or natural phenomenon events; and clarify that ''immediate'' restoration of a concrete cask's heat removal capabilities means ''within the design-basis time limit'' in Section 11.2.13 of the final safety analysis report, ''or within the time limit for a less than design-basis heat load case, as evaluated.'' Amendment No. 6 also clarifies that a limiting condition of operation for loaded cask surface dose rates applies prior to storage conditions, when dose rates will be highest.

DATES: *Effective date:* The effective date of January 7, 2019, for the direct final rule published October 22, 2018 (83 FR 53159), is confirmed.

ADDRESSES: Please refer to Docket ID NRC–2018–0075 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0075. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The proposed amendment to the certificate, the proposed Appendices A and B to the technical specifications, and preliminary safety evaluation report are available in ADAMS under Accession No. ML18088A169. The final amendment to the certificate, final appendices to the technical specifications, and final safety evaluation report can also be viewed in ADAMS under Accession No. ML18333A232.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Bernard H. White, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–6577; email: *Bernard.White@nrc.gov* or Robert D. MacDougall, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–5175; email: *Robert.MacDougall@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On October 22, 2018 (83 FR 53159), the NRC published a direct final rule amending its regulations in part 72 of title 10 of the *Code of Federal Regulations* by revising the NAC International NAC–UMS® listing within the ''List of approved spent fuel storage casks'' to include Amendment No. 6 to Certificate of Compliance No. 1015. Amendment No. 6 revises the technical specifications of the certificate of compliance to: Remove a redundant requirement for inspection of the concrete cask and canister; revise a limiting condition of operation for heat removal to clarify that ''LCO not met'' means that the concrete heat removal system is inoperable; remove an inspection requirement that is already covered by limiting condition of operation surveillance requirements for off-normal, accident, or natural phenomenon events; and clarify that ''immediate'' restoration of a concrete cask's heat removal capabilities means ''within the design-basis time limit'' in Section 11.2.13 of the final safety analysis report, ''or within the time limit for a less than design-basis heat load case, as evaluated.'' Amendment No. 6 also clarifies that a limiting condition of operation for loaded cask surface dose rates applies prior to storage conditions, when dose rates will be highest. In the direct final rule, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on January 7, 2019. The NRC did not receive any comments on the direct final rule. Therefore, this direct final rule will become effective as scheduled.

Dated at Rockville, Maryland, this 13th day of December 2018.

For the Nuclear Regulatory Commission.

Cindy K. Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2018–27436 Filed 12–18–18; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 590

Eliminating the End Use Reporting Provision in Authorizations for the Export of Liquefied Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Policy statement.

SUMMARY: The Department of Energy's Office of Fossil Energy (DOE/FE) is discontinuing its practice, adopted in 2016, of including an ''end use'' reporting provision in orders authorizing the export of domestically produced natural gas, including liquefied natural gas (LNG), issued under section 3 of the Natural Gas Act (NGA). Under this practice, many authorization holders are currently required to track and report the country (or countries) of destination into which their exported LNG or natural gas was ''received for end use.'' Due to practical concerns about this reporting requirement and a reconsideration of the need for the requirement given those concerns, DOE/FE has determined that it is prudent to discontinue this requirement in export authorizations going forward. DOE/FE will revert to its prior practice of requiring authorization holders to report, in relevant part, the country (or countries) into which the exported LNG or natural gas ''was actually delivered.'' DOE/FE believes this action will enhance the accuracy of information provided by authorization holders and will reduce administrative burdens for the U.S. LNG export market. This policy statement affects only future export authorizations issued by DOE/FE. However, concurrently with the issuance of this policy statement, DOE/FE is issuing a blanket order removing the end use provision from applicable existing export authorizations issued from February 2016 to present.

DATES: This policy statement is effective on December 19, 2018.

FOR FURTHER INFORMATION CONTACT: Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2627, email: *amy.sweeney@hq.doe.gov;* or Cassandra Bernstein or Shawn Flynn, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793 or (202) 586–5359, email: *cassandra.bernstein@hq.doe.gov* or *shawn.flynn@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory Background
II. Regulatory Background
III. Policy Statement
IV. Administrative Benefits
V. Approval of the Office of the Secretary

I. Statutory Background

The Department of Energy is responsible for authorizing exports of natural gas to foreign nations pursuant to section 3 of the NGA, 15 U.S.C. 717b.[1] Under section 3(c) of the NGA, exports of natural gas to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (FTA countries) are ''deemed to be consistent with the public interest.'' Therefore, applications authorizing natural gas and LNG exports to FTA countries must be granted ''without modification or delay.''[2] Section 3(a) of the NGA governs exports to any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries). DOE has consistently interpreted section 3(a) of the NGA as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest.[3] Accordingly, DOE conducts an informal adjudication and grants the application unless DOE finds that the proposed exportation to non-FTA countries will not be consistent with the public interest.[4]

II. Regulatory Background

DOE's regulations implementing section 3 of the NGA are codified at 10 CFR part 590. Under 10 CFR 590.404, DOE/FE has broad authority to ''issue a final opinion and order and *attach such conditions* thereto as may be required by the public interest after completion and review of the final record.''[5] In the long-term and short-term export authorizations issued by DOE/FE to date (both to FTA and non-FTA countries), DOE/FE imposes conditions on the authorization holder.[6] These conditions include certain reporting requirements, including those described below.

A. Long-Term LNG Export Authorization Orders—2011 to January 2016

In 2011, DOE/FE issued its first long-term export authorization to a LNG export project to be located in the lower-48 states. From that time through January 2016, DOE included two reporting provisions in every long-term LNG export authorization order that are relevant here.

First, DOE/FE required the long-term LNG export authorization holder to include the following provision in any agreement or other contract for the sale of LNG exported pursuant to its authorization:

> Customer or purchaser acknowledges and agrees that it will resell or transfer U.S.-sourced natural gas in the form of LNG purchased hereunder for delivery to the countries identified . . ., and/or to purchasers that have agreed in writing to limit their direct or indirect resale or transfer of such LNG to such countries. Customer or purchaser further commits to cause a report to be provided to [the long-term LNG export authorization holder] that *identifies the country of destination, upon delivery, into which the exported LNG or natural gas was actually delivered,* and to include in any resale contract for such LNG the necessary conditions to insure that [the long-term LNG export authorization holder] is made aware of all such actual destination countries.

Second, as part of the monthly reporting requirements imposed as a condition in these long-term LNG export authorization orders, DOE/FE required the authorization holder to report, for each LNG cargo, ''the country (or countries) of destination into which the exported LNG *was actually delivered.*''

Importantly, for all the orders issued during this timeframe, this language remains in effect. DOE/FE did not amend those orders to change these two reporting provisions and is not doing so through this policy statement. However, beginning in February 2016, DOE/FE incorporated different language for these two reporting provisions in long-term

[1] The authority to regulate the imports and exports of natural gas, including liquefied natural gas, under section 3 of the NGA (15 U.S.C. 717b) has been delegated to the Assistant Secretary for Fossil Energy in Redelegation Order No. 00–006.02, issued on November 17, 2014.

[2] 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

[3] *See Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 203 (D.C. Cir. 2017) (''We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.' '') (quoting *W. Va. Pub. Serv. Comm'n* v. *U.S. Dep't of Energy,* 681 F.2d 847, 856 (D.C. Cir. 1982)).

[4] *See id.* (''there must be 'an affirmative showing of inconsistency with the public interest' to deny the application'' under NGA section 3(a)) (quoting *Panhandle Procedures & Royalty Owners Ass'n* v. *Econ Regulatory Admin.,* 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

[5] 10 CFR 590.404 (emphasis added).

[6] The terms ''authorization'' and ''order'' are used interchangeably for purposes of this policy statement.

(and some short-term) LNG export authorization orders, as explained below.

B. Long-Term LNG Export Authorization Orders—February 2016 to Present

On February 5, 2016, DOE/FE granted the applications of certain Canadian companies requesting authorization to export U.S.-sourced natural gas by pipeline to Canada, where the companies planned to export U.S. natural gas to Canada by pipeline, then liquefy the U.S. natural gas and export it in the form of LNG to other countries.[7] These applications raised novel legal and policy considerations. In particular, DOE/FE was concerned about the potential for U.S.-sourced natural gas to be exported to a neighboring FTA country (Canada or Mexico), then re-exported as LNG from those countries to non-FTA countries without DOE/FE having knowledge of the final destination country. Such a situation could lead to a company attempting to circumvent the public interest review requirement of NGA section 3(a) by transiting U.S.-sourced natural gas through a FTA country to a non-FTA country. Additionally, as the U.S. LNG export market developed, DOE/FE sought greater transparency about where U.S.-sourced natural gas was being delivered and used around the world.

To address these issues, DOE/FE began adding an ''end use'' reporting requirement as a condition to all long-term (and some short-term) LNG export authorizations issued on or after February 5, 2016. At that time, DOE/FE did not find that the addition of this end use provision required notice in the **Federal Register**.

Under this provision, authorization holders are currently required to include the following provision in any agreement or other contract for the sale or transfer of LNG exported pursuant to its long-term LNG export authorization:

> Customer or purchaser acknowledges and agrees that it will resell or transfer U.S.-sourced natural gas in the form of LNG purchased hereunder for delivery to the countries identified in . . . and/or to purchasers that have agreed in writing to limit their direct or indirect resale or transfer of such LNG to such countries. Customer or purchaser further commits to cause a report to be provided to [the long-term LNG export authorization holder] that identifies the country of destination (or countries) *into which the exported LNG or natural gas was actually delivered and/or received for end use,* and to include in any resale contract for such LNG the necessary conditions to insure that [the long-term LNG export authorization holder] is made aware of all such actual destination countries.

Likewise, as part of the monthly reporting requirements, authorization holders are required to report, for each LNG cargo, ''the country (or countries) of destination into which the exported LNG *was actually delivered and/or received for end use.*''

In its orders, DOE/FE has defined ''end use'' to mean ''combustion or other chemical reaction conversion process (*e.g.,* conversion to methanol).''[8] To date, DOE/FE has included this end use provision in more than 40 export authorization orders.

III. Policy Statement

DOE/FE has become aware that it is impracticable, if not impossible, for authorization holders to comply with the end use reporting requirement. For example, a cargo of LNG could be offloaded and regasified in one country, and a portion of the U.S. natural gas could be re-exported by pipeline to another country or countries—without the direct knowledge or control of the parties to the initial export from the United States. As another example, an offloaded volume of U.S. LNG could be commingled with non-U.S. LNG before it is delivered to the end user. Some portion of this mixture could be reloaded and relocated to another country or countries before it is delivered to the end user, again without the direct knowledge or control of the parties to the initial U.S. export. In light of these possibilities, companies have expressed concern that the end use provision could put their export authorization(s) in jeopardy if they cannot strictly comply with it—*i.e.,* if they are unable to determine exactly where their exports were ''received for end use.''

Most recently, on October 29, 2018, Sempra LNG & Midstream, LLC (Sempra) filed comments in a different DOE/FE proceeding but preemptively raised the following concern about the end use reporting requirement:[9]

> [A]uthorization holders and Registrants may have limited visibility into the final end use country once a cargo of LNG has been delivered[.] . . . The inherent fungibility of natural gas poses a particular challenge for authorization holders, Registrants, and their customers in tracking molecules of the commodity to their ultimate end use destination.''[10]

Upon review of this issue, DOE/FE has determined that it is prudent to revert to the original (*i.e.,* pre-February 2016) destination language, which requires authorization holders to report the country (or countries) into which the exported LNG or natural gas ''was actually delivered''— not ''received for end use.''

Based on its analysis of the LNG export market, DOE/FE believes this change is in the public interest. DOE has determined that, for the reasons described herein, there is currently insufficient concern about authorization holders attempting to circumvent the public interest review process for non-FTA exports to justify an end-use reporting requirement—particularly given the compliance difficulties encountered by authorization holders. Among other reasons, all U.S. LNG export terminals operating or currently under construction have long-term authorization to export to both FTA and non-FTA countries. Second, presently there is no LNG ''hub'' located in a FTA country. Although the development of a LNG hub that facilitates physical trades in a FTA country could present an opportunity to transit U.S.-sourced natural gas through a FTA country to a non-FTA country, DOE/FE believes this risk is small given the development and transparency of the LNG export market at this time. Finally, re-exports of all LNG cargoes represent a very small percentage of LNG trade.[11]

For these reasons, DOE gives notice that DOE/FE is discontinuing its practice of including an end use provision in any export authorizations issued pursuant to section 3 of the NGA. In future long-term LNG export

[7] *See Bear Head LNG Corp. and Bear Head LNG (USA),* DOE/FE Order No. 3770, FE Docket No. 15–33–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas by Pipeline to Canada for Liquefaction and Re-Export in the Form of Liquefied Natural Gas to Non-Free Trade Agreement Countries (Feb. 5, 2016); *Pieridae Energy (USA) Ltd.,* DOE/FE Order No. 3768, FE Docket No. 14–179–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas Natural Gas by Pipeline to Canada for Liquefaction and Re-Export in the Form of Liquefied Natural Gas to Non-Free Trade Agreement Countries (Feb. 5, 2016).

[8] *See, e.g. Pieridae Energy (USA) Ltd.,* DOE/FE Order No. 3639, FE Docket No. 14–179–LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Natural Gas to Canada and to Other Free Trade Agreement Nations (May 22, 2015) at 3 n. 7.

[9] Sempra LNG & Midstream, LLC, Info. Collection Extension, OMB Control No. 1901–0294, Form FE–746R Natural Gas Imports and Exports, at 4 (Oct. 29, 2018).

[10] *Id.* at 5.

[11] *See, e.g.,* Internat'l Gas Union, *2018 World LNG Report,* at 7, *available at: https://www.igu.org/sites/default/files/node-document-field_file/IGU_LNG_2018_0.pdf* (''Globally-traded LNG volumes increased by 35.2 [million tons] MT in 2017, setting a new annual record of 293.1 MT. . . . After remaining stable during 2016, global re-export activity dropped by 39% [year-on-year], with only 2.7 MT re-exported by 11 countries during the year . . . .'').

authorization orders, DOE/FE will revert to its prior practice of requiring authorization holders to report, in relevant part, the country (or countries) into which the exported LNG or natural gas ''was actually delivered.'' In keeping with current practice, if a cargo of LNG exported from the United States makes multiple physical deliveries (a ''split cargo''), each country receiving delivery of U.S. LNG must be reported as a destination.

This policy statement applies only to future orders. Concurrently with this policy statement, DOE/FE is issuing a blanket order to remove the end use provision from existing authorizations issued on or after February 5, 2016.[12] DOE/FE has included a list of the affected export authorizations in that blanket order.[13]

IV. Administrative Benefits

In this policy statement, DOE/FE is not proposing any new requirements for applicants or authorization holders under 10 CFR part 590. Rather, DOE/FE's intent is twofold: To enhance the accuracy of LNG reporting information provided by authorization holders, and to minimize administrative burdens on authorization holders in the U.S. LNG export market and those who may purchase U.S. LNG.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this policy statement.

Signed in Washington, DC, on December 13, 2018.

Steven E. Winberg,

Assistant Secretary for Fossil Energy Office of Fossil Energy.

[FR Doc. 2018–27449 Filed 12–18–18; 8:45 am]

BILLING CODE 6450–01–P

[12] *See* U.S. Dep't of Energy, DOE/FE Order No. 4322, FE Docket Nos. 14–179–LNG, *et al.,* Order Removing End Use Reporting Provision from Existing Export Authorizations (Dec. 13, 2018).

[13] *Id.* (Appendix).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0486; Airspace Docket No. 18–ASO–11]

RIN 2120–AA66

Establishment of Class E Airspace; Hardinsburg, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Breckinridge County Airport, Hardinsburg, KY, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures serving the airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Effective 0901 UTC, February 28, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC, 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

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

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave, College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Breckinridge County Airport, Hardinsburg, KY, to support IFR operations in standard instrument approach procedures at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 45863, September 11, 2018) for Docket No. FAA–2018–0486 to establish Class E airspace extending upward from 700 feet above the surface at Breckinridge County Airport, Hardinsburg, KY. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Breckinridge County Airport, Hardinsburg, KY, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures. These changes are necessary for continued safety and management of IFR operations at this airport.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3)

does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, effective September 15, 2018, is amended as follows:

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

* * * * *

ASO KY E5 Hardinsburg, KY [New]

Breckinridge County Airport, KY
(Lat. 37°47′05″ N, long. 86°26′29″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Breckinridge County Airport.

Issued in College Park, Georgia, on December 11, 2018.

Debra Hogan,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2018–27255 Filed 12–18–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0356]

RIN 1625–AA09

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Boca Raton, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Camino Real (Boca Club) Bridge across the Atlantic Intracoastal Waterway, mile 1048.2, at Boca Raton, Florida. This modification is necessary to allow for the completion of extensive rehabilitation of the bridge and fender system. This modification will allow the draw to provide single-leaf openings with a 6-hour advanced notice for a full opening.

DATES: This temporary final rule is effective from 7 a.m. on December 19, 2018 though 7 p.m. on April 30, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*. Type USCG–2018–0356 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Lieutenant Samuel Rodriguez-Gonzalez, U.S. Coast Guard Sector Miami, Waterways Management Division; telephone 305–535–4307, email *samuel.rodriguez-gonzalez@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code
FL Florida

II. Background Information and Regulatory History

On April 27, 2018, we published a temporary deviation from the operating schedule for the Camino Real Bridge entitled, ''Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Boca Raton, FL'' in the **Federal Register** (83 FR 18415). Outreach conducted with mariners utilizing the waterway indicated no objections to the temporary deviation.

The temporary deviation time period ran from April 23, 2018 through October 9, 2018, and was effective from 7 a.m. to 7 p.m. Monday through Saturday. During the effective period, the bridge operated on single-leaf openings with a 6-hour advanced notice for a full opening. Outside of the effective period, the bridge operated per the normal bridge operating schedule.

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorized an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. Unanticipated weather delays negatively impacted the schedule and pace of the bridge rehabilitation, and as a result additional time is required to complete the work necessary to restore the bridge to full operation. Therefore, the operating schedule of the bridge must be modified to allow for performance of all remaining repairs to the bridge and fender system in order to ensure the safety of persons and vessels in the vicinity of the bridge.

We are issuing this rule and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register** for the reasons stated above.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The Camino Real (Boca Club) Bridge across the Atlantic Intracoastal Waterway, mile 1048.2, at Boca Raton, FL is a double-leaf bascule bridge with a vertical clearance of 10 feet at mean high water in the closed to navigation position and a horizontal clearance of 83 feet between the fender system. The existing

drawbridge operating regulation is set out in 33 CFR 117.261(aa–1). Kiewit Infrastructure South Co., on behalf of the bridge owner, Palm Beach County, requested this modification in order to effect rehabilitation of the bridge and fender system as described above.

The Atlantic Intracoastal Waterway is used by a variety of vessels including U.S. government vessels, small commercial vessels, recreational vessels and tugs and barge traffic. Vessels able to pass through the bridge in the closed position may do so at anytime. The bridge will not be able to provide a full opening for emergencies and there is no immediate alternate route for vessels to pass.

IV. Discussion of the Rule

As noted above, we received no comments on the temporary deviation published on April 27, 2018. Additionally, coordination with waterway users indicated no objection to the temporary modification of the drawbridge schedule.

This rule modifies the operating schedule governing the Camino Real (Boca Club) Bridge across the Atlantic Intracoastal Waterway, mile 1048.2, at Boca Raton, FL. The draw shall provide single-leaf openings with a 6-hour advanced notice for a full opening from 7 a.m. to 7 p.m. Monday through Saturday. During non-working hours, the bridge will operate per the normal bridge operating schedule. The rule is necessary to accommodate the completion of the rehabilitation of the bridge and fender system. The Coast Guard will inform the users of the waterway through Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that operators can arrange their transits to minimize any impact caused by the temporary rule.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on: (1) The modified schedule will only be effective for twelve hours daily, Monday through Saturday; (2) vessels may continue to pass under the bridge via single-leaf openings; (3) the draw will provide a full opening so long as a requesting vessel provides notice 6-hours in advance notice; and (4) vessel traffic able to pass under the bridge in the closed position may do so at anytime.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically

excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction. A Record of Environmental Consideration and a Memorandum for the Record are not required for this rule.

G. Protest Activities

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

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 117.261, effective from 7 a.m. on December 19, 2018 to 7 p.m. on April 30, 2019, suspend paragraph (aa–1) and temporarily add paragraph (aa–2) to read as follows:

§ 117.261 Atlantic Intracoastal Waterway from St. Marys River to Key Largo.

* * * * *

(aa–2) Camino Real (Boca Club) Bridge, mile 1048.2, at Boca Raton. The draw shall provide single-leaf openings from 7 a.m. to 7 p.m., Monday through Saturday, on the hour, twenty minutes past the hour and forty minutes past the hour. A full opening shall be available with a 6-hour advanced notice. At all other times, the bridge will provide full openings on the hour, twenty minutes past the hour and forty minutes past the hour.

* * * * *

Dated: December 13, 2018.

Peter J. Brown,

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

[FR Doc. 2018–27386 Filed 12–18–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0960]

RIN 1625–AA08

Safety Zone; Lower Mississippi River, Mile Markers 229.5 to 230.5 Baton Rouge, LA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Lower Mississippi River from mile marker (MM) 229.5 to MM 230.5, above Head of Passes. This action is necessary to provide for the safety of persons, vessels, and the marine environment on these navigable waters near Baton Rouge, LA, during a New Year's Eve fireworks display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector New Orleans.

DATES: This rule is effective from 11:30 p.m. on December 31, 2018 through 1 a.m. on January 1, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2018–0960 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Justin Maio, Marine Safety Unit Baton Rouge, U.S. Coast Guard; telephone 225–298–5400 ext. 230, email *Justin.P.Maio@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this safety zone by December 31, 2018 and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay safety measures necessary to protect the public from potential hazards until after the date of the fireworks.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the fireworks display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Sector New Orleans (COTP) has determined that potential hazards associated with the New Year's Eve fireworks display will be a safety concern for anyone within approximately one mile of the launch site. The launch site will be located on the top of the levee of the Lower Mississippi River at approximate mile marker (MM) 229.9, Baton Rouge, LA. Hazards from the fireworks display include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. This rule is necessary to protect persons, vessels, and the marine environment before, during, and after the scheduled fireworks display.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 11:30 p.m. on December 31, 2018 through 1 a.m. on January 1, 2019. The safety zone covers all navigable waters of the Lower Mississippi River in Baton Rouge, LA, from mile marker (MM) 229.5 to MM 230.5 above Head of Passes (AHP). The duration of the zone is intended to ensure the safety of persons, vessels, and the marine environment before, during, and after the scheduled fireworks display. Entry into this zone is prohibited unless authorized by the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer

of the U.S. Coast Guard assigned to units under the operational control of USCG Sector New Orleans. Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or 67, or through the Marine Safety Unit Baton Rouge Officer of the Day at 225–281–4789. All persons and vessels permitted to enter this safety zone must transit at the slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative. The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. This temporary safety zone would only restrict navigation on a one-mile portion of the Lower Mississippi River for approximately one-and-one-half hours on one evening. Moreover, the Coast Guard will issue BNMs via VHF–FM marine channel 16 about the zone, and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting for approximately one and a half hours that would prohibit entry into a one-mile stretch of the Lower Mississippi River on one evening. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0960 to read as follows:

§ 165.T08–0960 Safety Zone; Lower Mississippi River, Mile Markers 229.5 to 230.5, Baton Rouge, LA.

(a) *Location.* The following area is a safety zone: All navigable waters of the Lower Mississippi River from mile marker (MM) 229.5 to MM 230.5 above Head of Passes, Baton Rouge, LA.

(b) *Effective period.* This section is effective from 11:30 p.m. on December 31, 2018 through 1 a.m. on January 1, 2019.

(c) *Regulations.* (1) Under the general safety zone regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Sector New Orleans (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector New Orleans.

(2) Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative via VHF–FM Channel 16 or 67, or through the Marine Safety Unit Baton Rouge Officer of the Day at 225–281–4789.

(3) All persons and vessels permitted to enter this safety zone must transit at the slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

Dated: December 13, 2018.

Kristi M. Luttrell,

Captain, U.S. Coast Guard, Captain of the Port Sector New Orleans.

[FR Doc. 2018–27466 Filed 12–18–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–1091]

RIN 1625–AA00

Safety Zone; Monongahela River, Miles 91.7 to 92.3, Maidsville, WV

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Monongahela River from mile 91.7 to mile 92.3. This safety zone is necessary to protect persons, vessels, and the marine environment from potential hazards associated with shore side construction activities. Entry of persons or vessels into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh or a designated representative.

DATES: This rule is effective without actual notice from December 19, 2018 until December 21, 2018.

For the purposes of enforcement, actual notice will be used from December 14, 2018 until December 19, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–1091 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Jennifer Haggins, Marine Safety Unit Pittsburgh, U.S. Coast Guard; telephone 412–221–0807, email *Jennifer.L.Haggins@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Marine Safety Unit Pittsburgh
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(3)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. This safety zone must be established by December 14, 2018 and we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the safety zone until after the date of the shore side construction and compromise public safety.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying this rule would be contrary to the public interest because immediate action is necessary to respond to the potential safety hazards associated with the shore side construction work involving a helicopter lifting heavy equipment.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Marine Safety Unit Pittsburgh (COTP) has determined that potential hazards associated with shore side construction work will be a safety hazard for anyone within a one-mile stretch of the Monongahela River. The rule is needed to protect persons, vessels, and the marine environment on the navigable waters within the safety zone before, during, and after the construction is complete and the helicopter is away from the area.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 9 a.m. through 6 p.m. on December 14, 2018 through December 21, 2018. The safety zone will cover all navigable waters of the Monongahela River, from mile 91.7 to mile 92.3. The duration of the zone is intended to protect persons, vessels, and the marine environment on these navigable waters before, during, and after the shore side construction. No

vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Marine Safety Unit Pittsburgh. Persons and vessels seeking entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or by telephone at (412) 221–0807. Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful instructions of the COTP or a designated representative. The COTP or a designated representative will inform the public of the enforcement period for the safety zone as well as any changes in the schedule through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, duration, and location of the safety zone. This rule will impact a small designated area of the Monongahela River of only one mile and for only eight days. Moreover, the Coast Guard will issue MSIBs, LNMs, BNMs via VHF–FM marine channel 16 about the zone, and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting eight days that will prohibit entry on a one-mile stretch of the Monongahela River. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER**

INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–1091 to read as follows:

§ 165.T08–1091 Safety Zone; Monongahela River, miles 91.7 to 92.3, Maidsville, WV.

(a) *Location.* The following area is a safety zone: All navigable waters of the Monongahela River from mile 91.7 to mile 92.3.

(b) *Effective period.* This section is effective without actual notice from December 19, 2018 until December 21, 2018. For the purposes of enforcement, actual notice will be used from [December 14, 2018 until December 19, 2018].

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Marine Safety Unit Pittsburgh.

(2) Persons and vessels seeking entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or by telephone at (412) 221–0807.

(3) Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful instructions of the COTP or a designated representative.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the enforcement period for the safety zone as well as any changes in the schedule through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

Dated: December 14, 2018.

A.W. Demo,

Commander, U.S. Coast Guard, Captain of the Port Marine Safety Unit Pittsburgh.

[FR Doc. 2018–27445 Filed 12–18–18; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

New Mailing Standards for Domestic Mailing Services Products

AGENCY: Postal Service ™.

ACTION: Final rule.

SUMMARY: On October 10, 2018, the Postal Service filed a notice of mailing services price adjustments with the Postal Regulatory Commission (PRC), effective January 27, 2019. This final rule contains the revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to implement the changes coincident with the price adjustments and other minor DMM changes.

DATES: *Effective:* January 27, 2019.

FOR FURTHER INFORMATION CONTACT: Jacqueline Erwin at (202) 268–2158.

SUPPLEMENTARY INFORMATION: On November 13, 2018, the PRC found that the price adjustments proposed by the Postal Service may take effect as planned. The price adjustments and DMM revisions are scheduled to become effective on January 27, 2019. Final prices are available under Docket No. R2019–1 (Order No. 4875) on the Postal Regulatory Commission's website at *www.prc.gov.*

Comments on Proposed Changes and USPS Responses

The Postal Service did not receive any formal comments on the October 17, 2018 proposed rule.

The Postal Service's final rule includes the following changes:

Periodicals Address Corrections for Alternate Addressed Nonsubscriber-Nonrequester Copies

The Postal Service will introduce a specifically tailored Periodicals Service Type ID (STID) for publishers to include in the Intelligent Mail® barcode (IMb®) along with authorized alternative addressing formats. Publishers will no longer receive address-related notices if the address is vacant or not deliverable.

Correcting Business Reply Mail®/ Qualified Business Reply Mail™ (BRM/ QBRM™) Postage Anomaly

The Postal Service will correct the BRM/QBRM postage anomaly by applying the retail ''stamped'' letter price to basic and high volume BRM. To offset the postage increase, basic and high volume BRM per piece fees have decreased.

Picture Permit Imprint Indicia

The Postal Service will eliminate the Full-service requirement on commercial mailings of First-Class Mail® or USPS Marketing Mail® postcards, letters, or flats using picture permit imprint indicia.

Small Parcel Forwarding Fee

The Postal Service will add a small parcel forwarding fee for USPS Marketing Mail parcels, endorsed ''Change Service Requested'' under ''Option 2'' (ACS only), that are forwarded due to an active change-of-address.

Overweight Item Charge

The Postal Service will introduce a charge for items identified in the postal network that exceed the 70 pound weight limit for Postal Service products, and are therefore nonmailable. Overweight items identified in the postal network will be assessed a $100 charge payable before release of the item, unless the item is discovered at the same facility where it was entered.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 111.1.

* * * * *

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED.]

■ 1. The authority citation for part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

500 Additional Mailing Services

* * * * *

505 Return Services

1.0 Business Reply Mail (BRM)

1.1 BRM Postage and Fees

1.1.1 Basic BRM

[*Revise the first sentence of the introductory text in 1.1.1 to read as follows:*]

For basic BRM, a permit holder is required to pay an annual permit fee as provided under 1.2 and a per piece fee under 1.1.7 in addition to the applicable Retail First-Class Mail (stamped letters), First-Class Package Service—Retail, or Priority Mail postage for each returned piece.***

* * * * *

1.1.3 Basic Qualified BRM (QBRM)

[*Revise the first sentence of the introductory text in 1.1.3 to read as follows:*]

For basic qualified BRM, a permit holder is required to pay an account maintenance fee under 1.1.8, and a per piece fee under 1.1.7 in addition to the applicable retail letter or card First-Class Mail (stamped letters) postage for each returned piece.***

* * * * *

507 Mailer Services

1.0 Treatment of Mail

* * * * *

1.5 Treatment for Ancillary Services by Class of Mail

* * * * *

1.5.2 Periodicals

Undeliverable-as-addressed (UAA) Periodicals publications (including publications pending Periodicals authorization) are treated as described in Exhibit 1.5.2, with these additional conditions:

* * * * *

[*Revise the text in items 1.5.2b and 1.5.2c to read as follows:*]

b. Publications with an alternative addressing format under 602.3.0 are delivered to the address when possible. Forwarding service is not provided for such mail.

c. Address correction service is mandatory for all Periodicals publications, except when publishers use authorized alternative addressing and an IMb with proper STID. An address correction service fee must be paid for each notice issued.

* * * * *

1.5.3 USPS Marketing Mail and Parcel Select Lightweight

* * * * *

Exhibit 1.5.3 Treatment of Undeliverable USPS Marketing Mail and Parcel Select Lightweight

Mailer Endorsement	USPS Treatment of UAA pieces

* * * * *

''Change Service Requested'' 1, 4

* * * * *

[*Revise the parenthetical for ''Option 2'' to read as follows:*]

(*Available via ACS only; for USPS Marketing Mail (all shapes) and Parcel Select Lightweight*)

* * * * *

If change-of-address order on file:

[*Revise the text under ''If change-of-address order on file:'' for ''Months 1 through 12'' to read as follows:*]

Months 1 through 12: Piece forwarded; postage due charged to the mailer at applicable Forwarding Fee based on the piece shape for USPS Marketing Mail or Parcel Select Lightweight; separate notice of new address provided (electronic ACS fee charged).

* * * * *

600 Basic Standards For All Mailing Services

* * * * *

602 Addressing

* * * * *

3.0 Use of Alternative Addressing

3.1 General Information

* * * * *

3.1.3 Treatment

[*Revise the third sentence of the introductory text in 3.1.3 to read as follows:*]

Periodicals publishers are notified when a mailpiece with an occupant or exceptional address format is undeliverable for solely address-related reasons, (except publishers using an IMb with proper STID on non-subscriber or non-requester copies under 207.7.0.

* * * * *

604 Postage Payment Methods and Refunds

* * * * *

5.0 Permit Imprint (Indicia)

* * * * *

5.4 Picture Permit Imprint Indicia

5.4.1 Description

[*Revise the third sentence of 5.4.1 to read as follows:*]

***Picture permit imprints may be used to pay postage and extra service fees on commercial mailings of First-Class Mail or USPS Marketing Mail postcards, letters, or flats.

* * * * *

5.4.5 Picture Permit Imprint Indicia Format

As options to the basic format under 5.3.11 and if all other applicable standards in 5.0 are met, permit imprint indicia may be prepared in picture permit imprint format subject to these conditions:

* * * * *

[*Delete 5.4.5f in its entirety and renumber current 5.4.5g through 5.4.5k as new 5.4.5f through 5.4.5j.*]

* * * * *

Notice 123 (Price List)

[*Revise prices as applicable.*]

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Brittany M. Johnson,

Attorney, Federal Compliance.

[FR Doc. 2018–27412 Filed 12–18–18; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0308; FRL–9987–98–Region 4]

Air Plan Approval; KY; Updates to Attainment Status Designations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality, on December 13, 2016. The changes to the SIP that EPA is taking final action to approve are the attainment status designations, as of October 6, 2016, for geographic areas within the Commonwealth for several national ambient air quality standards (NAAQS). The updates are being made to conform Kentucky's attainment status tables with the federal attainment status designations made for these areas. EPA has determined that the December 13, 2016, SIP revision is consistent with the Clean Air Act (CAA or Act) and EPA's regulations.

DATES: This rule will be effective January 18, 2019.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2018–0308. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Madolyn Sanchez, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Ms. Sanchez can be reached via telephone at (404) 562–9644 or via electronic mail at *sanchez.madolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Sections 108 and 109 of the CAA require EPA to set NAAQS for criteria air pollutants: Ozone (O_3); particulate matter (PM); carbon monoxide (CO); lead (Pb); sulfur dioxide (SO_2); and nitrogen dioxide (NO_2); and to undertake periodic review of these standards. After EPA sets a new NAAQS or revises an existing standard, the CAA requires EPA to determine if areas of the country meet the new standards and to designate areas as either nonattainment, unclassifiable/attainment, or unclassifiable. Such designations inform the state's planning and implementation of requirements to achieve and maintain the NAAQS for each area within that state.

Section 107(d) of the CAA governs the process for these initial area designations. Under this process, states and tribes submit recommendations to EPA as to whether or not an area is attaining the NAAQS for criteria air pollutants. EPA then considers these recommendations as part of its obligation to promulgate the area designations and boundaries for the new or revised NAAQS. EPA codifies its designations for areas within each state in 40 CFR part 81.[1] Under section 107(d) of the CAA, a designation for an area remains in effect until redesignated by EPA.

In a proposed rulemaking published on September 21, 2018 (83 FR 47856), EPA proposed to approve changes to Kentucky regulation 401 KAR 51:010, which update, as of October 6, 2016, the description and attainment or nonattainment status of geographic areas within the Commonwealth with regard to a number of the NAAQS. The Commonwealth of Kentucky last amended Regulation 401 KAR 51:010 in 1997 and, since that time, EPA has promulgated several changes to the designations of areas within the Commonwealth. As a result, Kentucky has amended Regulation 401 KAR 51:010 by updating, as of October 6, 2016, the attainment status designations in Sections 4 through 8 and Section 10 for CO, Pb, NO_2, O_3, $PM_{2.5}$, and total suspended solids[2] to conform with EPA's designations as reflected in 40 CFR 81.318. Regulation 401 KAR 51:010 has also been amended by making minor textual modifications to the NECESSITY, FUNCTION, AND CONFORMITY section and Section 1 (Definitions) and Section 2 (Attainment Status Designations). The details of Kentucky's submission and the rationale for EPA's action are explained in the proposed rulemaking. Comments on the proposed rulemaking were due on or before October 22, 2018. EPA did not receive any relevant comments on the proposed action. EPA is now taking final action to approve the above-referenced revisions.

II. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Kentucky regulation 401 KAR 51:010, *Attainment Status Designations,* effective October 6, 2016, which was revised to be consistent with the current NAAQS.[3] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[4]

III. Final Action

EPA is taking final action to approve portions of the Commonwealth of Kentucky's SIP revision submitted on December 13, 2016, because the changes are consistent with the CAA and EPA regulations. The submission revises Kentucky's attainment status designations tables for several NAAQS to conform with the federal attainment status designations made for geographic areas within the Commonwealth.

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 Act and applicable Federal regulations. *See* 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. This action merely approves state law as meeting Federal

[1] EPA's attainment status designations for Kentucky are found at 40 CFR 81.318.

[2] EPA is not taking final action on the portion of the submittal (Section 9) that modifies the attainment status designations for SO_2.

[3] With the exception of Section 9. Attainment Status Designations for Sulfur Dioxide (SO_2).

[4] *See* 62 FR 27968 (May 22, 1997).

requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 19, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 28, 2018.

Mary S. Walker,

Acting Regional Administrator, Region 4.

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 S—Kentucky

■ 2. In § 52.920, table 1 in paragraph (c) is amended by revising the entry ''401 KAR 51:010'' to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 1—EPA-APPROVED KENTUCKY REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards				
*	*	*	*	*
401 KAR 51:010	Attainment status Designations.	10/06/16	12/19/18, [insert **Federal Register** citation].	With the exception of Section 9. Attainment Status Designations for Sulfur Dioxide (SO_2).
*	*	*	*	*

* * * * *

[FR Doc. 2018–27356 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0419; FRL–9988–11–Region 4]

Air Plan Approval; North Carolina Miscellaneous Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of State Implementation Plan (SIP) revisions provided by the State of North Carolina through the North Carolina Division of Air Quality (NCDAQ) in letters dated June 5, 2017, and August 22, 2017. The submissions revise several regulations concerning nitrogen oxides (NO_X), emission control standards, monitoring, and reporting requirements. EPA is taking final action to approve these provisions of the SIP revisions because these changes are consistent with the Clean Air Act (CAA or Act) and federal regulations.

DATES: This rule will be effective January 18, 2019.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2018–0419. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Wong, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8726. Mr. Wong can also be reached via electronic mail at *wong.richard@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

NCDAQ submitted SIP revisions through letters dated June 5, 2017, and August 22, 2017 to EPA for review and approval into the North Carolina SIP.[1] North Carolina's SIP revisions include multiple changes to its air quality rules, under Subchapter 15A North Carolina Administrative Code (NCAC) 02D, specifically at Section .1404, ''Recordkeeping: Reporting: Monitoring,'' Section .0542, ''Control of Particulate Emissions from Cotton Ginning Operations,'' Section .0606, ''Sources Covered by Appendix P of 40 CFR part 51,'' and Section .0608, ''Other Large Coal or Residual Oil Burners.''[2] EPA is not taking action on Section .0535, ''Excess Emissions Reporting and Malfunctions'' which is included in the changes in the August 22, 2017 SIP revision. EPA will address changes to Section .0535 in a separate action.

In a notice of proposed rulemaking (NPRM) published on November 14, 2018 (83 FR 56773), EPA proposed to approve the SIP submissions transmitted under cover letters dated June 5, 2017, and August 22, 2017. The specific details of the SIP submissions and the rationale for EPA's actions are discussed in the NPRM. Comments on the proposed rulemaking were due on or before December 5, 2018. EPA received five comments in total—one comment that is not relevant to the action, two comments that support the revision and two adverse comments. The comments can be found in the docket for this action. After considering the adverse comments, EPA is now taking final action to approve the above-referenced revision.

II. Response to Comments

Comments: As mentioned above, EPA received two adverse public comments on the proposed rule published on November 14, 2018. The comments are available for public viewing as a part of the electronic docket for this rulemaking. The first Commenter notes that if the revisions are in line with the CAA and federal regulations, they should be approved; however, ''if they are considered worse, such as they are raising the emission rates for certain vendors, this should be addressed and maybe suggest a stricter standard if it is feasible.'' The second Commenter asserts that ''[i]n the past year, the Clean Air Act has been revised to be less harsh for energy plants. With a more relaxed Clean Air Act, the United States air quality and overall environmental health can take a toll. In the past 50 years ago, toxic pollutants like sulfur dioxide and smog have been reduced. With this proposed rule, this could completely reverse the progress the act has made thus far. These proposed changes should consider the long-term effects on the environment.''

Response: It is unclear how either of the comments relate to the proposed rule or how the commenters would like EPA to change the proposed rule. The rule changes being approved do not involve any changes (including increases) to emission rates, nor do they implicate any long-term effects on the environment. Rather, as discussed in the notice of proposed rulemaking, the changes to the NO_X recordkeeping, reporting, and monitoring rule involve minor typographical and clarifying changes that do not relax the rule, and the addition of sources subject to continuous emissions monitoring for NO_X strengthens the SIP. Changes to the other rules are either minor or clarifying and do not alter the meaning of the rules or they are consistent with the requirements of the CAA and federal regulations.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is taking final action to incorporate by reference North Carolina regulations under Subchapter 2D Air Pollution Control Requirements, Section .1404, ''Recordkeeping: Reporting: Monitoring,'' effective January 1, 2009,[3] which clarifies the rule by updating quality assurance, recordkeeping and reporting requirements and provisions for heat input calculations and removes references to repealed rules. EPA is also taking final action to incorporate by

[1] The SIP revisions were received by EPA on June 6, 2017, and September 6, 2017, respectively.

[2] In the table of North Carolina regulations federally approved into the SIP at 40 CFR 52.1770(c), 15A NCAC 02D is referred to as ''Subchapter 2D Air Pollution Control Requirements.''

[3] January 1, 2009 is the most recent state effective date of Subchapter 2D, Section .1404, ''Recordkeeping: Reporting: Monitoring,'' and it reflects the exact version of the text of Section .1404 that EPA is proposing to approve into the SIP.

reference regulations under Subchapter 2D, Section .0542, ''Control of Particulate Emissions from Cotton Ginning Operations,'' Section .0606, ''Sources Covered by Appendix P of 40 CFR part 51,'' and Section .0608, ''Other Large Coal or Residual Oil Burners,'' effective June 1, 2008, which make minor and clarifying changes, update rule references, and remove obsolete controls and dates. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State's implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[4]

IV. Final Action

EPA is taking final action to approve the portions of the SIP revisions referenced above and provided by the NCDAQ in letters dated June 5, 2017, and August 22, 2017. EPA is taking final action to approve the changes because the submissions are consistent with section 110 of the CAA.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 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. These actions merely propose to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, these final actions:

- Are 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);
- Are not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 6, 2018.

Mary S. Walker,

Acting Regional Administrator, Region 4.

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 II—North Carolina

■ 2. Section 52.1770(c)(1) is amended under Subchapter 2D Air Pollution Control Requirements, by revising the entries for ''Section .0542''; ''Section .0606'', ''Section .0608''; and ''Section .1404'' to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(c) * * *

(1) EPA-APPROVED NORTH CAROLINA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
Subchapter 2D Air Pollution Control Requirements				
*	*	*	*	*
Section .0500 Emission Control Standards				
*	*	*	*	*
Section .0542	Control of Particulate Emissions from Cotton Ginning Operations.	6/1/2008	12/19/2018, [Insert citation of publication].	

[4] *See* 62 FR 27968 (May 22, 1997).

(1) EPA-APPROVED NORTH CAROLINA REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Section .0600 Monitoring: Recordkeeping: Reporting				
*	*	*	*	*
Section .0606	Sources Covered By Appendix P of 40 CFR Part 51.	6/1/2008	12/19/2018, [Insert citation of publication].	
*	*	*	*	*
Section .0608	Other Large Coal or Residual Oil Burners.	6/1/2008	12/19/2018, [Insert citation of publication].	
*	*	*	*	*
Section .1400 Nitrogen Oxides				
Section .1404	Recordkeeping: Reporting: Monitoring.	1/1/2009	12/19/2018, [Insert citation of publication].	
*	*	*	*	*

* * * * *

[FR Doc. 2018–27358 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0177; FRL–9987–97–Region 9]

Approval and Promulgation of Air Quality State Implementation Plans; California; Interstate Transport Requirements for Ozone, Fine Particulate Matter, and Sulfur Dioxide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of a State Implementation Plan (SIP) submission from the State of California regarding certain interstate transport requirements of the Clean Air Act (CAA or ''Act''). This submission addresses the 2008 ozone national ambient air quality standards (NAAQS), the 2006 fine particulate matter ($PM_{2.5}$) and 2012 $PM_{2.5}$ NAAQS, and the 2010 sulfur dioxide (SO_2) NAAQS. The interstate transport requirements under the CAA consist of several elements; this final rule pertains only to significant contribution to nonattainment and interference with maintenance of the NAAQS in other states.

DATES: This final rule is effective on January 18, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2017–0177. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Rory Mays, Air Planning Office (AIR–2), EPA Region IX, (415) 972–3227, *mays.rory@epa.gov.*

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

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I. Proposed Action

The California Air Resources Board (CARB) submitted the ''California Infrastructure State Implementation Plan (SIP) Revision, Clean Air Act Section 110(a)(2)(D)'' on January 19, 2016 (''California Transport Plan'' or ''Plan'').[1] This Plan addresses interstate transport for the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS.[2] On February 7, 2018, the EPA proposed to approve the California Transport Plan into the California SIP because we determined that it complies with the relevant CAA requirements.[3] Our proposed action contains more information on the California Transport Plan and our evaluation. We summarize the key points of our proposed rulemaking and evaluation in this final rule.

Sections 110(a)(2)(D)(i)(I)–(II) of the CAA require SIPs to include provisions prohibiting any source or other type of emissions activity in one state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the NAAQS, or interfere with measures required to prevent significant deterioration of air quality or to protect visibility in any other state. This final rule addresses the

[1] Letter dated January 19, 2016, from Richard W. Corey, Executive Officer, CARB to Jared Blumenfeld, Regional Administrator, Region 9, EPA.

[2] The 2008 ozone NAAQS include primary and secondary 8-hour ozone NAAQS of 0.075 parts per million (ppm), 73 FR 16436 (March 27, 2008). The 2006 $PM_{2.5}$ NAAQS include primary and secondary 24-hour NAAQS for $PM_{2.5}$ of 35 micrograms per cubic meter ($\mu g/m^3$), 71 FR 61144 (October 17, 2006). The 2012 $PM_{2.5}$ NAAQS include a primary annual $PM_{2.5}$ NAAQS of 12.0 $\mu g/m^3$, 78 FR 3086 (January 15, 2013). The 2010 SO_2 NAAQS include a primary 1-hour SO_2 NAAQS of 75 parts per billion (ppb), 75 FR 35520 (June 22, 2010).

[3] 83 FR 5375.

two requirements under section 110(a)(2)(D)(i)(I), which we refer to as prong 1 (significant contribution to nonattainment of the NAAQS in any other state) and prong 2 (interference with maintenance of the NAAQS in any other state).[4] The EPA refers to SIP revisions addressing the requirements of section 110(a)(2)(D)(i)(I) as ''good neighbor SIPs'' or ''interstate transport SIPs.''

In addition to our evaluation of the California Transport Plan with respect to transport of air pollution to other states, we considered transport to the Morongo Band of Mission Indians (''Morongo'') and the Pechanga Band of Luiseño Indians (''Pechanga''), given their regulatory monitoring for certain pollutants and comments during the EPA's rulemaking on California's interstate transport SIP for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. Based on our review of the ambient air quality data of Morongo and Pechanga and the emission control regimes of the South Coast Air Quality Management District (AQMD) for stationary sources and of CARB for mobile sources, as described in the EPA's memo to the docket,[5] the EPA proposed to find that California adequately prohibits the emission of air pollutants in amounts that will significantly contribute to nonattainment, or interfere with maintenance, of the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS in the Morongo and Pechanga reservations. The EPA offered consultation with each tribe at the time of the proposal; neither tribe requested such consultation.[6]

A. Evaluation for the 2008 Ozone NAAQS

In our proposed rulemaking the EPA agreed with the conclusion of the California Transport Plan that California meets the CAA requirements for interstate transport prongs 1 and 2 for the 2008 ozone NAAQS. However, our rationale differed from that presented by CARB. The analysis in the California Transport Plan relies primarily on CARB's conclusion that the ozone transport linkages are uncertain and therefore no significant contribution or interference with maintenance has been demonstrated. The EPA's evaluation finds that the transport linkages are adequately quantified (and uncertainties sufficiently addressed) and that California's emission control programs adequately address the transport requirements.

The EPA presented the various elements of our evaluation that led to this conclusion.[7] The EPA first explained that it approached its evaluation considering the four-step framework for evaluating regional ozone transport that has been developed through several prior regional EPA rulemakings. This framework evaluates downwind air quality (step 1), upwind state linkages (step 2), and various cost and air quality factors (step 3) to identify whether a state will significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state and to implement any necessary emission reductions (step 4). We discussed the EPA's modeling for the Cross-State Air Pollution Rule (CSAPR) Update rule (''CSAPR Update''),[8] which identified regulatory monitors throughout the continental U.S. that were expected to exceed the NAAQS in 2017 based on both projected average design values and monitored data as ''nonattainment receptors'' (*i.e.,* not expected to attain) and those that may have difficulty maintaining the NAAQS, taking into account historic variability in air quality, as ''maintenance receptors,'' and estimated the contribution of other states to the ozone levels at each of these receptors. The analytic year of 2017 was selected since it corresponds to the attainment year prior to the mid-2018 attainment deadline for 2008 ozone NAAQS nonattainment areas classified as Moderate.

We addressed CARB's assertions regarding ozone transport modeling uncertainties (relating to a prior, similar iteration of the EPA's ozone transport modeling) for identifying nonattainment and maintenance receptors in 2017 and linkages from California to downwind receptors, and discussed the contrast that CARB draws between ozone transport in the eastern versus western U.S.

Based on our analysis, we proposed to find that California is linked to three maintenance receptors in the Denver, Colorado area. This conclusion was based on a combination of factors: (1) The EPA's projection that California emissions would contribute above 1 percent of the 2008 ozone NAAQS at each of the three receptors (1.1 to 2.6 percent), (2) other states also contribute above 1 percent of the NAAQS to these receptors, and (3) the average interstate contribution to ozone concentrations from all states upwind of these receptors was both considerable (9.2 to 9.4 percent of the projected ozone design values) and comparable to collective contributions from upwind states to receptors in Texas as evaluated in the CSAPR Update. Accordingly, we proposed that a 1 percent threshold is appropriate as an air quality threshold to determine whether California is ''linked'' to the three maintenance receptors in the Denver area for the 2008 ozone NAAQS.

Our proposed finding that California is linked to the three Denver area receptors prompted further inquiry into whether the contributions would interfere with maintenance at the receptors and whether there are cost-effective controls that can be employed to reduce emissions. To do so, we presented a general assessment of the emission sources in California, including mobile and stationary emission sources. We proposed to find that control measures in the California SIP for mobile sources, large electricity generating units (EGUs), and large non-EGU sources (*e.g.,* cement plants and oil refineries), adequately prohibit the emission of air pollution in amounts that will interfere with maintenance of the 2008 ozone NAAQS at the identified receptors in the Denver area.

We discussed California's mobile source measures, which are primarily adopted and implemented by CARB, and stationary source measures, which are primarily adopted and implemented by California's 35 local air districts. For the latter, beyond the measures described in the California Transport Plan, we also considered stationary

[4] The remaining interstate and international transport requirements of CAA section 110(a)(2)(D) for the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS for California have been addressed in prior State submissions and EPA rulemakings. 81 FR 18766 (April 1, 2016). Specifically, this includes the section 110(a)(2)(D)(i)(II) requirements relating to interference with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4), and the section 110(a)(2)(D)(ii) requirements relating to interstate and international pollution abatement.

[5] Memorandum of January 2018 from Rory Mays, Air Planning Office, Air Division, Region IX, EPA, ''Interstate Transport for the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS and the Morongo Band of Mission Indians and the Pechanga Band of Luiseño Indians.''

[6] See, *e.g.,* email dated February 27, 2018 from Kelcey Stricker, Environmental Director, Pechanga Band of Luiseño Mission Indians to Rory Mays, Air Planning Office, U.S. EPA Region IX, indicating that Pechanga did not see the need to consult. The EPA did not receive a request for consultation or a comparable email from the Morongo Band of Mission Indians.

[7] For discussion of our general evaluation approach and our specific evaluation with respect to the 2008 ozone NAAQS, please see sections II.A and II.B of our proposed rulemaking preamble. 83 FR 5375 (February 7, 2018).

[8] 81 FR 74504 (October 26, 2016).

source control measures for EGUs, consistent with the controls analysis for the CSAPR and CSAPR Update rulemakings,[9] and examples of stationary source control measures for the largest non-EGU sources in the State.

We noted that California mobile sources account for approximately 70 percent of the projected 2017 nitrogen oxide (NO_X) emissions and that CARB has established a comprehensive program to control and reduce mobile source emissions within the state. The EPA has approved many of CARB's mobile source regulations as part of the California SIP, including regulations establishing standards and other requirements relating to emissions from cars, light- and medium-duty trucks, heavy-duty trucks, commercial harbor craft, mobile cargo handling equipment, marine engines and boats, and off-highway recreational vehicles. To support and enhance these emissions standards, we also noted that CARB has established specific gasoline and diesel fuel requirements, and the California Bureau of Automotive Repair has established a vehicle emissions and inspection (*i.e.,* ''smog check'') program.

With respect to stationary and area emission sources, we noted that the California SIP has hundreds of rules that limit the emissions of NO_X and volatile organic compounds (VOCs) and that many of these rules were developed by local air districts to reduce ozone concentrations in response to the prior 1979 1-hour ozone and 1997 8-hour ozone NAAQS.

For EGUs producing greater than 25 megawatts of electricity, including non-fossil fuel EGUs, we described how California's statewide NO_X emissions rate is very low (0.0097 pounds of NO_X per million British thermal units in 2018) and ranks as the 47th lowest out of the 48 contiguous states and Washington, DC for which the EPA performed power sector modeling in the context of the CSAPR Update. We found that California produces electricity very efficiently in terms of NO_X emissions and is therefore unlikely to have significant, further NO_X reductions available from the EGU sector at reasonable cost.

In investigating the potential for further NO_X emissions reductions from EGUs, we found that additional NO_X reductions from EGUs in California would cost more than three times the amount that the EPA determined to be cost-effective to partially address ozone transport obligations in the eastern U.S. under the CSAPR Update (*i.e.,* reductions expected above $5,000 per ton of NO_X in California versus a cost-effective control level of $1,400 per ton in the CSAPR Update rulemaking for 22 eastern states). Further, we noted that the largest collection of EGU facilities emitting over 100 tons per year (tpy) of NO_X, per the 2011 National Emissions Inventory, are found in the San Joaquin Valley, Bay Area, and South Coast air districts and are subject to district rules that limit NO_X emissions and have been approved into the California SIP.

For non-EGU stationary sources, we found that they emitted 6.7 times more NO_X than EGUs in California in 2011. Of these sources, 19 emitted over 500 tpy of NO_X, including Portland cement plants, petroleum refineries, and several other source types, and accounted for two thirds of the NO_X emissions from California stationary sources that emitted over 100 tpy in 2011 and 5.2 percent of the total 2011 NO_X inventory for California. These 19 sources are in the Bay Area, Kern County, Mojave Desert, San Joaquin Valley, and South Coast air districts and, overall, are subject to rules that limit NO_X emissions and have been approved into the California SIP. For the small number of large non-EGU sources that are either subject to NO_X control measures that have not been submitted for approval into the California SIP, or fall outside the geographic jurisdiction of the applicable district rules, we found that further emission controls would be unlikely to reduce any potential impact on downwind states' air quality because such sources comprise no more than 0.8 percent of the total NO_X emitted in California in 2011.

In sum, on the strength of CARB and the local air districts' emission control programs, especially for mobile and stationary sources of NO_X, we proposed that the California SIP adequately prohibits the emission of air pollutants in amounts that will significantly contribute to nonattainment, or interfere with maintenance, of the 2008 ozone NAAQS in any other state. The EPA also noted that recent modeling shows that by the 2023 ozone season the receptors identified in Denver are projected to be ''clean,'' *i.e.,* both the average and maximum design values are projected to be below the level of the 2008 ozone NAAQS.[10]

B. Evaluation for the 2006 $PM_{2.5}$ and 2012 $PM_{2.5}$ NAAQS

The EPA proposed to approve the California Transport Plan for the CAA requirements for interstate transport prongs 1 and 2 for the 2006 $PM_{2.5}$ and 2012 $PM_{2.5}$ NAAQS. First, we discussed our evaluation of CARB's identification of nonattainment and maintenance receptors in western states based on data presented in the California Transport Plan as well as the EPA's analysis of 2009–2013 24-hour and annual $PM_{2.5}$ design values. Based on that evaluation, we presented modified lists of such receptors that largely follow the lists of receptors in the California Transport Plan.

For the 2006 24-hour $PM_{2.5}$ NAAQS, we derived a list of 18 potential nonattainment receptors and three potential maintenance receptors within 11 western states (excluding California)[11] that accounted for the information presented in the California Transport Plan and ambient air quality and emissions data that were common to our evaluation of both the 24-hour and annual NAAQS. We also presented the 24-hour $PM_{2.5}$ design values for 2014–2016 at each identified receptor.

For the 2012 annual $PM_{2.5}$ NAAQS, we did not find that there would be any potential nonattainment receptors and we identified two potential maintenance receptors, one in Idaho and one in Pennsylvania. To do so, we relied on photochemical modeling results presented in the EPA's informational memo on interstate transport for the 2012 $PM_{2.5}$ NAAQS (''2012 $PM_{2.5}$ NAAQS Transport Memo''), which projected annual $PM_{2.5}$ design values for 2017 and 2025 at each regulatory $PM_{2.5}$ monitor in the continental U.S.[12] We used those results to evaluate projected air quality in 2021, which corresponds to the attainment deadline for 2012 $PM_{2.5}$ NAAQS nonattainment areas classified as Moderate. We also addressed some differences in the receptors identified by CARB and those identified by the EPA and considered the annual $PM_{2.5}$ design values for 2014–2016 at the potential maintenance receptors identified in the EPA's 2012 $PM_{2.5}$ NAAQS Transport Memo.

We then discussed California emissions of $PM_{2.5}$ and its precursors, California's regulations to limit such emissions, and the emissions trends

[9] 76 FR 48208 (August 8, 2011) and 81 FR 74504 (October 26, 2016), respectively.

[10] Memorandum dated October 27, 2017 from Stephen D. Page, Director, EPA Office of Air Quality Planning and Standards, to Regional Air Division Directors, Regions 1–10. Available at: *https://www.epa.gov/sites/production/files/2017-10/documents/final_2008_o3_naaqs_transport_memo_10-27-17b.pdf.*

[11] For purposes of this rulemaking, ''western states'' refers to the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[12] 2012 $PM_{2.5}$ NAAQS Transport Memo, Table 1, 5. Available at *https://www.epa.gov/pm-pollution/information-interstate-transport-good-neighbor-provision-2012-fine-particulate-matter.*

resulting from such regulations. We discussed California's control measures before our more specific discussion of interstate transport prongs 1 and 2 for each NAAQS because such discussion provided a common basis for evaluating the California emissions component of CARB's weight of evidence analysis. For three $PM_{2.5}$ precursors pollutants, we incorporated our evaluation of California's emissions and regulatory programs for NO_X and VOC (for the 2008 ozone NAAQS) and oxides of sulfur (SO_X) (for the 2010 SO_2 NAAQS).[13] For directly-emitted $PM_{2.5}$, we affirmed that many of California's measures limit the emission of particulate matter and have been approved into the California SIP. These include the State's mobile source emission standards and test procedures for heavy-duty engines and vehicles, passenger cars, light duty trucks, and medium duty vehicles; in-use diesel standards for heavy-duty trucks, buses, drayage trucks, and off-road vehicles; and inspection and maintenance programs, as well as air district stationary source measures for combustion sources of $PM_{2.5}$, such as open burning, refineries, and cement plants, and dust sources of $PM_{2.5}$, such as fugitive dust from roads and agricultural operations.

We also described trends in California emissions, which have decreased by substantial amounts (*e.g.,* statewide decreases from 2000 to 2016 of 75 percent direct $PM_{2.5}$, 66 percent NO_X, 54 percent VOC, and 75 percent SO_2) in response to state and local control measures, as well as federal measures for sources outside California's regulatory authority.

Based on our review of the state and local measures cited in the California Transport Plan that limit the emission of $PM_{2.5}$ and its precursor pollutants and of the applicable California emission trends, which are generally decreasing, we agreed with CARB's general conclusions regarding interstate transport of $PM_{2.5}$: That California emissions from stationary sources are subject to stringent limits for direct $PM_{2.5}$ and its precursors (*e.g.,* NO_X and SO_X); that California has a long history of reducing emissions through motor vehicle and fuel standards; and that state and local measures will continue to reduce the potential for California emissions to contribute significantly to nonattainment, or interfere with maintenance, of the 2006 24-hour $PM_{2.5}$ or 2012 annual $PM_{2.5}$ NAAQS in any other state.

Building on the identification of potential nonattainment and maintenance receptors and our discussion of California emissions, we presented the EPA's weight of evidence analysis to address the CAA requirements, which affirmed CARB's weight of evidence analysis for the 2006 24-hour $PM_{2.5}$ and 2012 annual $PM_{2.5}$ NAAQS. We prepared a Technical Support Document (TSD) containing our more detailed analysis of interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS (''EPA's $PM_{2.5}$ Transport TSD''), which was also relevant for our evaluation of the 2012 annual $PM_{2.5}$ NAAQS.[14]

For interstate transport prongs 1 and 2 for the 2006 24-hour $PM_{2.5}$ NAAQS, we summarized our evaluation of the areas encompassing the 18 nonattainment receptors, grouping them into three geographic bins (*i.e.,* Arizona, the Northern Rocky Mountains, and Utah) based on the nature of the emission sources affecting the receptors, and the areas encompassing the three maintenance receptors, grouping them by the two relevant states (Montana and Utah).

For each receptor area we described our review of the information compiled and presented in the California Transport Plan, including distance of relevant receptors from California; intervening terrain; potential wildfire effects; chemical speciation data; local topography; the effect of local emission sources, particularly residential wood burning and, in certain cases, other sources (*e.g.,* mobile sources, agricultural activities), on wintertime exceedances; and regional background levels represented by ambient 24-hour $PM_{2.5}$ data from Interagency Monitoring of Protected Visual Environments (IMPROVE) monitoring sites. We reviewed California's emissions and emission control programs for $PM_{2.5}$ and its precursors, especially for NO_X and SO_X, and concluded that California has an extensive and effective program for limiting emissions of such pollutants. Thus, we proposed that California will not significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any western state.

As the California Transport Plan did not evaluate $PM_{2.5}$ transport to states farther east than Montana, Wyoming, Colorado, and New Mexico, we evaluated the potential for transport of $PM_{2.5}$ and its precursors to states farther east. We did so by reviewing modeling data from the CSAPR and recent air quality data to identify the westernmost area in the East[15] with potential nonattainment or maintenance receptors, and then comparing California's likely contributions with the contributions of intervening states that may significantly contribute to nonattainment or interfere with maintenance of the NAAQS at the potential nonattainment and maintenance receptors, respectively.

We concluded that California emission sources will not significantly contribute to nonattainment or interfere with maintenance of the 2006 $PM_{2.5}$ NAAQS at the westernmost nonattainment and maintenance receptors in the East, which were in Madison County, Illinois. This was based on the generally improved air quality in the East since the EPA's analysis in 2011 for CSAPR, which reduced the number of potential nonattainment or maintenance receptors; the distance of the Madison County, Illinois receptors from California; intervening terrain; our analysis of the westernmost states linked to the Madison receptors and comparison of California emissions; the large reductions in emissions of $PM_{2.5}$ and its precursors in California; and the trend of decreasing 24-hour $PM_{2.5}$ concentrations at the Madison receptors. As the distance from California to the other potential eastern nonattainment or maintenance receptors is even greater, we noted that the expected contribution from California to 24-hour $PM_{2.5}$ concentrations at such receptors would be even smaller and thus not significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any state farther east than Montana, Wyoming, Colorado, and New Mexico.

For interstate transport prongs 1 and 2 for the 2012 annual $PM_{2.5}$ NAAQS, we agreed with CARB that California will not significantly contribute to nonattainment, or interfere with maintenance, of the 2012 annual $PM_{2.5}$ NAAQS in any other state and presented our analysis for potential maintenance receptors in Lemhi and Shoshone counties, Idaho and Allegheny County, Pennsylvania.

[13] CARB estimates that SO_2 comprises 97% of the state-wide SO_X inventory and therefore used California SO_X emissions in its analysis to represent California SO_2 emissions. California Transport Plan, App. C, C–1.

[14] ''EPA Evaluation of the California Interstate Transport Plan (2006 $PM_{2.5}$ NAAQS), Technical Support Document,'' EPA, Region IX, January 2018.

[15] For purposes of the $PM_{2.5}$ evaluation in this notice, ''the East'' refers to the 37 states and Washington, DC that lie east of the states of Montana, Wyoming, Colorado, and New Mexico. The EPA modeled the contribution of states within the East to each receptor for CSAPR but did not model the contribution of any state further west, such as California.

For the potential maintenance receptors in Idaho, we reviewed the information compiled and presented in the California Transport Plan, including distance of these monitors from California; intervening terrain; wildfire effects; local topography; the effect of local emission sources on wintertime exceedances of the 24-hour NAAQS and the effect of those exceedances on annual $PM_{2.5}$ concentrations; and rural background levels represented by IMPROVE data. We reviewed California's emissions and emission control programs for $PM_{2.5}$ and its precursors, especially for NO_X and SO_X, and concluded that California has an extensive and effective program for limiting emissions of such pollutants. Thus, we proposed that California will not significantly contribute to nonattainment or interfere with maintenance of the 2012 annual $PM_{2.5}$ NAAQS in Idaho or any western state.

For the potential maintenance receptor in Allegheny County, Pennsylvania, we concluded that California emission sources will not interfere with maintenance of the 2012 annual $PM_{2.5}$ NAAQS. This was based on our interpolated projection that the Allegheny monitor will likely be attaining the annual $PM_{2.5}$ NAAQS in 2021; the distance of this receptor from California; intervening terrain; the contribution modeling performed for CSAPR; the large reductions in emissions of $PM_{2.5}$ and its precursors in California; and the general trend of decreasing annual $PM_{2.5}$ concentrations at the Allegheny receptor.

Based on our analysis that there are no nonattainment receptors outside of California for the 2012 $PM_{2.5}$ NAAQS, and our analysis for the maintenance receptors in Idaho and Pennsylvania, we proposed that California will not significantly contribute to nonattainment, or interfere with maintenance, of the 2012 $PM_{2.5}$ NAAQS in any other state.

C. Evaluation for the 2010 SO_2 NAAQS

The EPA proposed to approve the California Transport Plan for the CAA requirements for interstate transport prongs 1 and 2 for the 2010 SO_2 NAAQS. We described how our evaluation of SO_2 transport required a slightly different approach than our evaluation for regional pollutants, such as ozone and $PM_{2.5}$, and more localized pollutants, like lead, given the universe of SO_2 emission sources and physical properties of SO_2 in the atmosphere relative to those other pollutants. In our evaluation we addressed the air quality, emission sources, and emission trends in the states bordering California, *i.e.,* Arizona, Nevada, and Oregon. Then we discussed California's air quality, emissions sources, control measures, and emission trends with respect to interstate transport prong 1, followed by discussion of additional California air quality trends and emission trends with respect to interstate transport prong 2.

We found that monitored 1-hour SO_2 levels in Arizona, Nevada, and Oregon are generally well below 75 ppb; that sources in these bordering states that emit over 2,000 tpy of SO_2 are located at a distance well beyond a 50-km buffer from California's borders where emissions from California sources might be expected to have downwind impacts on air quality; and that the downward SO_2 emission trends in each bordering state reduce the likelihood of SO_2 nonattainment or maintenance issues appearing in the future.[16]

For interstate transport prong 1, the EPA reviewed the analysis presented in the California Transport Plan and considered additional information on ambient SO_2 monitoring data, SO_2 emission sources and controls, including state measures for mobile sources and air district measures for large stationary sources, and emission trends in California. As for Arizona, Nevada, and Oregon, monitored 1-hour SO_2 levels in California are low (most often below half the level of the 2010 SO_2 NAAQS); the 29 SO_2 sources in California that emit over 100 tpy of SO_2 are located at a distance well beyond 50 km from California's borders, the distance where emissions from California sources might be expected to have downwind impacts on air quality in bordering states; and California's decreasing SO_2 emission trend each reduce the likelihood of California emitting SO_2 in amounts that would adversely affect other states in the future.

Therefore, based on our analysis of SO_2 air quality and emission sources in Arizona, Nevada, and Oregon and our analysis of SO_2 air quality and emissions in California, we proposed that California will not significantly contribute to nonattainment of the 2010 SO_2 NAAQS in any other state, per the requirements of CAA section 110(a)(2)(D)(i)(I).

For interstate transport prong 2, the EPA reviewed the analysis presented in the California Transport Plan and considered additional information on California air quality trends and emission trends to evaluate CARB's conclusion that California does not interfere with maintenance of the 2010 SO_2 NAAQS in other states. The EPA's analysis built on our evaluation of air quality and SO_2 emission sources in Arizona, Nevada, and Oregon, and our evaluation for significant contribution to nonattainment (prong 1) based on the evidence that we reviewed (*i.e.,* low ambient concentrations of SO_2, large distance of SO_2 sources from the California border, decreasing SO_2 emissions, and the existence of SIP-approved California control measures).

We found that from 2000 to 2015 both ambient SO_2 concentrations and SO_2 emissions from California's largest stationary sources have decreased substantially; and that state and local measures to limit the sulfur content of fuels and limit SO_2 emissions will continue to limit SO_2 emissions that might adversely affect other states. Accordingly, we proposed that California SO_2 emission sources will not interfere with maintenance of the 2010 SO_2 NAAQS in any other state, per the requirements of CAA section 110(a)(2)(D)(i)(I).

II. Public Comments and EPA Responses

The 30-day comment period for the EPA's proposed rulemaking closed on March 9, 2018. We received four comment letters in response to the proposed rulemaking. CARB submitted a letter affirming its support for the EPA's proposed approval.[17] The Center for Biological Diversity (CBD) submitted adverse comments regarding the State's and the EPA's evaluation of interstate transport for the 2008 ozone NAAQS.[18] The two remaining letters were anonymous comment letters that raised issues outside the scope of this rulemaking and did not identify any material issues necessitating a

[16] This final approval of the California Transport Plan for the 2010 SO_2 NAAQS under CAA section 110(a)(2)(D)(i)(I) is based on the information contained in the administrative record for this action and does not prejudge any other future EPA action that may make other determinations regarding California's air quality status. Any such future actions, such as area designations under any NAAQS, will be based on their own administrative records and the EPA's analyses of information that becomes available at those times. Future available information may include, and is not limited to, monitoring data and modeling analyses conducted pursuant to the EPA's SO_2 Data Requirements Rule (80 FR 51052, August 21, 2015) and information submitted to the EPA by states, air agencies, and third-party stakeholders such as citizen groups and industry representatives.

[17] Letter dated March 9, 2018, from Kurt Karperos, Deputy Executive Officer, CARB to Alexis Strauss, Acting Regional Administrator, EPA Region IX.

[18] Letter dated March 9, 2018, from Robert Ukeiley, Senior Attorney, Center for Biological Diversity to Rory Mays, Air Planning Office, EPA Region IX.

response.[19] The comment letters are available in the docket for this rulemaking.

CBD requests that the EPA disapprove the California Transport Plan with respect to the 2008 ozone NAAQS. We address CBD's comments in three parts as follows.

Comment #1: The commenter states that the ozone transport analysis in the California Transport Plan is flawed because it underestimates NO_X emissions from agricultural soils in California. The commenter relies on a recent study that concludes that agricultural soils are a dominant source of California's NO_X emissions (''Soil NO_X Study''), especially in the San Joaquin Valley.[20] Based on this study, the commenter states that California's NO_X emissions would have been 20 to 51 percent higher and that, by underestimating such emissions, the California Transport Plan underestimated California's contribution to downwind states. The commenter recommends re-running ozone transport modeling with a corrected NO_X emission inventory for California and suggests that this could change the linkages between California and other states for ozone. The commenter asserts that, pursuant to the Supreme Court's holding in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance,* it is unlawful to fail to consider an important aspect of a problem before the agency.[21]

Response #1: The EPA disagrees that the California Transport Plan is flawed in this manner and that the EPA failed to consider an important aspect of interstate transport for the 2008 ozone NAAQS. As an initial matter, the CSAPR Update modeling estimates that California contributes more than 1 percent of the NAAQS to downwind maintenance receptors in Denver (*i.e.,* California is ''linked'' to receptors in Denver). An increase in NO_X emissions from California could potentially increase the magnitude of the contribution to these receptors but would be unlikely to result in any additional downwind linkages for California because there are no other nonattainment or maintenance receptors in the West (excluding California), based on EPA's CSAPR Update modeling. Moreover, in the CSAPR Update four-step process, the amount of contribution above the 1 percent threshold is not a factor in determining whether the upwind state's contribution is significant or will interfere with maintenance.[22]

Although the study upon which the commenter relies was not published until after the EPA's proposed rulemaking was signed on January 26, 2018, we have considered the commenter's statement and the study on possible underestimation of NO_X emissions from agricultural soils in California and potential effects in analyzing California's contribution to ozone in downwind states. Accordingly, we present a brief synopsis of how the CSAPR Update modeling accounted for NO_X emissions from land in California, as well as a summary of the Soil NO_X Study referenced by the commenter and our evaluation thereof with respect to this rulemaking.

In 2016, the EPA's CSAPR Update modeling used NO_X emissions from soils for the continental U.S based on application of the Biogenic Emissions Inventory System (BEIS version 3.61).[23] Emissions of soil NO_X vary by land cover type and, accordingly, model emission factors vary for each type of land cover. For example, the emission factor for agricultural lands is relatively higher than grasslands due to application of nitrogen-based fertilizers. The annual soil NO_X emissions from California were estimated to be 30,593 tpy in both 2011 and 2017, which corresponds to 4.1 percent of the total 2011 NO_X inventory for California (740,179 tpy) and 5.6 percent of the total 2017 base case NO_X inventory (544,972 tpy), respectively. Thus, the CSAPR Update modeling accounted for the effect of California's soil NO_X emissions on ozone formation and downwind transport to other states.

In the Soil NO_X Study, the authors generated annual estimates of soil NO_X emissions from California using a nitrogen isotope model and the Integrated Model for the Assessment of the Global Environment at a 4 kilometer (km) by 4 km resolution. These complex biogeochemical models include the full suite of variables thought to contribute to soil NO_X emissions. The model results were compared to a limited number of observations from surface measurements around California. The average modeled NO_X emissions were comparable to the surface measurements in some areas and larger than the surface measurements in other areas.[24]

The authors then compared model predicted emissions to CARB's non-soil NO_X emissions inventory and estimated that soil NO_X emissions account for 25 percent of California's total NO_X emissions.[25] They note that this is in the range of previous modeling studies that considered agricultural soils worldwide. With respect to the San Joaquin Valley, the study also used airborne and surface measurements of NO_X from a separate study[26] to estimate total NO_X emissions from a portion of the San Joaquin Valley of 190 metric tons of nitrogen per day (tnpd), with a range of plus or minus 130 tnpd.

The Soil NO_X Study concludes that it is the first study to include a spatially explicit estimate of soil NO_X emissions compared to other emission sources in California. While acknowledging the uncertainty in the estimate, the Soil NO_X Study further concludes that its model results add to a growing body of

[19] Comments received on February 21, 2018 and February 27, 2018.

[20] Almaraz, et al., ''Agriculture is a major source of NO_X pollution in California,'' *Science Advances,* January 31, 2018, 1. As this article is copyrighted, it is available in hard copy, but not available electronically at *Regulations.gov*, as part of the docket of this rulemaking; see the **ADDRESSES** section of this action for hard copy viewing information. It is also publicly available at: *http://advances.sciencemag.org/content/4/1/eaao3477/tab-pdf.*

[21] 463 U.S. 29, 43 (1983).

[22] The 1 percent threshold can serve to limit the scope of an upwind state's emission reduction obligation if upwind emission reductions would otherwise reduce a state's impact to below the threshold. See *EME Homer City Generation, L.P.* v. *EPA,* 134 S. Ct. 1584, 1608–09 (2014) (the EPA cannot require a state to reduce its contribution to every receptor to which it is linked to below 1 percent of the NAAQS). In this action, however, the EPA has not concluded that California's impact to any downwind receptors would be reduced below the 1 percent threshold as a result of the emission controls implemented by the State's SIP. Therefore, the potential additional impact of NO_X emissions resulting from agricultural soils would not implicate this limit on the Agency's statutory authority.

[23] Information on BEIS can be found at *https://www.epa.gov/air-emissions-modeling/biogenic-emission-inventory-system-beis.* This web page includes a brief version history of BEIS, including points at which the system's soil NO algorithm was revised based on the work of peer-reviewed research papers, and a list of BEIS references at *https://www.epa.gov/sites/production/files/2015-10/documents/beis_references.pdf.* The EPA's emissions modeling platform TSD for the CSAPR Update final rule describes how BEIS was used to estimate emissions from soils and vegetation. ''Technical Support Document (TSD) Preparation of Emission Inventories for the Version 6.3, 2011 Emissions Modeling Platform,'' EPA, August 2016, 33–35.

[24] Soil NO_X Study, Table 1, 3.

[25] The Soil NO_X Study notes that CARB ascribes about 3.8 percent of California's total NO_X emissions to cropland soils. Soil NO_X Study, p. 1. The commenters did not attempt to further compare the model results of the Soil NO_X Study with the emissions inventory used in the California Transport Plan (based on the initial CSAPR Update modeling) nor the CSAPR Update modeling, upon which the EPA's proposed rulemaking was based. Notwithstanding, the proportion of CARB's cropland NO_X emissions estimates appear to fall in a similar scale to those modeled for the EPA's CSAPR Update rule.

[26] Trousdell, et al., ''Observing entrainment mixing, photochemical ozone production, and regional methane emissions by aircraft using a simple mixed-layer framework,'' *Atmospheric Chemistry and Physics.* 16, 15433–15450 (2016).

literature suggesting that soil NO_X emissions could be significantly underestimated in current inventories and possibly increase California's total NO_X emissions by 20 to 51 percent.[27]

The EPA acknowledges the value that studies of this kind contribute towards a better understanding of soil NO_X emissions from California. However, the quantification of such emissions is currently uncertain, as described below, and would require further field research to substantiate. The commenters did not address the uncertainties expressed in the study and did not consider other important analytical aspects of interstate transport of ozone.

First, the study acknowledges that a limited number of surface measurements were available for purposes of comparing the model results and, where observations exist, there is a large range in observed values due to varying soil conditions (*e.g.,* relating to temperature, moisture, fertilizer application, etc.). The authors acknowledge the difficulty in comparing the model results to the observations and note the need for more field measurements.[28] Second, there was a significant degree of uncertainty in the aircraft estimates of NO_X emissions over the San Joaquin Valley (190 tnpd plus or minus 130 tnpd, which equates to plus or minus 68 percent). Further research would be needed to determine whether these higher levels of soil NO_X emissions over California and elsewhere are accurate and reliable before updates are included in air quality modeling to support regulatory decisions.[29]

Furthermore, in the EPA's proposed rulemaking, we described the rationale for our disagreement with CARB's assertions in the California Transport Plan that California's contributions to ozone levels in the Denver area were *overestimated,* while acknowledging that the future research that CARB suggests to better characterize ozone transport from California to other states could prove valuable.[30] In this response, we disagree with the commenter that California's contributions to such ozone levels were *underestimated,* while similarly acknowledging the value of further research to better characterize California's NO_X emissions. In both cases, however, we assert that the prospect of future research that might better quantify California's emissions or their effect on other states' ozone levels does not itself undermine the technical adequacy of the EPA's current modeling for the 2008 ozone NAAQS. We reaffirm that the CSAPR Update modeling, including its emissions inventory bases, and our analysis with respect to California based on that modeling adequately estimate the interstate transport of ozone from California to downwind states.

In sum, the soil NO_X emissions used in the CSAPR Update modeling, upon which our evaluation of the California Transport Plan relies for the 2008 ozone NAAQS, were based on the BEIS, which incorporates prior research on soil NO_X as noted above. While the Soil NO_X Study suggests that California's soil NO_X emissions may be underestimated, they have not been adequately quantified and verified to a sufficient degree to replace the emissions inventories that were part of the analytical basis of the EPA's proposal to approve California Transport Plan for the 2008 ozone NAAQS, nor to warrant re-running the ozone transport modeling. Furthermore, the CSAPR modeling and our proposed finding did indicate that California is linked to downwind receptors, and therefore we presented a general assessment of cost-effective controls that can be employed to reduce emissions from sources in California.

The EPA therefore disagrees that it has failed to consider an important aspect of the interstate transport problem in violation of the Supreme Court's holding in *State Farm.* We affirm that the EPA has considered the multiple important aspects of interstate transport of ozone from California to other states, as described in our proposed rulemaking and in this final rule's response to comments. These aspects include, but are not limited to, consideration of measured and modeled ambient ozone concentrations, measured and estimated NO_X and VOC emissions inventories for California and the continental U.S., application of state of the science modeling tools for regional air pollution analysis and appropriate model validation, existing and planned emission control regimes, and meteorology. Furthermore, we have considered the commenter's arguments with respect to California's soil NO_X emissions and disagree that the science of such emissions is quantified and verified to a sufficient degree to warrant a new analysis of interstate transport from California to other states for the 2008 ozone NAAQS.

Comment #2: The commenter states that the ozone transport analysis in the California Transport Plan is flawed by failing to consider whether soil NO_X emissions from California are adequately controlled. Specifically, the commenter states that the EPA failed to consider whether California has rules to limit NO_X via agricultural management practices, whether such rules are in the California SIP, and whether such rules are adequate. The commenter does not believe that such rules are in place.

Response #2: We disagree with the commenter's assertion that the California Transport Plan should have examined whether soil NO_X emissions are subject to control and whether such controls are adequate for purposes of the interstate transport requirements for the 2008 ozone NAAQS. This flows from our considerations expressed in Response #1 of this final rule. We do not consider the Soil NO_X Study alone to be sufficient to compel replacement of the emissions inventories that were the analytical bases of the EPA's proposal, particularly given the study's wide range of suggested soil NO_X emission increases (20 to 51 percent for California) and the large uncertainty in the model results.

Soil NO_X emissions occur across California's wide range of ecological regions[31] and NO_X emissions from agricultural regions in the State represent a subset of the statewide annual soil NO_X estimate. Within the agricultural regions, the amount of soil NO_X emitted varies based on agricultural practices employed (*e.g.,* irrigation; method, timing, and amount of fertilizer application; etc.), crop type, temperature, and other factors. Additionally, soil NO_X is not directly emitted (*e.g.,* nitrifying bacteria in the soil convert ammonium from various sources into NO_X, some of which is emitted into the atmosphere) and involves numerous natural emissions sources and processes. Therefore, the production of NO_X in the soil is quite complex and inherently difficult to estimate and model.

In addition, the commenter did not provide examples or recommendations of alternative agricultural practices that might reduce soil NO_X emissions in California. Even if there were known

[27] Id. at 1.

[28] Id. at 5.

[29] Technical comments have been published in response to the Soil NO_X Study that present additional uncertainties (with respect to the calculations used) in the Soil NO_X Study and recommend supplemental data that could be released to allow for an improved assessment of the study. Maaz, et al., ''Inconsistencies undermine the conclusion that agriculture is a dominant source of NO_X in California,'' *Science Advances,* September 12, 2018. As these technical comments are copyrighted, they are available in hard copy as part of the docket of this rulemaking; see the **ADDRESSES** section of this action for viewing information. They are also publicly available at: *http://advances.sciencemag.org/content/4/9/eaat4706?intcmp=trendmd-adv.*

[30] 83 FR 5375, 5380 (February 7, 2018).

[31] A map of California's ecological regions is available at: *https://www.epa.gov/eco-research/ecoregion-download-files-state-region-9.*

alternative practices, it may prove difficult to estimate the effect of those potential controls given the complexity of soil NO_X production. Given the complexity in estimating and modeling soil NO_X emissions, the indirect and partially natural source of the emissions, the absence of specific alternative measures that could be implemented to reduce soil NO_X emissions, and the uncertainty in the effectiveness of potential emission controls, the EPA concludes that there is not sufficient information available at this time to warrant an evaluation of potential control of soil NO_X emissions in California for purposes of interstate transport prongs 1 and 2 for the 2008 ozone NAAQS.

Therefore, we reaffirm that our approach of evaluating California's largest sources of NO_X emissions and the control measures for such sources, including mobile sources (70 percent of the projected 2017 emissions inventory) and stationary point sources (15 percent of the inventory, including EGUs and non-EGU sources), is a reasonable means for assessing whether California has satisfied the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS.

Comment #3: Lastly, the commenter asserts that measures to control NO_X emissions from cropland soils will bring economic, ecosystem, and human health co-benefits to rural California, per the recent study. On this basis, the commenter disagrees that the EPA lacks discretionary authority under Executive Order 12898 to address disproportionate human health or environmental effects and highlights the San Joaquin Valley as an area with many communities that suffer environmental injustice. The commenter states that the California Transport Plan should include measures to control NO_X emissions from agricultural soils to reduce pollution in such communities, consistent with Executive Order 12898.

Response #3: We disagree that the EPA has discretionary authority in this rulemaking under Executive Order 12898 to address any disproportionate human health or environmental effects in rural California. First, Executive Order 12898 applies only to federal agency actions that invoke certain federal requirements, such as the National Environmental Policy Act or CAA section 309, and it does not apply where the EPA is merely approving a state submission as meeting basic requirements of the CAA. Second, this rulemaking concerns the interstate transport of ozone from California to other states under CAA section 110(a)(2)(D)(i)(I), rather than the effect of California's NO_X emissions on communities *within* California. Thus, the commenters suggestion that California should control NO_X emissions from cropland soils to reduce pollution that may affect communities in California is outside the scope of this rulemaking. For these reasons, Executive Order 12898 is not applicable to this action.

III. EPA Action

We have reviewed the California Transport Plan for the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS using step-wise processes. Based on this review and additional analyses conducted by the EPA to verify and supplement the California Transport Plan, and consistent with CAA section 110(a)(2)(D)(i)(I) and EPA guidance with respect to interstate transport for these NAAQS, we find that California will not significantly contribute to nonattainment, or interfere with maintenance, of the 2008 ozone, 2006 $PM_{2.5}$, 2012 $PM_{2.5}$, and 2010 SO_2 NAAQS in any other state. No comments were submitted that change our assessment of the California Transport Plan as described in our proposed rulemaking. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving the California Transport Plan into the California SIP for the requirements of CAA section 110(a)(2)(D)(i)(I) for these NAAQS.

In addition, for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS, the EPA had previously found that California failed to submit the required SIP revisions addressing interstate transport prongs 1 and 2 by certain dates.[32] Those actions triggered the obligation for the EPA to promulgate a federal implementation plan (FIP) for these requirements unless the State submitted and the EPA approved a SIP submission that addresses the two prongs. As the EPA is fully approving the California Transport Plan for these two NAAQS, this final rule also removes the obligation for the EPA to promulgate such FIPs.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

[32] 79 FR 63536 (October 24, 2014) for the 2006 $PM_{2.5}$ NAAQS; and 80 FR 39961 (July 13, 2015) for the 2008 ozone NAAQS.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 19, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ammonia, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: November 30, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(512) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(512) The following plan was submitted on January 19, 2016, by the Governor's Designee.

(i) [Reserved].

(ii) Additional materials.

(A) California Air Resources Board (CARB).

(1) ''California Infrastructure State Implementation Plan (SIP) Revision, Clean Air Act Section 110(a)(2)(D),'' adopted December 17, 2015, (''California Transport Plan'').

■ 3. Section 52.283 is amended by adding paragraphs (c)(3), (d)(3), and (g)(3) to read as follows:

§ 52.283 Interstate Transport.

* * * * *

(c) * * *

(3) The requirements of CAA section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment of the 2006 $PM_{2.5}$ NAAQS and 2012 $PM_{2.5}$ NAAQS in any other state and interference with maintenance of the 2006 $PM_{2.5}$ NAAQS and 2012 $PM_{2.5}$ NAAQS by any other state.

* * * * *

(d) * * *

(3) The requirements of CAA section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment of the 2008 ozone NAAQS in any other State and interference with maintenance of the 2010 ozone NAAQS by any other State.

* * * * *

(g) * * *

(3) The requirements of CAA section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment of the 2010 SO_2 NAAQS in any other State and interference with maintenance of the 2010 SO_2 NAAQS by any other State.

[FR Doc. 2018–27477 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R08–RCRA–2018–0554; FRL–9986–24–Region 8]

North Dakota: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: North Dakota has applied for final authorization of a revision to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The revision has two parts, both of which relate directly to the creation of the North Dakota Department of Environmental Quality (NDDEQ) by the North Dakota Legislature, and the impending transfer of authority, power, and duties relating to environmental quality from the North Dakota Department of Health (NDDH) to the NDDEQ. The first part of the program revision is the complete transfer of all hazardous waste program rules from Title 33 Article 24 of the North Dakota Administrative Code (NDAC) to NDAC Title 33.1 Article 24. The second part is replacing all references to NDDH with NDDEQ. No other changes are being made to the hazardous waste program rules in this revision. The EPA has reviewed the application and determined that North Dakota's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. The EPA is authorizing the state program revision through this direct final rule. The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial action and does not anticipate adverse comments. However, in the proposed rules section of this **Federal Register**, the EPA is publishing a separate document that will serve as a proposal to authorize the revision should the Agency receive adverse comment. Unless the EPA receives adverse written comments during the review and comment period, the decision to authorize North Dakota's hazardous waste program revision will take effect as provided below.

DATES: This final rule is effective on March 15, 2019, unless the EPA receives adverse written comment by January 18, 2019. Should the EPA receive such comments, it will publish a timely document either: Withdrawing the direct final publication or affirming the publication and responding to comments.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–RCRA–2018–0554. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information, the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through

http://www.regulations.gov or in hard copy at: EPA Region 8, from 8:00 a.m. to 4:00 p.m., 1595 Wynkoop Street, Denver, Colorado 80202–1129; contact: Moye Lin, phone number (303) 312–6667, or the North Dakota Department of Health (NDDH) from 9:00 a.m. to 4:00 p.m., 918 East Divide Avenue, 3rd Floor, Bismarck, North Dakota 58501–1947, phone number (701) 328–5166. The public is advised to call in advance to verify business hours.

FOR FURTHER INFORMATION CONTACT: Moye Lin, Resource Conservation and Recovery Program, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129; phone number (303) 312–6667; Email address: *lin.moye@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Authorization of Revisions to North Dakota's Hazardous Waste Program

A. Why are revisions to state programs necessary?

States which have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the federal program. As the federal program changes, states must change their programs and ask the EPA to authorize the changes. Changes to state programs may be necessary when federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273 and 279. When states make other changes to their regulations, it is often appropriate for the states to seek authorization for the changes.

B. What decisions have we made in this rule?

We conclude that North Dakota's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant North Dakota final authorization to operate its hazardous waste program with the changes described in the authorization application.

The State of North Dakota adopted state Senate Bill No. 2327 (S.L. 2017, ch. 199, § 75), which separated the Environmental Health Section from the North Dakota Department of Health (NDDH) to create a standalone North Dakota Department of Environmental Quality (NDDEQ). Per S.L. 2017, ch. 199, Section 75, the transfer of authority, power, and duties related to environmental quality from NDDH to NDDEQ will become effective upon the North Dakota Legislative Council's receipt of the certification by the Chief of the Environmental Health Section of the State Department of Health attesting that all necessary federal approvals have been obtained and all necessary federal and other agreements have been amended to ensure the state will continue to meet the authorization requirements it currently satisfies after the transfer of authority, powers and duties from the NDDH to the NDDEQ. This direct final rule constitutes EPA approval of the transfer of all duties and responsibilities of the state relating to the existing federal hazardous waste program in North Dakota from the NDDH to the NDDEQ.

North Dakota will continue to have responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian country), and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New federal requirements and prohibitions imposed by federal regulations that the EPA promulgates under the authority of HSWA after this action, if any, will be effective in North Dakota on the effective date of the federal rule. Thus, the EPA will implement those requirements and prohibitions in North Dakota, including issuing permits, until North Dakota applies for authorization of equivalent state rules and those rules are authorized.

C. What is the effect of this authorization decision?

While there will be no substantive changes to the federal hazardous waste program requirements if North Dakota is authorized for these changes, NDDEQ will become the state department responsible for implementation of the federal hazardous waste program instead of NDDH. This change should have little to no practical effect on the regulated community in North Dakota. Additionally, pursuant to section 3006 of RCRA, the regulated community must comply with HSWA regulations issued by the EPA for which the state has not received authorization. North Dakota will continue to have enforcement responsibilities under its state hazardous waste program for violations of such program, and the EPA continues to retain its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Conduct inspections and require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements; suspend or revoke permits; and,
- Take enforcement actions regardless of whether North Dakota has taken its own actions.

This action to approve these provisions would not impose additional requirements on the regulated community because the regulations for which North Dakota is requesting authorization are already effective under both state and federal law and are not changed by our authorization of these revisions.

D. For what has North Dakota previously been authorized?

North Dakota initially received final authorization on October 5, 1984, effective October 19, 1984 (49 FR 39328), to implement the RCRA hazardous waste management program. We granted authorization for changes to their program on: June 25, 1990, effective August 24, 1990 (55 FR 25836); May 4, 1992, effective July 6, 1992 (57 FR 19087); April 7, 1994, effective June 6, 1994 (59 FR 16566); January 19, 2000, effective March 20, 2000 (65 FR 02897); September 26, 2005, effective November 25, 2000 (70 FR 56132); February 14, 2008, effective April 14, 2008 (73 FR 8610); and October 30, 2018, effective October 30, 2018 (83 FR 54521).

The EPA understands that the state intends to take the necessary additional steps, as specified in S.L. 2017, ch. 199, Section 75, to ensure that NDDEQ comes into existence and that the NDDEQ rules are effective as a matter of state law so that the rules also and the NDDEQ will become federally enforceable prior to the effective date of EPA's approval of these revisions. Further background on the new department is documented in the state Program Description dated September 2018. Therefore, once this rule is effective and for the purposes of administration of the state's authorized hazardous waste program, references to the NDDH Division of Waste Management of the Environmental Health Section will be to the NDDEQ. For further legislative history on the new department, see North Dakota Session Laws of 2017 [S.L. 2017, ch. 199, § 75].

The NDDEQ has primary responsibility for administration of laws and regulations concerning hazardous waste under the North Dakota Hazardous Waste Management Act (codified in Chapter 23.1–04 of the North Dakota Century Code [N.D.C.C.]). The NDDEQ is also authorized to administer the federal hazardous waste

program, including jurisdiction over the generation, discharge, storage, treatment, handling, transportation, reclamation, or disposal of hazardous waste.

The NDDEQ has the rules necessary to implement the federal Hazardous Waste Program from the Base program through RCRA Cluster XXIV revisions promulgated through June 30, 2015, as found in NDAC Title 33.1 Article 24 Hazardous Waste Management. The NDDEQ authority to incorporate federal rules by reference can be found at N.D.C.C. § 23.1–01–04(1) and adoption of the hazardous waste rules in general are pursuant to the statutory provisions enacted in 2018 at N.D.C.C. Title 23.1.

E. What changes are we authorizing with this action?

The State of North Dakota submitted a final complete program revision application on July 31, 2018 and is seeking re-authorization of their complete program in accordance with 40 CFR 271.21 due to the transfer of the approved hazardous waste program from the NDDH to the NDDEQ as described in section I.D. above. North Dakota's program consists of regulations which specifically govern the federal hazardous waste program from base program authorization in 1984 through June 30, 2015 (RCRA Cluster XXIV).

All revisions to the applicable hazardous waste program are federally approved as of the effective date of this action. The EPA's understanding is that, per S.L. 2017, ch. 199, Section 75 (S.B. 2327), the state plans to rely on the date the EPA signs this notice for purposes of notifying the state legislature that the EPA has approved these revisions, which will provide for the transfer authority from NDDH to NDDEQ to be effective under state law. The EPA also understands that there are some programs that will not be required to be a part of this State Legislature approval. Unless and until the NDDEQ rules and agency become fully effective under state and federal law, for purposes of federal law, the EPA recognizes the state's program as currently approved under the North Dakota Department of Health.

We now make a final decision, subject to receipt of written comments that raise concerns with this action, that North Dakota's hazardous waste program satisfies all of the requirements necessary to qualify for final authorization. Therefore, we grant North Dakota DEQ final authorization for the state's hazardous waste program.

F. Who handles permits after the final authorization takes effect?

North Dakota will continue to issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits which were issued by the EPA prior to the effective date of this authorization.

G. How does this action affect Indian country (18 U.S.C. 1151) in North Dakota?

The EPA's approval of the North Dakota Hazardous Waste Program (state program) does not extend to Indian country, as defined in 18 U.S.C. 1151. Indian country in North Dakota generally includes:

1. Lands within the exterior boundaries of the following Indian reservations located within North Dakota:
   a. Fort Berthold Indian Reservation
   b. Spirit Lake Reservation
   c. Standing Rock Sioux Reservation
   d. Turtle Mountain Indian Reservation
2. Any land held in trust by the United States for an Indian tribe, and
3. Any other areas that are ''Indian country'' within the meaning of 18 U.S.C. 1151.

Therefore, this program revision does not extend to Indian country; the EPA will retain responsibilities under the Resource Conservation Recovery Act of 1976 (RCRA) in Indian country.

II. Administrative Requirements

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action authorizes state requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as today's authorization of North Dakota's revised hazardous waste program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes state requirements as part of the state RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA.

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant, and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this action, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the action in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This action does not impose an information collection burden under the

provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule authorizes pre-existing state rules which are at least equivalent to, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by state law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document 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 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). This action will be effective on March 15, 2019.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Dated: December 13, 2018.

Douglas Benevento,

Regional Administrator, Region 8.

[FR Doc. 2018–27422 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA–R08–UST–2018–0728; FRL–9986–98–Region 8]

North Dakota: Final Approval of State Underground Storage Tank Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the State of North Dakota's Underground Storage Tank (UST) program submitted by the State. The EPA has determined that these revisions satisfy all requirements needed for program approval. The State's federally-authorized and codified UST program, as revised pursuant to this action, will remain subject to the EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions.

DATES: This rule is effective March 15, 2019, unless the EPA receives adverse comment by January 18, 2019. If the EPA receives substantive adverse comment, it will publish a timely document either: Withdrawing the direct final publication or affirming the publication and responding to comments.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
2. *Email: Bents.Benjamin@epa.gov.*
3. *Mail:* Benjamin Bents, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P–R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
4. *Hand Delivery or Courier:* Deliver your comments to Benjamin Bents, Region 8, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P–R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

Instructions: Direct your comments to Docket ID No. EPA–R08–UST–2018–0728. The EPA's policy is that all comments received will be included in the public docket without change and may be available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or email. The federal *http://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4:00 p.m., Monday through Friday at the following location: EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone number (303) 312–6284. Interested persons wanting to examine these documents should make an appointment with the office at least 2 days in advance.

FOR FURTHER INFORMATION CONTACT: Benjamin Bents, (303) 312–6435, *Bents.Benjamin@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Benjamin Bents at (303) 312–6435.

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to North Dakota's Underground Storage Tank Program

A. Why are revisions to state programs necessary?

States which have received final approval from the EPA under RCRA section 9004(b) of RCRA, 42 U.S.C. 6991c(b), must maintain an underground storage tank program that is equivalent to, consistent with, and no less stringent than the federal underground storage tank program.

When the EPA makes revisions to the regulations that govern the UST program, states must revise their programs to comply with the updated regulations and submit these revisions to the EPA for approval. Most commonly, states must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) part 280. States can also initiate changes on their own to their underground storage tank program and these changes must then be approved by the EPA.

B. What decisions has the EPA made in this rule?

On July 26, 2018, in accordance with 40 CFR 281.51(a), North Dakota submitted a complete program revision application seeking the EPA approval for its UST program revisions (State Application). North Dakota's revisions correspond to the EPA final rule published on July 15, 2015 (80 FR 41566), which revised the 1988 UST regulations and the 1988 state program approval (SPA) regulations (2015 Federal Revisions). As required by 40 CFR 281.20, the State Application contains the following: A transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant state statutes and regulations. We have reviewed the State Application and determined that the revisions to North Dakota's UST program are equivalent to, consistent with, and no less stringent than the corresponding federal requirements in subpart C of 40 CFR part 281, and that the North Dakota program provides for adequate enforcement of compliance (40 CFR 281.11(b)). Therefore, the EPA grants North Dakota final approval to operate its UST program with the changes described in the program revision application, and as outlined below in Section I.G of this document.

The State of North Dakota adopted state Senate Bill No. 2327 [S.L. 2017, ch. 199, section 75] which separated the Environmental Health Section from the North Dakota Department of Health (NDDOH) to create a stand-alone Department of Environmental Quality (NDDEQ). Per S.L. 2017, ch. 199, Section 75, the transfer of authority, power, and duties related to environmental quality from NDDOH to NDDEQ will become effective upon the North Dakota Legislative Council's receipt of the certification by the Chief of the Environmental Health Section of the State Department of Health attesting that all necessary federal approvals have been obtained and all necessary federal and other agreements have been amended to ensure the state will continue to meet the authorization requirements it currently satisfies after the transfer of authority, powers, and duties from the NDDOH to the NDDEQ. The EPA understands that the State intends to take the necessary additional steps as specified in S.L. 2017, ch. 199, Section 75, to ensure that NDDEQ comes into existence and that the NDDEQ rules are effective as a matter of State law prior to the effective date of the EPA's approval of these revisions. This direct final rule constitutes the EPA approval of the transfer of all duties and responsibilities of the State relating to the existing federal underground storage tank program in North Dakota from the NDDOH to the NDDEQ.

C. What is the effect of this action on the regulated community?

This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already in effect in the State of North Dakota and are not changed by this action. This action merely approves the existing state regulations as meeting the federal requirements and renders them federally enforceable.

D. Why is the EPA using a direct final rule?

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and we anticipate no adverse comment. Unless the EPA receives adverse written comments during the review and comment period, the decision to authorize North Dakota's UST program revision will take effect as provided below.

E. What happens if the EPA receives comments that oppose this action?

Along with this direct final rule, the EPA is publishing a separate document in the ''Proposed Rules'' section of this issue of the **Federal Register** that serves as the proposal to approve the State's UST program revisions, and provides an opportunity for public comment. If the EPA receives substantive comments that oppose this approval, the EPA will withdraw this direct final rule by publishing a document in the **Federal Register** before it becomes effective. The EPA will base any further decision on approval of the State Application after considering all comments received during the comment period. The EPA will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this approval, you must do so at this time.

F. For what has North Dakota previously been approved?

On December 10, 1991, the EPA finalized a rule approving the UST program that North Dakota proposed to administer in lieu of the federal UST program. On August 21, 1995, the EPA codified the provisions of the approved North Dakota program that are part of the underground storage tank program under subtitle I of RCRA, and therefore are subject to the EPA's inspection and enforcement authorities under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions.

G. What changes are we approving with this action and what standards do we use for review?

In order to be approved, each state program application must meet the general requirements in 40 CFR 281.11, and specific requirements in 40 CFR Subpart B (Components of a Program Application); Subpart C (Criteria for No Less Stringent); and Subpart D (Adequate Enforcement of Compliance). This also is true for proposed revisions to approved state programs.

As more fully described below, the State has made the changes to its approved UST program to reflect the 2015 Federal Revisions. The EPA is approving the State's changes because they are equivalent to, consistent with, and no less stringent than the federal UST program and because the EPA has confirmed that the North Dakota UST program will continue to provide for adequate enforcement of compliance as described in 40 CFR 281.11(b) and part 281, Subpart D after this approval.

Once the State takes the necessary additional steps as specified in S.L. 2017, ch. 199, Section 75: The NDDEQ and its rules and statutes would be effective as a matter of state law; and the authority, power, and duties of the NDDOH as the implementing agency for the UST program in North Dakota (except in Indian country) would transfer to the NDDEQ.

The State continues to have broad statutory authority to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases under North Dakota Century Code, Sections 23.1–04. The North

Dakota UST Program obtains its enforcement authority from N.D.C.C. section 23.1–03. The NDDEQ has the responsibility for the administration and enforcement of this chapter. It has the power, and its duties are, to: (1) Administer the state hazardous waste management and underground storage tank programs, (2) Prepare, adopt, promulgate, modify, repeal, and enforce rules and regulations governing the management of hazardous waste and underground storage tanks, and (3) Enter into agreements or letters of understanding with other local, state, or federal agencies regarding responsibilities for regulating hazardous wastes and underground storage tanks in order to promote consistency in enforcement and to avoid duplication in regulation (N.D.C.C. section 23.1–03).

Specific authorities to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases are found under N.D.C.C. section 23.1–04–06 and 23.1–04.1, as amended effective as provided by S.L. 2017, ch. 199, section 75. The aforementioned statutory sections and regulations satisfy the requirements of 40 CFR 281.40 and 281.41.

Through a Memorandum of Agreement between the State of North Dakota and the EPA, signed by the EPA on November 9, 2018 (MOA), the State maintains procedures for receiving and ensuring proper consideration of information about violations submitted by the public. In the MOA, the State agrees to comply with public participation provisions contained in 40 CFR 281.42 including the requirement that the State will not oppose intervention under its State rule analogous to Rule 24(a)(2) of the Title IV of the Federal Rules of Civil Procedure on the grounds that the applicant's interest is adequately represented by the State. North Dakota, therefore, has met the public participation requirements found in 40 CFR 281.42.

To qualify for final approval, revisions to a state's program must be ''equivalent to, consistent with, and no less stringent'' than the 2015 Federal Revisions. In the 2015 Federal Revisions, the EPA addressed UST systems deferred in the 1988 UST regulations, and added, among other things, new operation and maintenance requirements; secondary containment requirements for new and replaced tanks and piping; operator training requirements; and a requirement to ensure UST system compatibility before storing certain biofuel blends. In addition, the EPA removed past deferrals for emergency generator tanks, field constructed tanks, and airport hydrant systems. The EPA analyzes revisions to approved state programs pursuant to the criteria found in 40 CFR 281.30 through 281.39.

Title 40 CFR 281.39 describes the state operator training requirements that must be met in order to be considered equivalent to, consistent with, and no less stringent than federal requirements. North Dakota did not incorporate by reference federal requirements for operator training, and has promulgated and is implementing its own operator training provisions under N.D.A.C. sections 33.1–24–08–45 to 33.1–24–08–48. After a thorough review, the EPA has determined that North Dakota's operator training requirements are equivalent to, consistent with, and no less stringent than federal requirements.

As part of the State Application, the North Dakota Attorney General certified that the State revisions meet the requirements ''equivalent to, consistent with, and no less stringent'' criteria in 40 CFR 281.30 through 281.39. The EPA is relying on this certification in addition to the analysis submitted by the State in making our determination that the DEQ has revised its regulations to help ensure that the State's UST program revisions are equivalent to, consistent with, and no less stringent than the 2015 Federal Revisions. For further information on the EPA's analysis of the State's application, see the chart in the Technical Support Document (TSD) contained in the docket for this rulemaking.

H. Where are the revised rules different from the federal rules?

Where an approved state program includes requirements that are considered more stringent than required by federal law; the more stringent requirements become part of the federally approved program. (40 CFR 281.12(a)(3)(ii))

The following regulatory requirements are considered more stringent than the federal program, and on approval, they become part of the federally approved program and are federally enforceable:

At N.D.A.C. section 33.1–24–08–03.52, the State defines piping as replaced when more than 10 feet of piping is removed and other piping is installed.

At N.D.A.C. section 33.1–24–08–45, North Dakota requires facility owners and operators notify the department and provide the name of each designated Class A and B operator for each UST facility, including any changes to the Class A or B operators.

I. How does this action affect Indian country (18 U.S.C. 1151) in North Dakota?

The EPA's approval of the North Dakota Underground Storage Tank Program (State Program) does not extend to Indian country, as defined in 18 U.S.C. 1151. Indian country in North Dakota generally includes:

1. Lands within the exterior boundaries of the following Indian Reservations located within North Dakota:
   a. Fort Berthold Indian Reservation
   b. Spirit Lake Reservation
   c. Standing Rock Sioux Reservation
   d. Turtle Mountain Indian Reservation
2. Any land held in trust by the United States for an Indian tribe, and
3. Any other areas that are ''Indian country'' within the meaning of 18 U.S.C. 1151.

Therefore, this program revision does not extend to Indian country; the EPA will retain responsibilities under the Resource Conservation Recovery Act of 1976 (RCRA) in Indian country.

II. Statutory and Executive Order (E.O.) Reviews

This action only applies to North Dakota's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by state law. It complies with applicable EOs and statutory provisions as follows:

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

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and 13563 (76 FR 3821, Jan. 21, 2011). This action approves and codifies state requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this final approval of North Dakota's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small

entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action approves and codifies pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action 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, as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999), because it merely approves and codifies state requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This action also is not subject to Executive Order 13045 (62 FR 19885, Apr. 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks.

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

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA section 9004(b), the EPA grants a state's application for approval as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental actions and interference with constitutionally protected property rights

The EPA has complied with Executive Order 12630 (53 FR 8859, Mar. 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

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

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule approves pre-existing state rules which are at least equivalent to, consistent with, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by state law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document 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 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). However, this action will be effective March 15, 2019, because it is a direct final rule.

Authority: This rule is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous substances, State program approval, and Underground storage tanks.

Dated: December 13, 2018.

Douglas Benevento,

Regional Administrator, Region 8.

[FR Doc. 2018–27420 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170817779–8161–02]

RIN 0648–XG467

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Less Than 60 Feet (18.3 Meters) Length Overall Using Hook-and-Line or Pot Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 meters (m)) length

overall (LOA) using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2018 Pacific cod total allowable catch allocated to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), December 15, 2018, through 2400 hours, A.l.t., December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2018 Pacific cod total allowable catch (TAC) allocated to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI is 8,748 metric tons (mt) as established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018), and reallocations (83 FR 2932, January 22, 2018, 83 FR 42227, August 21, 2018, and 83 FR 56740, November 14, 2018).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2018 Pacific cod TAC allocated as a directed fishing allowance to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI. While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 13, 2018.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: December 14, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–27439 Filed 12–14–18; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170816769–8162–02]

RIN 0648–XG676

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod total allowable catch (TAC) from catcher vessels using trawl gear to catcher vessels using hook-and-line gear, vessels using jig gear, and vessels using pot gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to allow the 2018 TAC of Pacific cod in the Western Regulatory Area of the GOA to be harvested.

DATES: Effective December 14, 2018 through 2400 hours, Alaska local time (A.l.t.), December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2018 Pacific cod TAC apportioned to catcher vessels using trawl gear in the Western Regulatory Area of the GOA is 2,140 metric tons (mt), as established by the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018). The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that catcher vessels using trawl gear will not be able to harvest 725 mt of the 2018 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(A)(3).

In accordance with § 679.20(a)(12)(ii)(B), the Regional Administrator has also determined that catcher vessels using hook-and-line gear, vessels using jig gear, and vessels using pot gear currently have the capacity to harvest this excess allocation. Therefore, NMFS apportions 725 mt of Pacific cod from the trawl catcher vessel apportionment to catcher vessels using hook-and-line gear, vessels using jig gear, and vessels using pot gear in the Western Regulatory Area of the GOA.

The harvest specifications for Pacific cod in the Western Regulatory Area of the GOA included in the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018) are revised as follows: 1,415 mt to catcher vessels using trawl gear, 85 mt to vessels using hook-and-line gear, 125 mt to vessels using jig gear, and 2,795 mt to vessels using pot gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would

delay the reallocations of Pacific cod in the Western Regulatory Area of the GOA. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 11, 2018.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: December 14, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–27438 Filed 12–14–18; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 243
Wednesday, December 19, 2018

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

[NRC–2017–0144]

RIN 3150–AK06

Update to Fees for Search and Review of Agency Records by NRC Personnel

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to revise the fees charged for search and review of agency records by NRC personnel in response to certain Freedom of Information Act (FOIA) requests. These revisions are being made to ensure the NRC recovers direct costs of these activities, as required by the FOIA.

DATES: Submit comments by January 18, 2019. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0144. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Stephanie Blaney, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6975; email: *Stephanie.Blaney@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Obtaining Information and Submitting Comments
II. Rulemaking Procedure
III. Background
IV. Plain Writing
V. Availability of Documents

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0144 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0144.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2017–0144 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is publishing this proposed rule concurrently with a direct final rule in the Rules and Regulations section of this issue of the **Federal Register.** The direct final rule will become effective on March 4, 2019. However, if the NRC receives significant adverse comments on this proposed rule by January 18, 2019, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to these proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-

comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule.

For procedural information, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register.**

III. Background

The FOIA provides that any person has a right to request and obtain access to federal agency records, except to the extent that any portions of those records are exempt from public disclosure. The FOIA also authorizes agencies to issue regulations specifying a schedule of fees for the processing of those requests (5 U.S.C. 552(a)(4)(A)). These fees are limited to reasonable standard charges for document search, duplication, and review, which may be charged depending on the purpose for which the records are sought and the class of requestor. The NRC's implementing FOIA regulations are found in part 9 of Title 10 of the *Code of Federal Regulations* (10 CFR).

The NRC charges fees for the search and review of agency records in accordance with § 9.37, ''Fees for search and review of agency records by NRC personnel,'' (although as specified in § 9.39, ''Search and duplication provided without charge,'' the NRC will search for records in some instances without charge, and requests for waivers or reduction of fees can be sought as specified in § 9.41, ''Requests for waiver or reduction of fees''). Consistent with Office of Management and Budget (OMB) guidelines on fee schedules (52 FR 10012; March 27, 1987), the NRC recoups the direct costs of search and review by charging the hourly rates of the employees performing the task, plus 16 percent for fringe benefits. These OMB guidelines also provide that, where a homogenous or single class of personnel is used, agencies may establish reasonable average rates for the range of salary grades typically involved.

The NRC first established fees for search and review of agency records in 1987 (52 FR 49350; December 31, 1987), and last updated these fees in 2010 (75 FR 41368; July 16, 2010). Recently, as part of the agency's biennial review of fees performed under the Chief Financial Officers Act of 1990 (31 U.S.C. 902(a)(8)), the NRC determined that the search and review rates for agency clerical staff and for professional/managerial staff needed to be increased in order to ensure the NRC continues to recover the direct costs of these activities.

Thus, based on the results of this biennial review, § 9.37(a) will be changed from a GG–7/step 6 salary rate to a GG–9/step 7 salary rate; and § 9.37(b) will be changed from a GG–13/step 6 salary rate to a GG–14/step 7 salary rate.

IV. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner that also follows other best practices appropriate to the subject or field and the intended audience. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883). The NRC requests comment on the proposed rule with respect to clarity and effectiveness of the language used.

V. Availability of Documents

The NRC may post materials related to this document, including public comments, on the Federal Rulemaking website at *http://www.regulations.gov* under Docket ID NRC–2017–0144. The Federal Rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2017–0144); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

List of Subjects in 10 CFR Part 9

Administrative practice and procedure, Courts, Criminal penalties, Freedom of information, Government employees, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553, the NRC is proposing the following amendments to 10 CFR part 9:

PART 9—PUBLIC RECORDS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: Atomic Energy Act of 1954, sec. 161 (42 U.S.C. 2201); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); 44 U.S.C. 3504 note.

Subpart A also issued under 31 U.S.C. 9701.

Subpart B also issued under 5 U.S.C. 552a.

Subpart C also issued under 5 U.S.C. 552b.

■ 2. In § 9.37, revise paragraphs (a) and (b) to read as follows:

§ 9.37 Fees for search and review of agency records by NRC personnel.

* * * * *

(a) Clerical search and review at a salary rate that is equivalent to a GG–9/step 7, plus 16 percent fringe benefits;

(b) Professional/managerial search and review at a salary rate that is equivalent to a GG–14/step 7, plus 16 percent fringe benefits; and

* * * * *

Dated at Rockville, Maryland, this 3rd day of December 2018.

For the Nuclear Regulatory Commission.

Margaret M. Doane,

Executive Director for Operations.

[FR Doc. 2018–27168 Filed 12–18–18; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 590

Filing of Contracts and Purchase Agreements Associated With the Export of Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Proposed interpretive rule.

SUMMARY: The Department of Energy (DOE or the Department) is proposing an interpretive rule to clarify certain DOE regulations governing the export of natural gas, including liquefied natural gas (LNG), under the Natural Gas Act (NGA). Under DOE's regulations, any person seeking authorization to export natural gas from the United States, or to amend an existing export authorization, must provide DOE's Office of Fossil Energy (DOE/FE) with a copy of ''all relevant contracts and purchase agreements.'' DOE is proposing this interpretive rule to clarify the types of contracts and purchase agreements associated with the export of natural gas that DOE considers to be ''relevant'' for purposes of these regulations. DOE's

regulations also impose a ''continuing obligation'' on authorization holders to notify DOE/FE ''as soon as practicable'' of any prospective or actual changes to the information submitted during the application process upon which the authorization was issued, including ''the terms and conditions of any applicable contracts.'' In this proposed interpretative rule, DOE is seeking to clarify the phrase ''as soon as practicable'' to mean within 30 days of the execution of the contracts.

DATES: Public comment on this proposed interpretive rule will be accepted until January 18, 2019.

ADDRESSES: You may submit comments using any of the following methods, although email is preferred:

1. *Email:* Send email to *fergas@hq.doe.gov* or *regulations.gov.* Include ''Natural Gas Contract Guidance'' in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.

2. *Regular Mail:* U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

3. *Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.):* U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–9478.

Due to potential delays in the delivery of postal mail, we encourage respondents to submit comments electronically to ensure timely receipt. PLEASE NOTE: If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

Docket: This notice of proposed rulemaking and any comments that DOE receives will be made available on DOE's website at: *https://www.energy.gov/fe/services/natural-gas-regulation.*

FOR FURTHER INFORMATION CONTACT: Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2627, Email: *amy.sweeney@hq.doe.gov;* or Cassandra Bernstein or Charles Park, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585; (202) 586–9793 or (202) 287–6531, Email: *cassandra.bernstein@hq.doe.gov* or *charles.park@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory Background
II. Regulatory Background
III. Proposed Regulatory Interpretations
IV. Public Comment Procedures
V. Approval of the Office of the Secretary

I. Statutory Background

The Department of Energy is responsible for authorizing exports of natural gas to foreign nations pursuant to section 3 of the NGA, 15 U.S.C. 717b.[1] Under section 3(c) of the NGA, exports of natural gas to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (FTA countries) are ''deemed to be consistent with the public interest.'' Therefore, applications authorizing natural gas and LNG exports to FTA countries must be granted ''without modification or delay.''[2] Section 3(a) of the NGA governs exports to any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries). DOE has consistently interpreted section 3(a) of the NGA as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest.[3] Accordingly, DOE conducts an informal adjudication and grants the application unless DOE finds that the proposed exportation will not be consistent with the public interest.[4]

II. Regulatory Background

DOE's regulations implementing section 3 of the NGA are codified in 10 CFR part 590. Under those regulations, ''[a]ny person seeking authorization to . . . export natural gas . . . from the United States, [seeking] to amend an existing . . . export authorization, or seeking any other requested action''[5] is required to provide DOE/FE with, *inter alia,* ''a copy of all relevant contracts and purchase agreements.''[6] DOE's regulations do not specify what types of ''contracts and purchase agreements'' associated with the export of natural gas are considered ''relevant'' for purposes of 10 CFR 590.202(c).

DOE implements this regulatory authority as part of its long-term export authorizations for natural gas, including LNG.[7] For example, in the ''Terms and Conditions'' section of DOE/FE's long-term LNG export orders, DOE/FE states that authorization holders are required to file, or cause to be filed, ''any relevant long-term commercial agreements'' pursuant to which the authorization holder or LNG title-holder (*i.e.,* Registrant) exports LNG ''once those agreements have been executed.''[8] Similarly, in the ''Order'' section, DOE/FE states that the authorization holder shall file, or cause others to file, ''all executed long-term contracts'' associated with both the long-term export of LNG and the long-term supply of natural gas to the export facility.[9]

DOE regulations also impose a ''continuing obligation'' on authorization holders to give DOE/FE ''written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based, including, but not limited to, changes . . . to the terms and conditions of any

[1] Authority to regulate the imports and exports of natural gas, including LNG, under section 3 of the NGA (15 U.S.C. 717b) has been delegated to the Assistant Secretary for Fossil Energy in Redelegation Order No. 00–006.02, issued on November 17, 2014.

[2] 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

[3] *See Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 203 (D.C. Cir. 2017) (''We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.' '') (quoting *W. Va. Pub. Serv. Comm'n* v. *U.S. Dep't of Energy,* 681 F.2d 847, 856 (D.C. Cir. 1982)).

[4] *See id.* (''there must be 'an affirmative showing of inconsistency with the public interest' to deny the application'' under NGA section 3(a)) (quoting *Panhandle Procedures & Royalty Owners Ass'n* v. *Econ Regulatory Admin.,* 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

[5] 10 CFR 590.201(a).

[6] *Id.* at 590.202(c).

[7] For purposes of this proposal, the terms ''authorization'' and ''order'' are used interchangeably.

[8] *See, e.g., Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, FE Docket No. 17–79–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Eagle Maxville Facility in Jacksonville, Florida, and Exported by Vessel to Free Trade Agreement and Non-Free Trade Agreement Nations (Sept. 15, 2017), at 43 (Terms and Conditions Para. H).

[9] *See id.* at 46–47 (Ordering Paras. I(i), (ii)).

applicable contracts.'' [10] DOE regulations do not specify when submission of such written notification must be made to constitute ''as soon as practicable.'' However, in DOE/FE's long-term export orders, DOE/FE expressly ''finds that the submission of all such [long-term commercial export] agreements or contracts within 30 days of their execution . . . will be consistent with the 'to the extent practicable' requirement of section 590.202(b).'' [11] Likewise, DOE/FE imposes a 30-day time period for an authorization holder to notify DOE/FE of a change in the company name, the term of any long-term contracts, and other relevant modifications.[12]

III. Proposed Regulatory Interpretations

DOE proposes the following clarifications to provide specificity, and thereby to reduce potential confusion and regulatory burdens, concerning DOE/FE's practice under the aforementioned regulations. As set forth above, these proposed clarifications are consistent with DOE/FE's practice under its long-term export authorizations, and thus are intended to provide additional guidance for authorization holders in complying with existing and/or future orders.

A. Proposed Interpretation of 10 CFR 590.202(c)

DOE proposes to clarify the types of ''contracts and purchase agreements'' associated with the export of natural gas that are ''relevant'' for purposes of 10 CFR 590.202(c). DOE proposes to interpret the term ''relevant contracts and purchase agreements'' to include the following types of executed,[13] long-term [14] binding commercial agreements associated with the export of natural gas (collectively, Executed Agreements):

i. Natural gas supply agreements;
ii. Terminal service agreements;
iii. Purchase and sale agreements; [15]
iv. Liquefaction tolling agreements, liquefaction and regasification tolling capacity agreements, and similar types of agreements; and
v. Any other natural gas export contractual agreements that are associated with the first sale or transfer of natural gas at the point of export and specify the volume of natural gas under contract.[16]

Under DOE's proposed interpretation, Executed Agreements may be associated with the sale, transfer, and/or export of natural gas, including LNG, prior to export.[17] For example, for export facilities that operate on a tolling model, if an off-taker that holds initial title to the LNG within the storage tank of an export facility (Party A) enters into an agreement to sell the LNG to another party (Party B) prior to the LNG being loaded onto a ship, both Party A's and Party B's contracts would be considered ''relevant'' for purposes of 10 CFR 590.202(c).

B. Proposed Interpretation of 10 CFR 590.407

DOE proposes to interpret the phrase ''as soon as practicable'' in 10 CFR 590.407 with respect to the continuing obligation of authorization holders and Registrants to provide written notification to DOE/FE of any prospective or actual changes to the information submitted during the application process. Specifically, DOE/FE will consider a written notification of any Executed Agreement(s) filed within 30 days of its execution to have been submitted ''as soon as practicable'' under this regulation. DOE/FE believes a 30-day timeframe, absent good cause for delay, will provide a reasonably sufficient time for authorization holders to prepare and file the written notifications with DOE/FE.

C. Anticipated Administrative Benefits

In this proposed interpretive rule, DOE/FE is not proposing any new requirements for applicants or authorization holders under 10 CFR part 590. Rather, DOE's intent is to reduce administrative uncertainty and minimize regulatory burdens associated with the application of 10 CFR 590.202(c) and 10 CFR 509.407.

IV. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this proposed rule. To help DOE review the comments, interested persons are asked to refer to specific proposed provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed interpretive rule.

Signed in Washington, DC, on December 13, 2018.

Steven E. Winberg,

Assistant Secretary, Office of Fossil Energy.

[FR Doc. 2018–27450 Filed 12–18–18; 8:45 am]

BILLING CODE 6450–01–P

[10] 10 CFR 590.407.

[11] *See, e.g., Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, at 43 (Terms and Conditions Para. H); *see also id.* at 46–47 (Ordering Paras. I(i), (ii), K, Q) (imposing 30-day reporting periods).

[12] *See id.* at 48 (Ordering Para. L).

[13] ''Executed'' means that all parties to a long-term commercial agreement have signed the agreement, regardless of whether conditions precedent have been met, and that such an agreement is binding upon all parties to the transaction.

[14] ''Long-term'' means any Executed Agreement with a term of two years or longer.

[15] ''Purchase and sale agreements'' include long-term commercial agreements covering ''free on board'' sales subsequent to a terminal service agreement.

[16] ''Any other natural gas export contractual agreements'' may include, but are not limited to, heads of agreement, memoranda of understanding, letters of intent, and similar types of agreements if and when they become fully binding and effective in lieu of a definitive agreement.

[17] An ''export'' occurs when the LNG is delivered to the flange of the LNG export vessel. *See Freeport LNG Expansion, L.P., et al.,* DOE/FE Order No. 3282, FE Docket No. 10–161–LNG, Order Conditionally Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas, to Non-Free Trade Agreement Nations, at 10 n.28 (May 17, 2003) (citation omitted).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0787; Airspace Docket No. 18–ASW–12]

RIN 2120–AA66

Proposed Establishment of Class E Airspace; Coushatta, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet above the surface at The Red River Airport, Coushatta, LA. Controlled airspace is necessary to accommodate new standard instrument approach procedures developed at The Red River Airport, for the safety and management of instrument flight rules (IFR) operations.

DATES: Comments must be received on or before February 4, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2018–0787; Airspace Docket No. 18–ASW–12, at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

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

FOR FURTHER INFORMATION CONTACT: Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5857.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace extending upward from 700 feet above the surface at The Red River Airport, Coushatta, LA, in support of standard instrument approach procedures for IFR operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2018–0787; Airspace Docket No. 18–ASW–12.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at http://www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air-traffic/publications/airspace-amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface at The Red River Airport, Coushatta, LA. This action would enhance safety and the management of IFR operations at the airport.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018, is amended as follows:

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

* * * * *

ASW LA E5 Coushatta, LA [New]

The Red River Airport, LA
(Lat. 31°59′25″ N, long. 093°18′40″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of The Red River Airport.

Issued in Fort Worth, Texas, on December 12, 2018.

John Witucki,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2018–27370 Filed 12–18–18; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[EPA–R07–OAR–2018–0828; FRL–9988–09–Region 7]

Approval of Operating Permits Program; Kansas; Reporting Emission Data, Emission Fees and Process Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Operating Permits Program for the State of Kansas submitted on January 22, 2018. The revised Kansas rules reorganize, clarify, and update the Class I emission fee, application fee, and emissions inventory regulations and ensure that Kansas's Operating Permits Program is adequately funded. Approval of these revisions ensures consistency between the State and federally-approved rules and does not impact air quality.

DATES: Comments must be received on or before January 18, 2019.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2018–0828 to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Deborah Bredehoft, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551–7164, or by email at *Bredehoft.Deborah@epa.gov.*

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

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III. What is being addressed in this document?
IV. Have the requirements for approval of a Part 70 revision been met?
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I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2018–0828, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Background

EPA granted full approval of the Kansas Operating Permit Program effective February 29, 1996. *See* 61 FR 2938. Under title 40 Code of Federal Regulations (CFR) 70.9(a) and (b), an approved state's title V operating permits program must require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and ensure that any fee required under 40 CFR 70.9 is used solely for permit program costs. The fee schedule must result in the collection and retention of revenues sufficient to cover the permit program implementation and oversight costs.

Kansas Statutes Annotated (KSA) 65–3024 establishes the Air Quality Fee Fund and authorizes the Secretary of the Kansas Department of Health and Environment (KDHE) to fix, charge and collect annual emissions fees in amounts necessary to administer the Kansas Air Quality Act. The Secretary also has the authority to periodically increase or decrease such fees, as needed.

Kansas has determined that it has experienced shortfalls in its title V annual emission fee revenues in recent years, due to emission reductions at major facilities. It has determined that fee adjustments are needed to offset the effect of declining revenues and to maintain the Kansas Air Quality program overall. The proposed increases in fees will aid in offsetting the effect of declining revenue and in maintaining the title V fee schedule and the Kansas Air Quality program overall. Projections of program needs for fiscal year 2019 and beyond indicate that resources adequate for effective implementation of the program will not be available without the proposed amendments. The amendments are needed to update the Class I Operating Permit fee schedule to bring in sufficient revenue to adequately administer the Kansas Air Quality Act, specifically to adequately administer the Class I Operating Permit program. Thus, Kansas has submitted this program revision for review and action by the EPA.

III. What is being addressed in this document?

The EPA is proposing to approve revisions to the Operating Permits Program for the State of Kansas submitted to the EPA on January 22, 2018. Revisions to the program include revoking Kansas Administrative Regulation (K.A.R.) 28–19–202; adding new language to K.A.R. 28–19–517 which parallels language in the revoked K.A.R. 28–19–202; increasing the annual emission fee from $37 dollars per ton to $53 dollars per ton; increasing all application fees in K.A.R. 28–19–516; establishing a baseline emission fee; and adding additional clarifications to the Program to address fees, refunds, electronic submittal, and who is required to submit an annual emissions inventory.

IV. Have the requirements for approval of a Part 70 revision been met?

The state provided a public comment period for this Operating Permits Program revision from September 7, 2017, to November 15, 2017, and received comments. In response to the comments, Kansas revised the rule prior to submitting to the EPA. The revisions are consistent with applicable EPA requirements in title V of the CAA and 40 CFR part 70.

V. What action is EPA taking?

The EPA is proposing to approve revisions to the Kansas Operating Program by approving the State's request to revoke K.A.R. 28–19–202, Annual emissions fees; and to amend K.A.R. 28–19–516, Class I operating permits, application fees; and K.A.R. 28–19–517, Class I operating permits, annual emissions inventory and fees. Approval of these revisions will ensure consistency between the state and federally-approved rules. EPA has determined that these changes will not adversely impact air emissions. Additional information on the the EPA's analysis can be found in the Technical Support Document (TSD) included in this docket.

We are processing this as a proposed action because we are soliciting comments. Final rulemaking will occur after consideration of any comments.

VI. Statutory and Executive Order Reviews

This proposed 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because Title V approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; 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).

This proposed approval of the revision to Kansas's Title V Operating Permit Program does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 70

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: December 14, 2018.

James Gulliford,

Regional Administrator, Region 7.

For the reasons stated in the preamble, EPA proposes to amend 40 CFR part 70 as set forth below:

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 1. The authority citation for part 70 continues to read as follows:

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

■ 2. Amend appendix A to part 70 by adding new paragraph (g) under Kansas to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Kansas

* * * * *

(g) The Kansas Department of Health and Environment submitted revisions to Kansas rules K.A.R. 28–19–202, K.A.R. 28–19–516, and K.A.R. 28–19–517, on January 22, 2018. The state effective date is January 5, 2018. This revision is effective [date 60 days after date of publication of the final rule in the **Federal Register**].

* * * * *

[FR Doc. 2018–27457 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R08–RCRA–2018–0554; FRL–9987–31–Region 8]

North Dakota: Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to grant authorization to the State of North Dakota for the changes to its hazardous waste program under the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA). The EPA has determined that these changes satisfy all requirements needed to qualify for final authorization and is authorizing the state's changes through a direct final action.

DATES: Send written comments by January 18, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–RCRA–2018–0554 by mail to Moye Lin, Resource Conservation and Recovery Program, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. You may also submit comments electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the Rules

section of this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Moye Lin at (303) 312–6667, *lin.moye@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this issue of the **Federal Register**, the EPA is authorizing changes to the North Dakota program as a direct final rule. The EPA did not make a proposal prior to the direct final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the direct final rule.

Unless the EPA receives written comments that raise concerns with the authorization during the comment period, the direct final rule will become effective on March 15, 2019, and we will not take further action on this proposal. If we get comments that raise concerns with the authorization, we will withdraw the direct final rule and it will not take immediate effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

Dated: December 13, 2018.

Douglas Benevento,

Regional Administrator, Region 8.

[FR Doc. 2018–27423 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA–R08–UST–2018–0728; FRL–9986–99—Region 8]

North Dakota: Authorization of State Underground Storage Tank Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the State of North Dakota's Underground Storage Tank (UST) program submitted by the State. This action is based on the EPA's determination that the State's revisions satisfy all requirements for UST program approval. The State's federally-authorized UST program, as revised pursuant to this action, will remain subject to the EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions. All revisions to the State of North Dakota's UST program would be federally approved as of the effective date of this action.

DATES: Send written comments by January 18, 2019.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: http://www/regulations.gov.* Follow the online instructions for submitting comments.
2. *Email: bents.benjamin@epa.gov.*
3. *Mail:* Benjamin Bents, Project Officer, UST, Solid Waste and PCB Unit, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P–R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
4. Hand delivery or courier: Deliver your comments to Benjamin Bents, Region 8, Project Officer, UST, Solid Waste and PCB Unit, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P–R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

Instructions: Direct your comments to Docket ID No. EPA–R08–UST–2018–0728. The EPA's policy us that all comments received will be included in the public docket without change and may be available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or email. The federal *http://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4:00 p.m., Monday through Friday at the following location: EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone number (303) 312–6435. Interested persons wanting to examine these documents should make an appointment with the office at least 2 days in advance.

FOR FURTHER INFORMATION CONTACT: Benjamin Bents, Project Officer, UST, Solid Waste and PCB Unit, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P–R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone number (303) 312–6435, email address: *Bents.Benjamin@epa.gov.*

SUPPLEMENTARY INFORMATION: The State of North Dakota adopted state Senate Bill No. 2327 (S.L. 2017, ch. 199, § 75) which separated the Environmental Health Section from the North Dakota Department of Health (NDDOH) to create a stand-alone North Dakota Department of Environmental Quality (NDDEQ). Per S.L. 2017, ch. 199, Section 75, the transfer of authority, power, and duties related to environmental quality from NDDOH to NDDEQ will become effective upon the North Dakota Legislative Council's receipt of the certification by the Chief of the Environmental Health Section of the State Department of Health attesting that all necessary federal approvals have been obtained and all necessary federal and other agreements have been amended to ensure the State will continue to meet the authorization requirements it currently satisfies after the transfer of authority, powers, and duties from the NDDOH to the NDDEQ. This rule constitutes the EPA approval of the transfer of all duties and responsibilities of the State relating to the existing federal UST program in North Dakota from the NDDOH to the NDDEQ.

The State plans to rely on the date when the EPA signs the final rule for purposes of notifying the state legislature that the EPA has approved these revisions, which will provide for the transfer of authority to implement the federal UST program from the NDDOH to NDDEQ to be effective under state law. The EPA understands that the State intends to take the necessary

additional steps as specified in S.L. 2017, ch. 199, Section 75, to ensure that NDDEQ comes into existence and that the NDDEQ rules are effective as a matter of state law prior to the effective date of the EPA's approval of these revisions. Unless and until the NDDEQ rules and agency become fully effective under federal law, for purposes of federal law the EPA recognizes the State's program as currently approved. For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this issue of the **Federal Register**.

Authority: This rule is issued under the authority of Sections 2002(a), 7004(b), and 9004 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous substances, State program approval, and Underground storage tanks.

Dated: December 13, 2018.

Douglas Benevento,

Regional Administrator, Region 8.

[FR Doc. 2018–27421 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 162

[CMS–0054–P]

RIN 0938–AT42

Administrative Simplification: Rescinding the Adoption of the Standard Unique Health Plan Identifier and Other Entity Identifier

AGENCY: Office of the Secretary, HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would rescind the adopted standard unique health plan identifier (HPID) and the implementation specifications and requirements for its use and the other entity identifier (OEID) and implementation specifications for its use. The decision to propose to rescind the adopted standards was made following a careful assessment of industry input, as well as HHS's intention to explore options for a more effective standard unique health plan identifier in the future.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on February 19, 2019.

ADDRESSES: In commenting, please refer to file code CMS–0054–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–0054–P, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–0054–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Lorraine Doo, (410) 786–6597, for all policy questions.

Rosali Topper, (410) 786–7260, for information about website content and frequently asked questions.

Gladys Wheeler, (410) 786–0273, for information about the Health Plan and Other Entity Enumeration System (HPOES).

Heinz Stokes-Murray, (410) 786–0383, and LaKisha Brown, (410) 786–1798, for general information.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments.

I. Background

A. Statutory and Regulatory History

Section 262 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191) added section 1173 to the Social Security Act (the Act) and required, among other things, that the Secretary of the Department of Health and Human Services (HHS or the Secretary) adopt a standard unique health plan identifier. The stated purpose of section 261 of HIPAA is to improve the effectiveness and efficiency of the health care system by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information and reducing the clerical burden on patients, health care providers, and health plans.

Section 1173(b)(1) of the Act specifies that, in adopting a standard unique identifier for health plans, the Secretary must take into account multiple uses for the identifier, and section 1173(b)(2) of the Act provides that, in adopting a standard health plan identifier, the purposes for which the identifier may be used must be specified. Congress renewed the requirement for the Secretary to adopt a standard unique health plan identifier in section 1104(c)(1) of the Patient Protection and Affordable Care Act (Pub. L. 111–148) ((as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) and collectively known as the Affordable Care Act) by requiring the Secretary to promulgate a final rule to establish a unique health plan identifier, as described in section 1173(b) of the Act and based on the input of the National Committee on Vital and Health Statistics (NCVHS).

To implement these statutory provisions, we adopted the HPID and OEID via a final rule published on September 5, 2012 (77 FR 54664) entitled Administrative Simplification: Adoption of a Standard for a Unique Health Plan Identifier; Addition to the National Provider Identifier Requirements; and a Change to the Compliance Date for the International Classification of Diseases, 10th Edition (ICD–10–CM and ICD–10–PCS) Medical Data Code Sets (hereafter, referred to as the September 2012 final rule). The September 2012 final rule did the following:

- Adopted the HPID as the standard unique identifier for health plans.
- Defined the terms ''Controlling health plan'' (CHP) and ''Subhealth plan'' (SHP). The definitions of these two terms differentiate health plan

entities that are required to obtain an HPID and those that are eligible, but not required, to obtain an HPID.

• Required all covered entities to use an HPID whenever a covered entity identifies a health plan in a covered transaction.

• Established requirements for CHPs and SHPs in order to enable health plans to obtain HPIDs to reflect different business arrangements so they can be identified appropriately in HIPAA transactions.

• Adopted a data element to serve as an ''other entity identifier'' (OEID).

++ The OEID functions as an identifier for entities that are not health plans, health care providers, or individuals (including, for example, third party administrators, transaction vendors, clearinghouses, and other payers), but that need to be identified in HIPAA transactions.

++ Did not require other entities to obtain an OEID, but permitted them to obtain and use one if they need to be identified in covered transactions.

For more detailed information regarding the statutory and regulatory history of the HPID and OEID or HIPAA legislation and regulations, see the April 17, 2012 proposed rule titled ''Administrative Simplification: Adoption of a Standard for a Unique Health Plan Identifier; Addition to the National Provider Identifier Requirements; and a Change to the Compliance Date for ICD–10–CM and ICD–10–PCS Medical Data Code Sets'' (77 FR 22952 through 22954), (hereinafter referred to as the April 2012 proposed rule) and the September 5, 2012 final rule (77 FR 54666).

B. Adoption of the Health Plan Identifier (HPID) and Other Entity Identifier (OEID)

The NCVHS Subcommittee on Standards conducted a public hearing about the health plan identifier between July 19 and 21, 2010. Industry stakeholders—including representatives from health plans, health care provider organizations, health care clearinghouses, pharmacy industry representatives, standards developers, professional associations, representatives of Federal and State public programs, the Workgroup on Electronic Data Interchange (WEDI), the National Uniform Billing Committee (NUBC), the National Uniform Claim Committee (NUCC), and individuals with health plan identifier proposals—provided in-person and written testimony at the hearing. Stakeholder testimony focused on the use and need for an HPID to: Facilitate the appropriate routing of HIPAA transactions; reduce the cost of managing financial and administrative information; reduce dissatisfaction among health care providers and patients/members by improving communication with health plans and intermediaries; and provide information about health plan products and benefits. Stakeholders provided suggestions on the types of entities to be identified in HIPAA transactions, those that should be eligible to obtain an HPID, and the level of enumeration needed for each plan (for example, the legal entity, product, and benefit package). For a full discussion of the key topics and recommendations from that NCVHS hearing, see the April 2012 proposed rule (77 FR 22956 and 22957).

Following the hearing in 2010, the NCVHS submitted recommendations to the Secretary regarding the HPID, including definitions and types of entities that should be eligible for enumeration. In that recommendation letter, the NCVHS advised HHS to collaborate across federal agencies and to request stakeholder input on each topic through national associations, Designated Standards Maintenance Organizations (also known as standards development organizations or SDOs), and WEDI. The letter included observations relating to the levels of entity enumeration, and the format and content of the HPID. It also included recommendations for a publicly accessible directory database to support the enumeration system and process, as well as testing, use of the HPID on a health plan ID card, exempting its use in pharmacy transactions, and improving its use through operating rules. The full text of the letter can be found on the NCVHS website at: *https://www.ncvhs.hhs.gov/wp-content/uploads/2014/05/100930lt1.pdf.*

After the receipt of the NCVHS recommendations, and upon internal review, HHS published the April 2012 proposed rule incorporating several of the recommendations, including the following proposals:

• The adoption of a standard for a unique health plan identifier, the HPID, for use in HIPAA transactions.

++ The concepts of Controlling health plan and Subhealth plan.

++ The requirement that all controlling health plans, including self-funded health plans, obtain an HPID.

• The creation of a new data element—the OEID—for use by entities that do not meet the definition of a health plan, but that need to be identified in HIPAA transactions.

• Requirements and provisions for the implementation of the HPID and OEID.

The policy in the September 2012 final rule (77 FR 54666 and 54667) that requires health plans to enumerate with an HPID attempted to address the issues associated with health plans being identified in HIPAA transactions with different numbers originating from multiple sources and with multiple, proprietary formats. We believed that the various identifiers, assigned by different governmental or private organizations, were the identifiers health plans used to represent themselves in the HIPAA transactions. These identifiers included the National Association of Insurance Commissioners' (NAIC) Company code, the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) Employer Identification Number (EIN) number, the Tax Identification Number (TIN), and proprietary numbers assigned by clearinghouses. We refer herein to the various identifiers that identify payers in the HIPAA transactions as Payer IDs. We did not define the term payer in the September 2012 final rule, but are aware that while the industry uses the terms payer and health plan interchangeably, they do not have the same meaning when referenced for purposes of a transaction.

We believed our policies specifying requirements for health plans to obtain identifiers, and use them in HIPAA transactions when appropriate, resolved, or took steps towards resolving, the issues of transaction routing, difficulty determining patient eligibility, and challenges identifying the health plan during claims processing. Specifically, we assumed the HPID framework, with the use of CHPs and SHPs, would address any industry confusion of having multiple ways to identify a health plan in a transaction. In the September 2012 final rule (77 FR 54667), we explained which entities would be required to obtain and use an HPID in HIPAA transactions in order to identify the plan in the appropriate loops and segments of the transactions. We stated that we believed the adoption of the HPID and the OEID would increase standardization within HIPAA transactions and provide a platform for other regulatory and industry initiatives, and that their adoption would allow for a higher level of automation for health care provider offices, particularly for provider processing of billing and insurance-related tasks, eligibility responses from health plans, and remittance advice that describes healthcare claim payments.

However, the importance of the distinction between the HPID and Payer IDs, and the industry's use of, and reliance on, Payer IDs in the HIPAA

transactions, became evident after publication of the September 2012 final rule when health plans and insurers began to prepare for enumeration and realized the impact of having to accommodate the HPID rather than a Payer ID in the HIPAA transactions.

C. Events Leading to This Proposed Rule

After publication of the September 2012 final rule, we conducted outreach on the enumeration process (for example, we held webinars and attended industry conferences), published guidance on our website, and hosted an email box to receive industry inquiries. Through these initiatives, we received questions from health plans and providers about a number of issues, including: How many HPIDs health plans should obtain; why self-funded plans were being required to obtain an HPID; how the HPID and Payer IDs were to be used together in the HIPAA transactions; whether certain providers could or should obtain OEIDs (for example, atypical providers); which HPID would be used for enforcement actions; and whether or how the HPID database would be made accessible to industry for look-up and verification. In October 2012, organizations began to apply for HPIDs, and 11,000 numbers were assigned between that date and October 2014. As the enumeration process began, professional associations for both health plans and health care providers submitted feedback that stated there was no need for the HPID in HIPAA transactions, and that the policy requirements were problematic, costly, and burdensome.

The NCVHS Standards Subcommittee held a hearing on February 19, 2014, and sent a letter to the Secretary on May 15, 2014, summarizing participant comments and providing recommendations (*https://www.ncvhs.hhs.gov/wp-content/uploads/2014/05/140515lt2.pdf*).

The NCVHS wrote:

> [T]estifiers indicated that there is confusion on how the HPID and OEID should be used. Many health plans face challenges with respect to the definitions of controlling health plan (CHP) and sub-health plan (SHP); the use of HPID for group health plans that do not conduct HIPAA standard transactions (the self-insured plans); and the cost to health plans, clearinghouses and providers because software has to be modified to account for the HPID. Testifiers questioned the impact on health plans, third-party payers (TPAs) and Administrative Services Only (ASO) self-insured groups and the degree of granularity required to enumerate. Others expressed concerns that the HPID database would not be accessible and without public access to the HPID database, the identifier is of no value to trading partners; validation cannot be performed; a crosswalk would not be possible among Medicaid proprietary plans, and the data collection did not include reference to the Bank Identification Number/Processor Control Number (BIN/PCN) used in pharmacy claims processing. Concern was also expressed that self-insured health plans are not aware of the requirements that apply to them.[1]

On June 10, 2014, the NCVHS held another hearing and sent a follow-up letter to the Secretary on September 23, 2014 titled ''Letter to the Secretary, Findings from the June 2014 NCVHS Hearing on Coordination of Benefits, Health Plan Identifier (HPID), and ICD–10 Delay,'' in which it recommended that HHS specify that the HPID not be used in HIPAA transactions, that the HPID's use be better clarified, and that the HPID not replace the existing Payer IDs. See *https://www.ncvhs.hhs.gov/wp-content/uploads/2014/10/140923lt5.pdf.* Specifically, the NCVHS highlighted the following items from the June 2014 stakeholder testimony:

- Lack of clear business need and purpose for using HPID and OEID in health care administrative transactions.
- Confusion about how the HPID and OEID would be used in administrative transactions, including strong concerns that HPID might replace current Payer IDs which were widely in use between covered entities.
- Challenges faced by health plans with respect to the definitions of CHPs and SHPs.
- Use of the HPID for group health plans that do not conduct HIPAA transactions.
- Cost to health plans, clearinghouses, and providers for modifying software to account for the HPID.

In response to the NCVHS's 2014 recommendations, HHS took two administrative actions.

First, on October 31, 2014, through a statement of enforcement discretion,[2] HHS delayed enforcement of the regulations pertaining to HPID enumeration and use of the HPID in the HIPAA transactions in order to review the NCVHS' recommendations and to consider any appropriate next steps. The enforcement discretion, which remains in effect, means that HHS will not impose penalties if it determines a covered entity is out of compliance with the HPID requirements of the September 2012 final rule.

The effect of the enforcement discretion has been two-fold: (1) In general, it appears that industry has taken little action to implement the requirements of the September 2012 final rule; and (2) we have not published any further educational, outreach, or guidance materials on the industry's use of the HPID and OEID.

Second, in the May 29, 2015 **Federal Register** (80 FR 30646), we published a request for information (RFI) to solicit additional public input to determine whether HPID policies were still warranted. Through the RFI, we sought public comment on three (3) topics: (1) The HPID enumeration structure, including the use of the CHP/SHP and OEID concepts; (2) use of the HPID in HIPAA transactions in conjunction with the Payer ID; and (3) whether changes to the nation's health care system since the issuance of the September 2012 final rule had altered perspectives about the need for the HPID.

We received 53 timely comments in response to the RFI, with the overwhelming majority of submissions recommending that the HPID not be required in the HIPAA transactions, either alone or in combination with the Payer IDs. A small minority of commenters continued to support the concept of a standard health plan identifier, though not the specific HPID adopted by HHS, believing it may have some value for enforcement or HIPAA health plan certification of compliance. Although many commenters acknowledged that they had supported the creation of a standard health plan identifier in the proposed rule and understood its policy intent, in response to the RFI they warned that inclusion of the HPID in the transactions would create significant administrative problems without corresponding benefit due, at least in part, to a confusing framework.

A commenter stated that, regardless of the enumeration schema, converting from the Payer IDs to the HPID would be costly for all stakeholders because of the potential for misrouting transactions and disrupting claims processing, while multiple commenters indicated that the health care community had become adept at using the Payer IDs, and that those, along with the operating rules, were enabling benefits and cost savings of the HIPAA transactions.

In response to the third topic in the RFI, ''whether the changes in health care had altered perspectives about the need for an HPID,'' some commenters stated that too much time had elapsed since industry had been using the Payer

[1] *https://www.ncvhs.hhs.gov/wp-content/uploads/2014/05/140515lt2.pdf.*

[2] Statement of Enforcement Discretion regarding 45 CFR 162 Subpart E—Standard Unique Health Identifier for Health Plans *https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Unique-Identifier/HPID.html.*

IDs in transactions, and the industry had established appropriate routing technologies. These commenters said that the requirement for a standard unique health plan identifier no longer represented best practices for how information was exchanged between health plans and health care providers. A number of commenters stated that the health care system was continuing to undergo innovation and experimentation with care delivery and payment models. These commenters noted that the market required flexibility to enable continued innovation to mature, and suggested that HHS allow payers, clearinghouses, and third party administrators more time to adapt to the evolving health care environment before implementing a unique health plan identifier. Other commenters stated that if there were other proposed purposes or future use cases for a standard health plan identifier, a lawful and compelling business case for its intended use should be made and sufficient opportunity for comment be available in the **Federal Register**. We did not receive specific recommendations or alternative proposals for consideration.

In summary, from the NCVHS hearings as well as comments on the May 2015 RFI, several common themes emerged. First, the industry already has satisfactorily functioning mechanisms to route claims and other HIPAA transactions using the existing Payer IDs. Second, it would likely be a costly, complicated, and burdensome disruption for the industry to have to implement the HPID because it would require mapping existing Payer IDs to the new HPIDs, which would likely result in the misrouting of claims and other transactions. Third, the HPID framework does not provide added value for other anticipated purposes, such as including certain information in the transaction, including the name of the health plan name, the level of benefits or coverage description (medical, dental, vision, pharmacy), or co-payment and co-insurance responsibility for certain services (for example, certain optional and required coverage types).

The Affordable Care Act amended HIPAA to require the Secretary to adopt a set of operating rules for each of the HIPAA transactions with the intent of creating as much uniformity in the implementation of the HIPAA standards as possible. Operating rules are business rules for the exchange of electronic information, and are not already defined by a standard. HHS named the Council for Affordable Quality Healthcare (CAQH) Committee on Operating Rules for Information Exchange (CORE) the authoring entity for the operating rules, which labels its operating rules in Phases as they are developed and approved. To date, HHS has adopted operating rules for three HIPAA transactions—eligibility for a health plan, health care claim status, and health care electronic funds transfers (EFT) and remittance advice. On July 8, 2011, HHS adopted the CAQH CORE Phase I and Phase II operating rules for the eligibility for a health plan and health care claim status transactions (77 FR 40458), and on August 10, 2012, HHS adopted the CAQH CORE Phase III operating rules for the health care electronic funds transfers (EFT) and remittance advice transaction (77 FR 48008). For additional information about the operating rules and the designation of the operating rules authoring entity, we refer the reader to the July 8, 2011 interim final rule (77 FR 40458) and the August 10, 2012 interim final rule (77 FR 48008).

Specific to the HPID and challenges for its use with eligibility for a health plan and claim status transactions, the operating rules require that coverage description data elements be provided by a health plan in HIPAA transactions (CORE Phase I Operating Rule 154 and CORE Phase II Operating Rule 260: Eligibility & Benefits (270/271) Data Content Rule version 2.1.0 March 2011).[3] For example, health plans must support an explicit request for content related to 12 service types specified in the Phase I operating rules in the eligibility transaction, and the Phase II operating rule provides a list of 51 service types for which health plans must provide some type of information to providers in both the eligibility and claim status responses. Providers need information about health plan coverage type along with a Payer ID to successfully determine: If an individual is eligible for services, what coverage can be provided, the co-payments that are due, and where to submit the final claim for processing. The operating rules combined with Payer IDs enable improved communication between health plans and providers. The HPID as adopted does not enable information about benefits, coverage, or payment, in part because it is only to be used for routing, and in part because it does not contain any ''intelligence'' about the health plan with which the coverage for the patient is associated.

On May 3, 2017, the NCVHS held another hearing on the HPID to solicit industry input on the business needs for the HPID, its use in HIPAA transactions, and to confirm whether the testimony from the 2014 and 2015 NCVHS hearings was still valid. The questions for testifiers were as follows:

- What identifiers are used today and for what purpose?
- What business needs do you have that are not adequately met with the current scheme?
- What benefits do you see that the current HPID model provides? Does it meet those needs?
- What challenges do you see with the current HPID model?
- What recommendations do you have going forward regarding health plan identifiers and the HPID final rule?

At the May 3, 2017 NCVHS hearing, testimony was consistent with that from the February and June 2014 hearings and the May 2015 RFI. Health plans, providers, self-funded/Employee Retirement Income Security Act (ERISA) plans, clearinghouses, and vendors confirmed that the HPID did not satisfy a business need, did not provide other value, and its implementation would be costly and disruptive.

Furthermore, industry indicated that it wished to continue using the Payer IDs instead of the HPID, and health plans and providers testified consistently that, even if required to use the HPID, they would not give up use of the Payer IDs. Importantly, as had been indicated in 2014 and 2015, multiple testifiers in 2017 reiterated that the health plan is the HIPAA covered entity that establishes the payment policies, but the payer is the entity that needs to be identified in the transactions. Organizations had evaluated the HPID policy and determined they could not use the HPID. Testifiers stated that it would be too confusing to make the change to using the HPID because it is not clear which of the components—CHP, SHP or OEID—should be used in HIPAA transactions in place of the Payer IDs. One testifier noted that if none of those entities is the payer, the transaction routing process will be disrupted. Furthermore, testifiers were concerned about the cost to map Payer IDs to HPIDs without knowing how many HPIDs an entity has obtained, especially across the many systems and organizations involved. Stakeholders informed HHS that mapping would be a complex endeavor that would impact all parties. Mapping could be made more difficult by the potential for other changes in the edits and rules that would be required for reporting, provider enrollment, payer distribution, rerouting, and other related tasks.

[3] *https://www.caqh.org/core/caqh-core-phase-ii-rules.* For a Direct link to the Phase II Operating Rules.

The May 2017 hearing provided additional confirmation of what HHS was previously told by health plan and provider testifiers in hearings. Moreover, those same testifiers were beginning to experience a positive return on investment due to use of the CAQH CORE operating rules adopted in July 2011. Both health plan and provider testifiers explained that operating rules supporting the eligibility and health care claim status transactions drive down the cost of using the HIPAA transactions—communication is faster, the contents of the transactions are more predictable, and the information more reliable. Based on industry testimony, use of Payer IDs in these transactions also appears to facilitate the provision of needed health plan information.

Overall, there was near unanimity from testifiers that HHS should rescind the HPID and OEID. The oral and written testimony can be found on the NCVHS website at *https://www.ncvhs.hhs.gov/meeting-calendar/agenda-of-the-may-3-2017-ncvhs-subcommittee-on-standards-hearing-on-health-plan-identifier-hpid/*.

In a June 21, 2017 letter to the Secretary,[4] the NCVHS wrote that testifiers were unanimous regarding their preferred use of Payer IDs versus the HPID. The net of all the testimony was that while Payer IDs do not identify the health plan, they identify the payers, which is necessary to meet transaction routing needs. The NCVHS wrote that they heard from testifiers that the HPID interferes with the established processes and provides no value to industry. The NCVHS made three recommendations to HHS in this letter:

- HHS should rescind its September 2012 final rule which required health plans to obtain and use the HPID.
- HHS should communicate its intent to rescind the HPID final rule to all affected industry stakeholders as soon as a decision is made. HHS should provide the applicable guidance on the effect a rescission may have on all parties involved.
- HHS should continue with the 2014 HPID enforcement discretion until publication of a final regulation rescinding the HPID final rule.

For a full discussion of the key topics and recommendations from all of the NCVHS hearings from 2010 through 2017, we refer readers to the text of the documents on the NCVHS website: *https://www.ncvhs.hhs.gov/subcommittees-work-groups/subcommittee-on-standards/*.

[4] June 21, 2017 NCVHS Letter to Secretary Price from May 3, 2017 Hearing on the HPID.

Industry has provided substantial input to the NCVHS and HHS regarding the use of identifiers, the terminology surrounding identifiers, and routing of standard transactions. We acknowledge that we envisioned the HPID as being foundational to other industry uses in the future, though we did not specifically describe these uses in the September 2012 final rule. Given the uncertainty and confusion about the HPID framework and enumeration, we believe it would be useful to reassess any future standard health plan identifier with additional input from industry. Several testifiers stated that any use case for a health plan identifier should be clearly defined in advance, and that ample opportunity for public comment be made available, and we agree that public input has often been useful for assessing complex concepts. We will consider options for industry engagement in the future.

The OEID was intended to identify entities that are not health plans, health care providers, or individuals. As specified in 45 CFR 162.514, these other entities are not required to obtain an OEID, but may obtain one if they need to be identified in covered transactions. During the outreach period in 2013, covered entities submitted questions about the enumeration, purpose, and use of the OEID. Commenters asked about its value in their responses to the 2015 RFI. In general, the industry continued to seek greater specificity and definitive information about uses for the OEID.

To date, a total of 99 OEIDs have been assigned. None of the industry surveys conducted to date have collected data on the use of the OEID in HIPAA transactions, and none of the testifiers or commenters requested that it be retained for future use.

III. Provisions of the Proposed Regulations

As noted previously, the HPID and OEID were adopted in the September 2012 final rule under the statutory authority of HIPAA and the Affordable Care Act. However, as we describe in this section of this proposed rule, we now believe, based on recommendations from the NCVHS and overwhelming and persistent industry input, the HPID and OEID do not, and cannot, serve the purpose for which they were adopted. Therefore, this rule proposes to remove Subpart E—Standard Unique Health Identifier for Health Plans at 45 CFR 162, as well as the definitions of ''Controlling health plan'' (CHP) and ''Subhealth plan'' (SHP) at 45 CFR 162.103.

Two primary areas of industry concern emerged from the May 2015 RFI. These concerns were emphatically repeated in all the post-final rule industry feedback, through direct inquiries to HHS and NCVHS hearings testimony and recommendations. Industry has developed best practices for use of Payer IDs for purposes of conducting the HIPAA transactions. The adopted HPID does not have a place in these transactions, and from industry's perspective, does not facilitate administrative simplification.

We now better understand the significance of providers being able to identify the payer in a HIPAA transaction. The provider needs to know which organization should receive an inquiry about a patient's eligibility for services, or which entity will receive the health care claim transactions. The organization that needs to be identified in transactions is the payer, rather than the health plan. Industry has clearly communicated that they are successfully routing transactions using the various Payer IDs, and cannot use the HPID. Payers often contract with many health plans or own a network of health plans which operate in different geographic regions. In their letters and testimony, payers maintained that the process of determining how to designate and enumerate the health plans as CHPs or SHPs was a significant challenge. Many organizations were concerned about being able to accurately conduct what they deemed a complicated analysis to determine corporate entity ownership and organizational relationships, and make the right decisions about enumeration. According to health care providers, their information exchange systems are programmed to identify the payers in the transactions, not the individual health plan. Once enumeration was complete, neither the payers nor the providers were confident that the mapping would be accurate. Regardless of the enumeration, according to testimony and comments, requiring covered entities to use the HPID in HIPAA transactions would not have addressed any remaining routing challenges, provided information about the services covered under a health plan's benefit package, or allowed for a higher level of automation for health care provider offices, particularly for provider processing of billing and insurance-related tasks, eligibility responses from health plans, and remittance advice that describes health care claim payments.

Likewise, when we adopted the OEID, we believed that because entities other than health plans were identified in

HIPAA transactions in a similar manner as health plans, establishing the OEID would increase efficiency. The few comments we received on the OEID in any forum have led us to believe that the identifier is not useful or necessary, and that the fields where the OEID would go in the HIPAA transactions can be successfully populated using other numbers such as the TIN, EIN, or North American Industry Classification System code from the NAIC. Similar to the HPID, we now understand that providing another data element for other entities does not add value for industry's business processes.

Second, it would be a costly, complicated, and burdensome disruption for the industry to have to implement the HPID because it would require mapping existing Payer IDs to HPIDs. This process was perceived as complicated, with the potential for wide-scale misrouting of claims and other transactions.

We also believe it is appropriate to remove the definitions of controlling health plan (CHP) and subhealth plan (SHP) at 45 CFR 162.103. Those terms were established in the September 2012 final rule in association with the HPID requirements. Because the two terms are integrally related to the HPID requirements, we believe they would have no application if we finalize our proposal to rescind the HPID.

Finally, should we finalize this proposal to rescind the HPID and OEID, rather than having each entity deactivate their HPIDs and OEIDs, we are proposing that we would deactivate each HPID and OEID record in the Health Plan and Other Entity Enumeration System (HPOES) on behalf of each enumerated entity, and notify the manager of record at the current email address in the system. We propose that HHS would store the numbers for 7 years in accordance with federal record keeping requirements and that HHS would not regulate any actions entities may take with their existing HPID identifiers or their use. We propose that entities that acquired HPIDs and OEIDs would be free to retain and use these identifiers at their own discretion.

There are two legislative enactments that require us to adopt a standard unique health plan identifier, and in this proposed rule we have provided a history of our efforts to do so. We will continue to work with industry on other solutions to meet those requirements, and we remain open to industry and NCVHS discussion and recommendations for an appropriate use case that might eliminate or reduce costs and burden on covered entities.

We welcome comments on these proposals.

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*).

However, it must be noted that the information collection request (ICR) associated with the HPID was previously approved under OMB control number 0938–1166 and subsequently expired May 31, 2016. HHS incurred a violation of the PRA when the ICR expired. As stated earlier in this document, we are proposing to rescind the adoption of the HPID and the other entity identifier (OEID) along with the implementation specifications and requirements for the use of the HPID and OEID; therefore, we will not be seeking to reinstate the ICR previously approved under 0938–1166.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble; and when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A Regulatory Impact Analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule does not reach the economic threshold and thus is not considered a major rule, thus we are not required to prepare an RIA. We discuss our approach to Executive Order 12866 and demonstrate that this rule would not have economically significant effects because it would not only remove requirements perceived by industry as burdensome, but it would rescind a regulation that has effectively never been implemented by industry. We have described in detail the history and impact in the preamble, and provide more information later in this section.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. This rule would have no consequential effect on state, local, or

tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. Since this regulation does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017, and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

A. Cost and Savings

As stated previously, and shown in this section, we estimate that this proposed rule would not have economically significant effects on industry. We refer readers to the September 2012 final rule where we made several references to the large measure of uncertainty in the assumptions of our original impact analysis. In some cases we indicated that the HPID would be ''foundational'' to subsequent activities such as the automation of the Coordination of Benefits (COB) process (77 FR 54705). We also stated that the costs and benefits associated with the HPID were applicable only to entities that are directly involved in sending or receiving HIPAA transactions and that the cost estimates were based on the number of health plans that would use the HPID in the transactions, though we did not have data on how many health plans were actually identified in HIPAA transactions, as opposed to ''other entities'' that were, instead, identified in HIPAA transactions (77 FR 54703). Therefore, we said that we had no assurance of how many health plans would use the HPID in standard transactions, and took a conservative approach to the costs to health plans. We were aware that covered entities were using Payer IDs to identify the health plan or the responsible entity in transactions. Though a few commenters did not agree with the methodology we chose for our cost analysis in the proposed rule, we did not change it in the September 2012 final rule.

For the estimated cost and benefits of implementation and use of HPID, we reiterate the narrative from the April 2012 proposed rule: The discussion needs to be understood in the context of the initial belief that the HPID would be foundational to other administrative simplification initiatives, both those initiated by industry and those regulated by State or Federal governments. In the proposed and final rules published in 2012, we suggested that if other initiatives did not follow, then the HPID would likely have little substantive impact (77 FR 22977). Since we essentially imposed a delay on implementing the HPID through the enforcement discretion, its use has not had an impact on other administrative simplification initiatives. Rather, industry has made its own operational improvements by other means.

In the April 2012 proposed rule, we stated that the possible cost and benefit impacts are reflective of the uncertainty inherent in the health care industry. However, to illustrate the foundational aspects of the HPID, we estimated an increase in the use of two transactions, eligibility for a health plan and health care claim status, in the range of 1 to 2 percent per year, for 10 years, starting in 2015. The increase could be attributable to the implementation of the HPID (77 FR 22977). We also estimated a 1 to 3 percent increase in the use of the electronic health care payment and remittance advice transaction attributable to implementation of the HPID because the routing of that transaction is especially important for the payment process. Yet, despite HPID compliance having been under enforcement discretion, all three of these transactions have seen modest increases in use. Thus, our assumption that an increase in the use of those transactions could be attributed to the HPID was incorrect. As we have explained elsewhere in this proposed rule, some of the increases (and therefore savings) may be due to use of the adopted operating rules and some may be due to improved system capabilities. CAQH conducts a study each year to assess the utilization of the transactions and operating rules, and tries to identify savings opportunities from their use. The most recent report from 2016 shows progressive adoption of the eligibility for a health plan, health care claim status, and health care electronic funds transfers (EFT) and remittance advice transactions. The transactions use Payer IDs for routing and other payer and health plan identification purposes. We acknowledge that while this study only includes those payers, plans, and providers that participated, it is nonetheless indicative of a positive trend in the utilization rate without use of the HPID. Table 1 shows the steady increase in industry's use of three transactions over a period of 4 years, which includes 2 years where HPID rule was in effect but compliance action was not taken due to the ongoing enforcement discretion.

TABLE 1—CAQH STUDY PARTICIPANT ADOPTION RATE OF CERTAIN STANDARD TRANSACTIONS *

	Claim status (fully electronic)	Eligibility (%)	Remittance advice (%)
2012	48	65	NA
2013	50	65	NA
2014	57	71	51
2015	63	76	55

* CAQH 2016 Efficiency Index *https://www.caqh.org/explorations/2016-caqh-index-report.*

We do not attempt to attribute other cost savings to this proposed rule because we do not have industry data regarding expenditures, if any, for anticipated system implementation and transition costs such as software and software development, testing, training, and other conversion costs. To the best of our knowledge, expenditures have not been made to prepare for use of the HPID during the enforcement discretion period, nor have new contracts been executed for the services of software system vendors, billing companies, transaction vendors, and/or health care clearinghouses to facilitate the transition to the HPID. We invite industry comment on our assumptions.

1. Costs

Certain funds have already been expended and cannot be recouped by the federal government and by those organizations that have already applied for and obtained an HPID or OEID. The federal government spent $1.5 million to build the components of the enumeration system specific to the HPID and OEID, and currently spends $45,000 annually for operations and maintenance. We cannot account for the cost of legal personnel that may have been expended in conducting the analysis for the number or type of HPIDs or OEIDs that may have been acquired.

2. Savings

As a result of our proposal to rescind the HPID and OEID, we believe there would be modest cost avoidance (savings). First, we assume there will be no costs for enumeration of new health plans or other entities while the September 2012 final rule remains in effect due largely to the ongoing enforcement discretion, and because there is no growth in the number of overall health plans. We base this assumption on data from our April 2012 proposed rule, in which we reported that from 2013 to 2018, industry trends indicate that the number of health plans will remain constant, or even decrease.[5] Our calculations reflected that there would be no statistically significant growth in the number of health plans or other entities and we calculated zero growth in new applications (77 FR 22971). We acknowledge that some of our assumptions in the April 2012 proposed rule may be outdated, and welcome industry feedback on our use of those assumptions for purposes of this analysis.

In the April 2012 proposed rule, we estimated that there would be up to 15,000 entities that would be required to, or would elect to, obtain an HPID or OEID. We based this number on the data in Chart 2 from the April 2012 proposed rule which is republished here for reference (77 FR 22970).

TABLE 2—NUMBER AND TYPE OF ENTITIES THAT WERE EXPECTED TO OBTAIN AN HPID OR OEID

Type of entity	Number of entities
Self-insured group health plans, health insurance issuers, individual and group health markets, HMOs including companies offering Medicaid managed care	* 12,000
Medicare, Veterans Health Administration, Indian Health Service	** 1,827
TriCare and State Medicaid programs	60
Clearinghouses and Transaction vendors	*** 162
Third Party Administrators	**** 750
Total	15,000

* Report to Congress: Annual Report on Self-Insured Group Health Plans,'' by Hilda L. Solis, Secretary of Labor, March 2011.
** Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment, 2011 **Federal Register** (Vol. 76), July, 2011,'' referencing data from *www.healthcare.gov.*
*** Health Insurance Reform; Modifications to the Health Insurance Portability and Accountability Act (HIPAA) Electronic Transaction Standards; Proposed Rule *http://edocket.access.gpo.gov/2008/pdf/E8-19296.pdf,* based on a study by Gartner.
**** Summary of Benefits and Coverage and the Uniform Glossary; Notice of Proposed Rulemaking *http://www.gpo.gov/fdsys/pkg/FR-2011-08-22/pdf/2011-21193.pdf.*

As we stated earlier in this proposed rule, slightly fewer than 11,000 entities applied for and obtained an HPID immediately following publication of the September 2012 final rule. The cost for enumeration was explained in the April 2012 proposed rule (77 FR 22970). Health plans and other entities were required to complete the application or update form online through the Health Plan and Other Entity Enumeration System (HPOES). Any changes to a health plan's information are submitted to the same system. Most applications were received shortly after publication of the September 2012 final rule, subsequent to which the application rate slowed down considerably. Between May 2016 and May 2017, 156 applications for HPIDs were received.

The HPID and OEID application is a one-time burden, and our cost savings estimate for this proposed rule is based on the elimination of that burden. For purposes of this impact analysis, we make an estimate of the elimination of that burden. We have proposed a method to help industry implement this proposal in a cost effective way if it is finalized, by HHS deactivating the HPIDs and OEIDs. The cost savings are estimated as follows: We estimated that it would take 30 minutes to complete the on-line application form or make updates, and used an hourly labor rate of approximately $23/hour, the average wage reported for professional and business services sector, based on data from the Department of Labor, Bureau of Labor Statistics, June 2011, ''Average hourly and weekly earnings of production and nonsupervisory employees (1) on private nonfarm payrolls.'' (*https://www.bls.gov/news.release/empsit.t24.htm*). If we increase the rate to account for 2017 dollar values (March 2017 table), to $31/hour, this represents a unit cost of $15.00 per HPID or OEID application. For the initial enumeration of 11,000 entities, this would have been $165,000.

Rather than having each entity individually deactivate their HPIDs and OEIDs if this proposed rule is finalized, HHS is proposing that it would deactivate each HPID and OEID record in the HPOES and notify the manager of record at the current email address available in the system. The HPIDs and OEIDs would be stored securely in the HHS record system for 7 years. There would be no further cost to the enumerated entities. We believe that the cost to HHS will not be substantial for this task because it will be conducted as part of regular staff activities.

We also estimated the potential savings for those entities that might have already updated their HPID or OEID records before the HHS deactivation and based our assumption on the actual number of updates to the HPOES system since 2013. Each year, an average of 95 records, or 1 percent of

[5] *See* Robinson, James C., ''Consolidation and the Transformation of Competition in Health Insurance,'' Health Affairs, 23, no.6 (2004):11–24; ''Private Health insurance: Research on Competition in the Insurance Industry,'' U.S. Government Accountability Office (GAO), July 31, 2009 (GAO–09–864R); American Medical Association, ''Competition in Health Insurance: A Comprehensive Study of US Markets,'' 2008 and 2009.

valid applications have been deactivated or updated. Using the same formula, if 1 percent of the current organizations (110 entities) update their HPIDs/OEIDs, the cost would be $1,650 (110 × $15). To account for any increase in wages and benefits, we multiply this by two (2), and arrive at a sum of $3,300. This proposed rule might result in savings of $3,300 if finalized. We typically provide ranges in an impact analysis, and so provide a high range of 3 percent as well. Therefore, our calculation means 330 entities would make updates, for a total high end savings estimate of $9,900 (330 × $15) × 2. However, should this proposed rule be finalized, those updates would not be necessary and organizations that have obtained HPIDs or OEIDs would not need to take any action. See Table 3 for a summary of the savings for updates that would not have to be made to HPIDs and OEIDs after 2019.

We welcome industry feedback on our assumptions, estimates, and the deactivation of the HPID and OEIDs.

3. Summary of Costs and Savings for the Proposal To Rescind the HPID

TABLE 3—SAVINGS (COST AVOIDANCE)—UPDATES THAT WOULD NOT HAVE TO BE MADE TO HPIDS AND OEIDS AFTER 2019

Savings	2019		2020	2021	2022	2023	2024	2025	2026
	1%	3%							
Updates to enumeration	$3,300	$9,900	$0	$0	$0	$0	$0	$0	$0
Total	3,300	9,900							

D. Regulatory Review Costs

If regulations impose administrative costs on private entities, such as the time needed to read and interpret a proposed rule, we should estimate the cost associated with the review of our documents. We assume that commenters on this proposed rule will be representative of HIPAA covered entities and their business associates—primarily health plans, health care clearinghouses, health care providers and vendors. However, it is not possible to accurately quantify the number of entities, or the number of individuals within each organization who will participate in reviewing the proposed rule. Our best estimate is based on the number of organizations who have submitted comments on previous regulations related to HIPAA standards and operating rules, and organizations who have participated in NCVHS hearings. HHS has received comments from approximately 100 to 150 commenters on past HIPAA regulations, and there are a similar number of organizations who either testify or listen to the NCVHS hearings. We assume this number will hold true for this proposed rule. We acknowledge that this assumption may result in an understatement or overstatement of the cost calculation for the review of this proposed rule. We also recognize that this proposed rule will affect covered entities in different ways, however, both health plans and health care providers have provided feedback on this topic in the past, and may have a positive or negative response to the proposal. For purposes of our estimate we assume that each reviewer reads approximately 50 percent of the proposed rule. Using the wage information from the BLS for Computer and Information Systems managers for insurance carriers (Code 11–3021), we estimate that the cost of reviewing the proposed rule is $70.07 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes113021.htm*). Assuming an average reading speed, we estimate that it will take approximately 2.5 hours for these individuals to review half of the proposed rule. We estimate that multiple individuals from 150 organizations will read the proposed rule, and that the key readers are likely the information systems manager and legal staff. We selected the information systems manager for purposes of this analysis. For each information systems manager that reviews the rule, the estimated cost is $175.17 (2.5 hours × $70.7). Therefore, we estimate that the total cost of reviewing this proposed rule is $175 × 150 reviewers = $26,250. Though we acknowledge that our estimate for the total number of reviewers may be high, we are trying to provide an estimate for the burden of reviewing our proposal and welcome feedback if appropriate.

E. Alternatives Considered

We are not required to provide alternatives for our proposal because we are not providing a full regulatory impact analysis, and we have fully discussed our reasons for proposing to rescind the HPID and OEID throughout this proposed rule. However, we did consider several alternatives before making this proposal, including the effects of these alternatives. We are providing our rationale for not selecting these options in accordance with OMB Circular A–4, which directs agencies to consider a range of regulatory and non-regulatory alternatives, including different choices defined by statute, different compliance dates, market-oriented approaches, and different enforcement methods, to name a few.

We considered, but did not propose, to allow covered entities to apply for and use the HPID or OEID voluntarily between willing trading partners. We rejected this option because there has been no demand for the use of these identifiers. Industry has clearly stated that there is no business use case for the HPID and OEID, and there is no anticipated benefit or savings from its use in the HIPAA transactions or for other purposes. An entirely voluntary model using the HPID and OEID would likely result in confusion in its implementation and impose costs on trading partners who did not choose to implement the two identifiers. We also rejected this option because it would be inconsistent with the statutory requirement to adopt an identifier for health plans that would be required for use.

We considered retaining the option of allowing health plans to obtain an HPID and enumerate as a CHP or SHP for their own systems, and use the identifier for their own purposes. Given the low enumeration numbers over the past 4 years, we decided not to pursue this alternative because we believe it would be confusing to the industry to enable enumeration without providing federal guidance on the use of the HPID. We determined that it was best to rescind the entire scheme (HPID, OEID, CHPs, and SHPs), and leave room to hear from industry about further business changes that may inform specific needs in a future standard unique health plan identifier.

At the May 3, 2017 NCVHS hearing, two commenters suggested that HHS consider alternative uses of the HPID, such as placing the HPID on health insurance identification cards to assist

with better understanding of patient coverage and benefits (including its use in patient medical records to help clarify a patient's healthcare benefit package). A commenter stated that the HPID could be used for enforcement or certification of compliance of health plans. The adoption of a standard unique health plan identifier is required by statute, and HHS remains open to industry and NCVHS discussion and recommendations for appropriate use case(s) that meet the requirements of administrative simplification and will explore options for a more effective standard unique health plan identifier in the future.

We solicit and welcome comments on our proposal, on the alternatives we have identified, and on other alternatives that we could consider, as well as on the costs and benefits of a health plan identifier.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget.

List of Subjects in 45 Part 162

Administrative practice and procedures, Electronic Transactions, Health facilities, Health insurance, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 162 to read as follows:

PART 162—ADMINISTRATIVE REQUIREMENTS

■ 1. The authority citation for part 162 is revised to read as follows:

Authority: 42 U.S.C. 1320d–1320d–9 and secs. 1104 and 10109 of Pub. L. 111–148, 124 Stat 146–154 and 915–917.

§ 162.103 [Amended]

■ 2. Section 162.103 is amended by removing the definitions of ''Controlling health plan (CHP)'' and ''Subhealth plan (SHP)''.

Subpart E [Removed and Reserved]

■ 3. Part 162 is amended by removing and reserving Subpart E.

Dated: December 6, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2018–27435 Filed 12–18–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[4500090022]

Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions to List 13 Species as Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce 12-month findings on petitions to list 13 species as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to list the Cedar Key mole skink, Florida sandhill crane, Fremont County rockcress, Frisco buckwheat, Ostler's peppergrass, Frisco clover, MacGillivray's seaside sparrow, Ozark pyrg, pale blue-eyed grass, San Joaquin Valley giant flower-loving fly, striped newt, Tinian monarch, and Tippecanoe darter. However, we ask the public to submit to us at any time any new information that becomes available relevant to the status of any of the species mentioned above or their habitats.

DATES: The findings in this document were made on December 19, 2018.

ADDRESSES: Detailed descriptions of the basis for each of these findings are available on the internet at *http://www.regulations.gov* under the following docket numbers:

Species	Docket No.
Cedar Key mole skink	FWS–R4–ES–2015–0047
Florida sandhill crane	FWS–R4–ES–2018–0099
Fremont County rockcress	FWS–R6–ES–2018–0049
Frisco buckwheat, Ostler's peppergrass, and Frisco clover	FWS–R6–ES–2018–0100
MacGillivray's seaside sparrow	FWS–R4–ES–2018–0067
Ozark pyrg	FWS–R4–ES–2018–0101
Pale blue-eyed grass	FWS–R1–ES–2018–0102
San Joaquin Valley giant flower-loving fly	FWS–R8–ES–2015–0023
Striped newt	FWS–R4–ES–2018–0065
Tinian monarch	FWS–R1–ES–2018–0103
Tippecanoe darter	FWS–R5–ES–2018–0066

Supporting information used to prepare these findings is available for public inspection, by appointment, during normal business hours, by contacting the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions concerning these findings to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

Species	Contact information
Cedar Key mole skink	Jay Herrington, Field Supervisor, North Florida Ecological Services Field Office, 904–731–3191.
Florida sandhill crane	Jay Herrington, Field Supervisor, North Florida Ecological Services Field Office, 904–731–3191.
Fremont County rockcress	Tyler Abbot, Project Leader, Wyoming Ecological Services Field Office, 307–772–2374, ext. 231.

Species	Contact information
Frisco buckwheat, Ostler's peppergrass, and Frisco clover.	Jennifer Lewinsohn, Biologist, Utah Ecological Services Field Office, 801–597–8352.
MacGillivray's seaside sparrow	Thomas McCoy, Field Supervisor, South Carolina Ecological Services Field Office, 843–300–0431.
Ozark pyrg	Melvin Tobin, Field Supervisor, Arkansas Ecological Services Field Office, 501– 513–4473.
pale blue-eyed grass	Karen Reagan, Biologist, Washington Fish and Wildlife Office, 360–753–7762.
San Joaquin Valley giant flower-loving fly	Josh Hull, Recovery and Listing Division Chief, Sacramento Fish and Wildlife Office, 916–414–6742.
striped newt	Jay Herrington, Field Supervisor, Northeast Florida Ecological Services Field Office, 904–731–3191.
Tinian monarch	Mary Abrams, Field Supervisor, Pacific Islands Fish and Wildlife Office, 808–792–9400.
Tippecanoe darter	Robert Anderson, Field Supervisor, Pennsylvania Field Office, 814–234–4090, ext. 7447.

If you use a telecommunications device for the deaf (TDD), please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

We are required to make a finding whether or not the petitioned action is warranted within 12 months after receiving any petition we determined contained substantial scientific or commercial information indicating that the petitioned action may be warranted (section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*)) (''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded. ''Warranted but precluded'' means that (a) the petitioned action is warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened species, and (b) expeditious progress is being made to add qualified species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) and to remove from the Lists species for which the protections of the Act are no longer necessary. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring that a subsequent finding be made within 12 months of that date. We must publish these 12-month findings in the **Federal Register.**

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Lists. The Act defines ''endangered species'' as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)), and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered species or a threatened species because of any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering whether a species may meet the definition of an endangered species or a threatened species because of any of the five factors, we must look beyond the mere exposure of the species to the stressor to determine whether the species responds to the stressor in a way that causes actual impacts to the species. If there is exposure to a stressor, but no response, or only a positive response, that stressor does not cause a species to meet the definition of an endangered species or a threatened species. If there is exposure and the species responds negatively, we determine whether that stressor drives or contributes to the risk of extinction of the species such that the species warrants listing as an endangered or threatened species. The mere identification of stressors that could affect a species negatively is not sufficient to compel a finding that listing is or remains warranted. For a species to be listed or remain listed, we require evidence that these stressors are operative threats to the species and its habitat, either singly or in combination, to the point that the species meets the definition of an endangered or a threatened species under the Act.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the Cedar Key mole skink (*Plestiodon egregius insularis*), Florida sandhill crane (*Antigone canadensis pratensis*), *Boechera pusilla* (Fremont County rockcress), *Eriogonum soredium* (Frisco buckwheat), *Lepidium ostleri* (Ostler's peppergrass), *Trifolium friscanum* (Frisco clover), MacGillivray's seaside sparrow (*Ammodramus maritimus macgillivraii*), Ozark pyrg (*Marstonia ozarkensis*), *Sisyrinchium sarmentosum* (pale blue-eyed grass), San Joaquin Valley giant flower-loving fly (*Rhaphiomidas trochilus*), striped newt (*Notophthalmus perstriatus*), Tinian monarch (*Monarcha takatsukasae*), and Tippecanoe darter (*Etheostoma tippecanoe*) meet the definition of ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future stressors and threats. We reviewed the petitions, information available in our files, and other available published and unpublished information. These evaluations may include information from recognized experts; Federal, State, and tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

The species assessment forms for the Cedar Key mole skink, Florida sandhill crane, Fremont County rockcress, Frisco buckwheat, Ostler's peppergrass, Frisco clover, MacGillivray's seaside sparrow, Ozark pyrg, pale blue-eyed grass, San Joaquin Valley giant flower-loving fly, striped newt, Tinian monarch, and Tippecanoe darter contain more detailed biological information, a thorough analysis of the listing factors, and an explanation of why we determined that these species do not meet the definition of an endangered species or a threatened species. This supporting information can be found on the internet at *http://www.regulations.gov* under the appropriate docket number (see

ADDRESSES, above). The following are informational summaries for each of the findings in this document.

Cedar Key Mole Skink

Previous Federal Actions

On July 11, 2012, we received a petition from the Center for Biological Diversity, C. Kenneth Dodd, Jr., Kenney Krysko, Michael J. Lannoo, Thomas Lovejoy, Allen Salzberg, and Edward O. Wilson to list 53 amphibians and reptiles, including the Cedar Key mole skink, as endangered or threatened species under the Act and to designate critical habitat. On July 1, 2015, we published the 90-day finding in the **Federal Register** (80 FR 37568), concluding that the petition presented substantial information indicating the Cedar Key mole skink may warrant listing. This document constitutes the 12-month finding on the July 11, 2012, petition to list the Cedar Key mole skink under the Act.

Summary of Finding

The Cedar Key mole skink is a shiny brown lizard reaching a total length of approximately 15 centimeters (5.9 inches) with the light pink colored tail accounting for two-thirds of the length. This subspecies is semi-fossorial (adapted to digging, burrowing, and living underground) and cryptic in nature but has also been seen running along the substrate surface when exposed.

The Cedar Key mole skink inhabits the beach berm and dry coastal hammock habitats on eight islands of the Cedar Keys along a 10-mile section of Levy County along Florida's Gulf Coast. The Cedar Key mole skink relies on dry, unconsolidated soils for movement, cover, and nesting.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors include effects of sea-level rise and climate change-associated shifts in rainfall, temperature, and storm intensities. The continued occurrence of the Cedar Key mole skink in low numbers on two of the historically surveyed islands, as well as recent observations on five additional islands, indicates a level of resiliency to the stressors that have been acting upon the subspecies in the past and are currently acting on it. In addition, over time, the subspecies has persisted on multiple islands, providing a level of redundancy that will help the Cedar Key mole skink withstand the potential increased catastrophic events into the future. Finally, the subspecies should continue to exhibit a level of representation with suitable habitat continuing to occur on multiple islands in varying sizes and elevations across the range of the subspecies. In sum, we find that the continued presence of occupied habitat (as well as potentially occupied suitable habitat) and projected continuance of suitable habitat across the subspecies' range continues to provide a level of resiliency, redundancy, and representation to the subspecies such that the Cedar Key mole skink is not presently in danger of extinction throughout all or a significant portion of its range or likely to become so within the foreseeable future. We find that the stressors acting on the subspecies and its habitat, either singly or in combination, are not of sufficient imminence, intensity, or magnitude to indicate that this subspecies meets the definition of an endangered species or a threatened species. Therefore, we find that listing the Cedar Key mole skink as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the Cedar Key mole skink species assessment form and other supporting documents (see **ADDRESSES**, above).

Florida Sandhill Crane

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, the Alabama Rivers Alliance, the Clinch Coalition, Dogwood Alliance, the Gulf Restoration Network, Tennessee Forests Council, and the West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the Florida sandhill crane, as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836), concluding that the petition presented substantial information indicating the Florida sandhill crane may warrant listing. This document constitutes the 12-month finding on the April 20, 2010, petition to list the Florida sandhill crane under the Act.

Summary of Finding

Florida sandhill cranes are graceful, monogamous, long-lived birds in the Gruidae family. This subspecies is one of six that reside in North America, and one of three that are non-migratory. The Florida sandhill crane is a single, large population that ranges from the Okefenokee Swamp in southern Georgia to the Everglades in southern Florida, overlapping with the greater sandhill crane subspecies during the winter season. Both males and females raise one to two chicks per nesting attempt and are able to re-nest two to three times per year, if necessary.

Florida sandhill cranes use a variety of adjacent, open upland habitats, including grasslands, prairies, emergent palustrine wetlands, open pine forests, pastures, and forest-pasture transition areas. They also use the transition areas between wetland and upland habitats, and they feed in human-manipulated environments year-round, such as (but not limited to) agricultural lands, golf courses, airports, and suburban areas.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary threats to the Florida sandhill crane include habitat loss/conversion/degradation, changing climate conditions (drought and precipitation/heavy rain events), and mortalities resulting from predation, collisions, or human interactions/nest disturbances. The most significant of these threats for the long-term persistence of Florida sandhill crane is loss, conversion, or degradation of suitable habitat. Habitat has been lost historically and is expected to be lost or converted into the future. However, the Florida sandhill crane continues to currently occupy its historical range, and is also expected to in the future, albeit as a smaller (*i.e.,* less abundant) population than is currently represented. Its demonstrated ability to adapt to and use agricultural and suburban habitats (*e.g.,* croplands, pastures, golf courses, recreational areas) for breeding, nesting, and feeding activities help ensure its resiliency into the future. Although drought, precipitation changes/events, and direct mortalities will play a role on the species' resource needs and reproductive success, the best available information suggests that any impacts are affecting and likely to affect the subspecies at the individual level as opposed to the population/rangewide level both currently and in the future. Therefore, we find that listing the Florida sandhill crane as endangered or threatened is not warranted. A detailed discussion of the basis for this finding can be found in the Florida sandhill crane species assessment form and other supporting documents (see **ADDRESSES**, above).

Fremont County Rockcress

Previous Federal Actions

On July 30, 2007, we received a petition from Forest Guardians (now WildEarth Guardians), to list 206

Mountain-Prairie Region species, including the Fremont County rockcress, as endangered or threatened species under the Act. On August 18, 2009, we published a 90-day finding in the **Federal Register** (74 FR 41649), concluding that the petition presented substantial information indicating the Fremont County rockcress may warrant listing. On June 9, 2011, we published a 12-month finding in the **Federal Register** (76 FR 33924), concluding that listing the Fremont County rockcress is warranted based on survey information indicating the species was in decline. However, listing the species was precluded at that time by higher priority actions, and the species was added to the candidate species list with a listing priority number of 8. We subsequently addressed the status of the species annually in our candidate notices of review (76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR 72450, December 5, 2014; 80 FR 80584, December 24, 2015; 81 FR 87246, December 2, 2016). In 2016, we revised the listing priority number from an 8 to an 11 because we found that the threats affecting the species were no longer high in magnitude nor were they imminent, and were instead low in magnitude and non-imminent.

Summary of Finding

The Fremont County rockcress is a narrow endemic perennial herb known to occur on approximately 18 acres (7 hectares) of habitat in the southern foothills of the Wind River Range, Wyoming. The species' habitat consists of sparsely vegetated, course, granite soil pockets in exposed granite-pegmatite (igneous rock solidified from lava or magma) outcrops, and the habitat faces extreme cold temperature and wind conditions. The species is also characterized by its reproductive system, in which individual plants reproduce through asexual seed production.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. To assess the resiliency of the species, we reviewed the abundance of flowering and non-flowering individuals and colonization of populations, which is driven by the species' reproductive system, winter precipitation, soil availability, sunlight, and freedom from competition. Stochastic events such as severe precipitation events, wildfire, and invasions of nonnative, invasive species affect the resiliency of the species. However, we find that there are no stressors currently impacting the species; the species has demonstrated persistence as a narrow endemic; there are protections in place to benefit the species; and its sole occurrence has sufficiently high levels of flowering plant abundance, colonization, and suitable habitat factors.

Considering that Fremont County rockcress presently exhibits high levels of resiliency, and is expected to continue to be resilient within the foreseeable future while retaining sufficient adaptive capacity and the ability to withstand catastrophic events, we find that the species is not presently in danger of extinction throughout all or a significant portion of its range or likely to become so within the foreseeable future. Therefore, we find that listing Fremont County rockcress as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the Fremont County rockcress species assessment form and other supporting documents (see **ADDRESSES**, above).

Frisco Buckwheat, Ostler's Peppergrass, and Frisco Clover

Previous Federal Actions

On July 30, 2007, we received a petition from Forest Guardians (now WildEarth Guardians), to list 206 Mountain-Prairie Region species, including the Frisco buckwheat, Ostler's peppergrass, and Frisco clover, as endangered or threatened species under the Act. On August 18, 2009, we published 90-day findings in the **Federal Register** (74 FR 41649), concluding that the petition presented substantial information indicating the Frisco buckwheat, Ostler's peppergrass, and Frisco clover may warrant listing. On February 23, 2011, we published 12-month findings in the **Federal Register** (76 FR 10166), concluding that listing the Frisco buckwheat, Ostler's peppergrass, and Frisco clover is warranted primarily due to the threat of habitat destruction from mining activities. However, listing the species was precluded at that time by higher priority actions, and the species were added to the candidate species list with listing priority numbers of 8. We subsequently addressed the status of these species annually in our candidate notices of review (76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR 72450, December 5, 2014; 80 FR 80584, December 24, 2015; 81 FR 87246, December 2, 2016).

Summary of Finding

The Frisco buckwheat, Ostler's peppergrass, and Frisco clover are rare endemic plants species found only in Utah. These species are addressed here together as they occupy roughly the same area, have similar life histories, and face similar potential threats. Frisco buckwheat and Ostler's peppergrass occur together in three populations, occupying 297 acres (120 hectares) and 153 acres (62 hectares) of habitat, respectively. The Frisco clover is known from six populations and occupies 360 acres (146 hectares) of habitat.

These three species are long-lived perennial plants that flower in the spring and summer months and likely require pollinators for maximum reproduction. Plant survival and successful recruitment require suitable intact soils with microsites for establishment and growth. The low canopy coverage of associated vegetation must result in low plant competition but also appears to provide sufficient floral resources to support pollinators. The health (long-term productivity) of populations is affected by the population size, habitat quantity, and habitat quality available to support stable or increasing populations. In addition to proximity between populations, habitat connectivity is important to support gene flow within populations.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors are precious metal exploration and mining; stone mining; nonnative, invasive species; and climate change. We found that there has been no reduction in redundancy or representation from historic conditions for these species. Currently, there is some stone mining occurring with minimum overlap with the plant populations and no significant impact on current viability. Despite some impacts from mining, invasive species, and climate change, the species are likely to face minimal decreases in population resiliency and minimal reduction in redundancy and representation, with all populations persisting within the foreseeable future. Therefore, we find that listing the Frisco buckwheat, Ostler's peppergrass, and Frisco clover as endangered or threatened is not warranted. A detailed discussion of the basis for this finding can be found in the Frisco buckwheat, Ostler's peppergrass, and Frisco clover species assessment form and other supporting documents (see **ADDRESSES**, above).

MacGillivray's Seaside Sparrow

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, the Alabama Rivers Alliance, the Clinch Coalition, Dogwood Alliance, the Gulf Restoration Network, Tennessee Forests Council, and the West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the MacGillivray's seaside sparrow, as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836), concluding that the petition presented substantial information indicating the MacGillivray's seaside sparrow may warrant listing. Subsequently, we entered into a stipulated settlement agreement with the Center for Biological Diversity that required us to submit a 12-month finding to the **Federal Register** by September 30, 2018. The court later agreed to extend this deadline until December 15, 2018. This document constitutes the 12-month finding on the April 20, 2010, petition to list the MacGillivray's seaside sparrow under the Act.

Summary of Finding

The MacGillivray's seaside sparrow is a subspecies of seaside sparrow that occurs in Atlantic coastal marshes in South Carolina, Georgia, and Florida. The MacGillivray's seaside sparrow is an olive-gray bird with a relatively long bill and short, sharp tail, and the subspecies reaches approximately 14 to 15 centimeters (5.5 to 6 inches) in length.

MacGillivray's seaside sparrows spend their entire life in coastal salt and brackish marshes. The subspecies is currently characterized by four breeding populations. In South Carolina, the subspecies breeds in lower elevation areas of natural high marsh and impoundments; in Georgia, the MacGillivray's seaside sparrow breeds in higher elevation areas of natural low salt marsh. The subspecies needs dense herbaceous cover for nesting and sheltering, and high tide roosting sites in the marsh to evade flooding. Adult MacGillivray's seaside sparrows have behavioral adaptations to balance the trade-off in risk from predation and flooding to nest success, and, therefore, will shift nest-site placement along a nest height gradient to contend with these dual risks.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors are predation, tidal flooding, sea level rise, and increased storm frequency due to climate change. We conclude that the viability of the MacGillivray's seaside sparrow will continue to be characterized by four breeding populations across most of the current range of coastal marshes in South Carolina, Georgia, and Florida in the near term and within the foreseeable future. In addition, although sea level rise will cause the loss of high abundance breeding habitat, the MacGillivray's seaside sparrow will continue to occur in different habitat types and thus will maintain some adaptive capacity in the future.

We find that the stressors acting on the subspecies and its habitat, either singly or in combination, are not of sufficient imminence, intensity, or magnitude to indicate that this subspecies meets the definition of an endangered species or a threatened species. Therefore, we find that listing the MacGillivray's seaside sparrow as endangered or threatened is not warranted. A detailed discussion of the basis for this finding can be found in the MacGillivray's seaside sparrow species assessment form and other supporting documents (see **ADDRESSES**, above).

Ozark Pyrg

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, the Alabama Rivers Alliance, the Clinch Coalition, Dogwood Alliance, the Gulf Restoration Network, Tennessee Forests Council, and the West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the Ozark pyrg, as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836), concluding that the petition presented substantial information indicating the Ozark pyrg may warrant listing. This document constitutes the 12-month finding on the April 20, 2010, petition to list the Ozark pyrg under the Act.

Summary of Finding

The Ozark pyrg is a freshwater snail historically found in a shoal of the White River near Cotter, Arkansas, and in the North Fork White River near the confluence. No specific life-history data exist regarding the species' reproduction, diet, age, growth, population size structure, or fecundity. However, many species within the same genus are adapted to springs, ponds, and other sensitive aquatic habitats. Some of these species also show a preference for gravel and pebble substrates and shallower water depths.

Based on extensive surveys between 1915, when the species was first described, and 2010 throughout the range of the species in Arkansas and Missouri that have yielded no specimens, and the extreme modification of the habitat at the species' type locality, the best available science indicates there are no extant populations of the Ozark pyrg. Therefore, we determine the Ozark pyrg to be extinct. As a result, the Ozark pyrg does not meet the statutory definition of either an endangered species or a threatened species and, accordingly, does not warrant listing under the Act. A detailed discussion of the basis for this finding can be found in the Ozark pyrg species assessment form and other supporting documents (see **ADDRESSES**, above).

Pale Blue-Eyed Grass

Previous Federal Actions

On July 30, 2007, we received a petition from Forest Guardians (now WildEarth Guardians), to list 206 Mountain-Prairie Region species, including the pale blue-eyed grass, as endangered or threatened species under the Act. On August 18, 2009, we published a 90-day finding in the **Federal Register** (74 FR 41649), concluding that the petition presented substantial information indicating the pale blue-eyed grass may warrant listing. This document constitutes the 12-month finding on the July 30, 2007, petition to list the pale blue-eyed grass under the Act.

Summary of Finding

The pale blue-eyed grass is a long-lived perennial herb in the iris family that produces small, pale blue flowers. The species is a narrow endemic known from a limited area in the Cascade Range of south-central Washington and north-central Oregon. Individual plants need early seral, open habitats with cool temperatures to break seed dormancy, adequate moisture to germinate and establish, and warm sunny days to stimulate flowering. Individual plants need pollinators for sexual exchange of genetic materials and adequate seed set but can reproduce by self-fertilizing and by sprouting rhizomes to reproduce vegetatively. Seeds need a dispersal mechanism that moves them away from the parent plant, thereby reducing intraspecific competition and exposure to pathogens that may have infected older established plants.

For robust resiliency over time, it can be assumed that pale blue-eyed grass populations likely need numerous individuals representing a diversity of genotypes within habitat patches of adequate area, quality, and connectivity to maintain survival and reproduction in spite of disturbance and shifting environmental conditions. Redundant populations across the range are needed to increase the species' chances of surviving catastrophic events. Representation through genetic and environmental diversity within and among populations is necessary to conserve long-term adaptive capability.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors affecting the pale blue-eyed grass' status include grazing, motor vehicles, invasive plants, putative hybridization, camping and recreation, habitat-disturbing management activities, habitat encroachment, and effects of climate change. Despite impacts from these stressors at an individual level, the species has maintained resilient populations. Although we predict some continued impacts from these stressors in the future, we anticipate the species will continue to be viable in resilient populations that are distributed widely throughout both of its representative areas (Washington and Oregon). Therefore, we find that listing the pale blue-eyed grass as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the pale blue-eyed grass species assessment form and other supporting documents (see **ADDRESSES**, above).

San Joaquin Valley Giant Flower-Loving Fly

Previous Federal Actions

On June 26, 2014, we received a petition from Gregory R. Ballmer and Kendall H. Osborne to list the San Joaquin Valley giant flower-loving fly as an endangered species under the Act. On April 10, 2015, we published a 90-day finding in the **Federal Register** (80 FR 19259), concluding that the petition presented substantial information indicating that listing the San Joaquin Valley giant flower-loving fly may be warranted. This document constitutes the 12-month finding on the June 26, 2014, petition to list the San Joaquin Valley giant flower-loving fly under the Act.

Summary of Finding

San Joaquin Valley giant flower-loving fly larvae have small, foot-like protrusions like caterpillars, and grow to about 6.4 centimeters (2.5 inches). They burrow down to moist sands below the surface, where they prey on the burrowing larvae of other insects. After 1 to 2 years, the fly larva produces a pupa, which metamorphoses into an adult. Adults are strong flyers, are 2.5 to 3.5 centimeters (1 to 1.5 inches) long, and live about 3 days. The species' ''flight season'' lasts about 7 weeks, from mid-August to early October. Males seek potential mates by sight, occasionally defending territories from other males. After mating, females lay eggs in shaded areas, either on the surface of bare sandy soil, or in shallow holes dug into the sand using their abdomens. Eggs likely hatch in about 10 days.

The San Joaquin Valley giant flower-loving fly's known historical range includes eight locations across the San Joaquin Valley, California, but it is now known only from Sand Ridge, a large stable sand dune about 24 kilometers (15 miles) east of Bakersfield, in Kern County, California. For over 20 years prior to discovery of the Sand Ridge population in 1997, the species was thought to be extinct. A second, smaller population was also discovered in 1997, about 16 kilometers (10 miles) south of Bakersfield, but no individuals have been observed there since 2006.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors that may be affecting the species include effects of climate change, urban and agricultural development, sand mining, vegetation overgrowth, small population size, off-highway vehicles, and pesticide drift. Despite the fly being dependent on rare areas of inland dune sand and having lost seven of eight historically known populations, we found that the remaining population provides sufficient resiliency, redundancy, and representation now and in the future. Further, we found that the stressors we assessed are not of sufficient imminence, intensity, or magnitude, either singly or in combination, to indicate that the fly is in danger of extinction throughout all or a significant portion of its range now or in the foreseeable future. Therefore, we find that listing the San Joaquin Valley giant flower-loving fly as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the San Joaquin Valley giant flower-loving fly species assessment form and other supporting documents (see **ADDRESSES**, above).

Striped Newt

Previous Federal Actions

On July 14, 2008, we received a petition from Dr. D. Bruce Means, Ryan C. Means, and Rebecca P.M. Means of the Coastal Plains Institute and Land Conservancy, requesting that the striped newt be listed as a threatened species under the Act. On March 23, 2010, we published a 90-day finding in the **Federal Register** (75 FR 13720), concluding that the petition presented substantial information indicating that listing the striped newt may be warranted. On June 7, 2011, we published a 12-month finding in the **Federal Register** (76 FR 32911), concluding that listing the striped newt was warranted due to threats associated with habitat loss, disease, drought, and inadequacy of existing regulatory mechanisms to address those threats. However, listing the species was precluded at that time by higher priority actions, and the species was added to the candidate species list with a listing priority number of 8. We subsequently addressed the status of the species annually in our candidate notices of review (76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR 72450, December 5, 2014; 80 FR 80584, December 24, 2015; 81 FR 87246, December 2, 2016).

Summary of Finding

The striped newt uses ephemeral wetlands and the upland habitat (*e.g.,* scrub, mesic flatwoods, sandhills) that surrounds those wetlands. Striped newts have a lifespan of 12 to 15 years and use aquatic and terrestrial habitats during their complex life cycle. Adult striped newts can occur as both a gilled aquatic form and a terrestrial form.

The current range of the striped newt extends from southern Georgia to north-central Florida, with 105 breeding ponds extant in Florida and 11 in Georgia. Striped newts are divided into two regions: the Eastern Region (peninsular Florida and eastern Georgia) and the Western Region (panhandle Florida and western Georgia). Patterns in precipitation and temperature cause ecological differentiation between these two regions.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors are land

use change, fire suppression, effects of climate change, and off-road vehicle impacts. Potential impacts associated with overutilization and predation were also analyzed but found not to affect the species to such an extent that they would have a negative impact on species' viability.

We have concluded that the threats currently impacting the striped newt are of lower magnitude than were previously thought. Furthermore, new populations of striped newt have been discovered since the species was added to the candidate species list, resulting in increased resiliency, redundancy, and representation for the species. Additionally, past conservation efforts, including captive rearing and release of striped newts, have helped reestablish striped newt populations in previously extirpated areas, such as in the Apalachicola National Forest. Finally, 85 percent of striped newt populations currently occur on conserved lands.

Based on the best available information, we find that the striped newt does not meet the definition of an endangered species or threatened species. Therefore, we find that listing the striped newt as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the striped newt species assessment form and other supporting documents (see **ADDRESSES**, above).

Tinian Monarch

Previous Federal Actions

On December 12, 2013, we received a petition from the Center for Biological Diversity requesting that the Tinian monarch be listed as an endangered or threatened species under the Act. On September 18, 2015, we published a 90-day finding in the **Federal Register** (80 FR 56423), concluding that the petition presented substantial information indicating that listing the Tinian monarch may be warranted. This document constitutes the 12-month finding on the December 12, 2013, petition to list the Tinian monarch under the Act.

Summary of Finding

The Tinian monarch is a small flycatcher bird about 15 centimeters (6 inches) bill to tail. Tinian monarchs are dull with light rufous underparts, olive-brown upperparts, and dark chocolate brown wings and tail. This species is endemic to the island of Tinian, which is part of the Northern Mariana Islands in the western Pacific Ocean.

The Tinian monarch lives mainly in forested habitat where it shelters, breeds, and forages for insects. There are various types of forest on Tinian including native limestone, secondary-mixed, and nonnative tangantangan forest, all of which are inhabited by the monarch. Individuals breed year round beginning at about 2 years of age and live around 10 years.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary potential stressors affecting the Tinian monarch include the risk of the invasive, predatory brown treesnake establishing on Tinian and habitat loss from civilian and military development, including loss via potential resulting wildfires. We find that the risk of brown treesnake establishing on Tinian now and in the future is low, because of the sufficient interdiction program on Guam and Tinian that prevents the spread of the snake to areas where it is not found, including Tinian. We also find that despite extensive historical impacts to Tinian's forest habitat, the Tinian monarch is currently thriving. This is the result of expansive forest regrowth and the species' highly resilient nature, which is evidenced by its rebound following historical periods of habitat loss and by its ability to forage and reproduce within the remaining native forest, abundant nonnative forest, and mixed forest on Tinian. Therefore, we find that listing the Tinian monarch as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the Tinian monarch species assessment form and other supporting documents (see **ADDRESSES**, above).

Tippecanoe Darter

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, the Alabama Rivers Alliance, the Clinch Coalition, Dogwood Alliance, the Gulf Restoration Network, Tennessee Forests Council, and the West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the Tippecanoe darter, as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836), concluding that the petition presented substantial information indicating that listing the Tippecanoe darter may be warranted. This notice constitutes the 12-month finding on the April 20, 2010, petition to list the Tippecanoe darter under the Act.

Summary of Finding

The Tippecanoe darter is one of the smallest species of darters (35 millimeters (1.38 inches) in length). Males are distinguished by their gold or orange color with blue-black vertical bars, while females are more subdued in color. The fish has a relatively widespread, disjunct distribution with 12 of its 15 historical populations extant across six States: Indiana, Kentucky, Ohio, Pennsylvania, Tennessee, and West Virginia. The species is expanding its range in some areas.

Tippecanoe darters inhabit fourth-order and larger streams and rivers, and prefer riffles and runs with rocky bottom substrates and adequate water flow to keep spaces between and under rocks free from sediment. Individuals are mature within their first year, spawn in May to early August, and live to between 1 and 2 years of age.

We evaluated all relevant factors under the five factors, including any regulatory mechanisms and conservation measures ameliorating stressors. The primary stressors affecting the Tippecanoe darter include habitat fragmentation from dams and impairments to water quality, including sedimentation and agricultural and urban runoff. Despite impacts from these stressors, the species has maintained resilient populations and is increasing occupancy in some reaches, likely due to improved water quality or improved survey techniques. Although we predict some continued impacts from these stressors in the future, we anticipate the species will persist in resilient populations that are distributed widely throughout each of its representative physiographic provinces.

In summary, we find that the stressors acting on the species and its habitat, either singly or in combination, are not of sufficient imminence, intensity, or magnitude to indicate that this species meets the definition of an endangered species or a threatened species. Therefore, we find that listing the Tippecanoe darter as an endangered species or threatened species is not warranted. A detailed discussion of the basis for this finding can be found in the Tippecanoe darter species assessment form and other supporting documents (see **ADDRESSES**, above).

New Information

We request that you submit any new information concerning the taxonomy of, biology of, ecology of, status of, or stressors to the Cedar Key mole skink, Florida sandhill crane, Fremont County rockcress, Frisco buckwheat, Ostler's peppergrass, Frisco clover,

MacGillivray's seaside sparrow, Ozark pyrg, pale blue-eyed grass, San Joaquin Valley giant flower-loving fly, striped newt, Tinian monarch, and Tippecanoe darter to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor these species and make appropriate decisions about their conservation and status. We encourage local agencies and stakeholders to continue cooperative monitoring and conservation efforts.

References Cited

Lists of the references cited in the petition findings are available on the internet at *http://www.regulations.gov* in the dockets provided above in **ADDRESSES** and upon request from the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**.

Authors

The primary authors of this document are the staff members of the Species Assessment Team, Ecological Services Program.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 7, 2018.

Margaret E. Everson,

Principal Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–27467 Filed 12–18–18; 8:45 am]

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Notices

Federal Register

Vol. 83, No. 243

Wednesday, December 19, 2018

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

Privacy Act of 1974; System of Records

AGENCY: Office of the Assistant Secretary for Civil Rights (OASCR).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the U.S. Department of Agriculture (USDA) proposes to modify a system of records, USDA/OCRE–1, which will be renamed USDA/OASCR–1, Civil Rights Enterprise System (CRES). The Office of the Assistant Secretary for Civil Rights (OASCR) maintains CRES, which contains program discrimination complaints, alleging unlawful discrimination arising within programs or activities conducted or assisted by USDA. Records relating to Equal Employment Opportunity (EEO) complaints alleging unlawful discrimination against USDA employees or applications for employment are maintained in CRES also; however, those records are covered by EEOC/GOVT–1, EEO in the Federal Government Complaint and Appeal Records. The revised notice also conveys updates to the system location, categories of records, routine uses (one of which permits records to be provided to the National Archives and Records Administration), storage, safeguards, retention and disposal, system manager and address, notification procedures, records access, and contesting procedures.

DATES: This system of records will be effective without further notice on thirty (30) days after publication in the **Federal Register**, unless modified by a subsequent notice to incorporate comments received from the public. To ensure consideration, the contact person listed below must receive written or electronic comments on or before thirty (30) days after publication in the **Federal Register**.

ADDRESSES: The public may submit any comments to: Kenneth J. Baisden, Director, Data and Records Management Division, OASCR, USDA, 1400 Independence Avenue SW, Washington, DC 20250, Mail Stop 0115 or at *kenneth.baisden@ascr.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Kenneth J. Baisden, Director, Data and Records Management Division, OASCR, USDA, *kenneth.baisden@ascr.usda.gov,* 202–260–1897.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a), requires the Department to publish in the **Federal Register** this notice of a modified system of records maintained by the Department. The Department's regulations implementing the Privacy Act are contained in the Code of Federal Regulations in 7 CFR 1, Subpart G. The Department proposes to amend the existing system of records, USDA/OCRE–1 Program Discrimination Complaints, which was last published in the **Federal Register** in 60 FR 5618 (January 30, 1995). The proposed amendments to USDA/OCRE–1 pertain to program discrimination complaints contained in CRES. Equal employment complaint records in CRES remain covered by the system of records EEOC/GOVT–1, Equal Employment Opportunity (EEO) in the Federal Government Complaint and Appeal Records (last published 81 FR 81116, Nov. 17, 2016).

The CRES provides core support for the mission of Civil Rights (CR) offices, both at the department and sub-agency levels. The CRES serves management needs of agency heads who are, by law, charged with the responsibility for agency compliance with civil rights laws and regulations. CRES is a Web-based enterprise-wide complaint tracking system, consisting of a suite of applications supporting USDA and all Department agencies by tracking complaints. Additionally, CRES adheres to the regulatory reporting requirements and provides data for Civil Rights Reporting. The program discrimination complaints process supports enforcement of Title VI of the Civil Rights Act of 1964, the Rehabilitation Act, the implementing regulations at 7 CFR part 15, and any other applicable anti-discrimination statutes, rules, and regulations.

The proposed revisions to the system incorporate MicroPact as the commercial vendor for the system and the location of the CRES servers. MicroPact focuses on engineering Web-based commercial off-the-shelf solutions for the Federal Government. CRES facilitates improved management of discrimination complaints using separate modules: Program Complaints Management System (PCMS) and Entellitrak (an Alternative Dispute Resolution System).

The proposed revisions to the notice convey updates to the system location, categories of records, storage, safeguards, retention and disposal, system manager and address, notification procedures, records access, and contesting procedures. In addition, the Department proposes the following changes to the routine uses:

- The Department proposes to revise former Routine Use 1 and redesignate it as new Routine Uses A and H. Routine Use A permits disclosures to the U.S. Department of Justice (DOJ) for litigation purposes, and Routine Use H permits disclosures to a court or adjudicative body in a proceeding;
- The Department proposes to revise former Routine Use 2 and redesignate it as new Routine Use G for disclosure to Federal, State, local, foreign, Tribal, or other agencies to enforce, implement, investigate, or prosecute a violation of law;
- The Department proposes to revise former Routine Use 3 and redesignate it as new Routine Use B for disclosure to congressional offices at the written request of the constituent;
- The Department proposes to revise former Routine Use 4 and redesignate it as new Routine Use C for disclosure to the United States Civil Rights Commission;
- The Department proposes a new Routine Use D for disclosure for records management purposes;
- The Department proposes a new Routine Use E for disclosure to appropriate agencies, entities, and persons of information necessary to respond to a suspected or confirmed breach of the system of records in accordance with Office of Management and Budget (OMB) Memorandum M–17–12, Preparing for and Responding to a Breach of Personally Identifiable Information (Jan. 3, 2017);

• The Department proposes a new Routine Use F for disclosure to another Federal agency or entity of information reasonably necessary to assist in responding to a suspected or confirmed breach or to prevent, minimize, or remedy harm, in accordance with OMB Memorandum M–17–12; and

• The Department proposes a new Routine Use I for disclosure to contractors, grantees, experts, consultants, or others when necessary to accomplish an agency function.

In accordance with the Privacy Act, 5 U.S.C. 552a(r), the Department has provided a report to OMB and Congress on this revised system of records.

Stephen L. Censky,

Deputy Secretary.

SYSTEM NAME AND NUMBER

USDA/OASCR–1, Civil Rights Enterprise System, (CRES).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

OASCR maintains the records in this system and stores a hard copy at the National Archives and Records Administration. The electronic record systems are maintained on servers physically located at the MicroPact Data Center, 12901 Worldgate Drive, Suite 800, Herndon, Virginia. In the future, USDA may transfer records within this system to a USDA-authorized cloud service provider, in which case records would reside at another location within the Continental United States. Additionally, USDA employees may maintain hard or electronic copies at USDA offices.

SYSTEM MANAGER(S):

Shawn McGruder, Director, Office of Adjudication, OASCR, USDA,1400 Independence Avenue SW, Washington, DC 20250, *shawn.mcgruder@ascr.usda.gov;* 202–720–5212.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 42 U.S.C. 2000d, *et seq.,* 42 U.S.C. 3608(d); 42 U.S.C. 12101, *et seq.;* 20 U.S.C. 1681, *et seq.;* 29 U.S.C. 794; 15 U.S.C. 1691, *et seq;* and 7 U.S.C. 2011, *et seq.*

PURPOSE(S) OF THE SYSTEM:

This system is maintained for the purpose of effectively documenting and processing program discrimination complaints arising within USDA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records about individuals who have filed complaints of program discrimination by USDA, and the Department and sub-agencies generally access the records by that individual's name or an identifier unique to that individual's complaint. In addition, the system may capture information about individuals referenced or identified in records created or compiled as part of the process of documenting and processing program discrimination complaints. Individuals who may have information in the system include contractors, complainants, witnesses, investigators, third parties, Administrative Judges, legal representatives, applicants for employment who have filed informal or formal complaints alleging discrimination, customers, members of the public who have filed a complaint, and others who have participated or otherwise been involved in proceedings relating to a program discrimination complaint.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system consists of records created or compiled as part of the process of documenting and processing program discrimination complaints. Such records include the following: Records created or compiled in response to complainants' statements of alleged discrimination; respondents' statements; witnesses' statements; names and addresses of complainants and respondents; personal, employment, or program participation information; medical records; conciliation and settlement agreements; related correspondence; initial and final determinations; and any other records related to the intake, investigation, or adjudication of discrimination complaints.

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from the covered individuals, members of the public, USDA employees, contractors, USDA applicants, and other individuals or entities participating in program complaint matters, or is taken from other program discrimination complaints.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Under the routine uses listed, USDA may disclose, without the consent of the individual, information contained in a record in this system, provided the disclosure is compatible with a purpose for which the record was collected.

A. To the DOJ when: (a) USDA or any component thereof; or (b) any employee of USDA in his or her official capacity; or (c) any employee or former employee of USDA in his/her individual capacity when the DOJ has agreed to represent the employee; or (d) the United States is a party to litigation or has an interest in such litigation, and by careful review, USDA determines that the records are both relevant and necessary to the litigation and the use of such records by the DOJ is therefore deemed by USDA to be for a purpose that is compatible with the purpose for which USDA collected the records.

B. To a congressional office from the record of an individual in response to a written inquiry from the congressional office made at the request of that individual.

C. To the United States Civil Rights Commission in response to its request for information, per 42 U.S.C. 1975a.

D. To the National Archives and Records Administration (NARA) or General Services Administration, pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

E. To appropriate agencies, entities, and persons when (1) USDA suspects or has confirmed that there has been a breach of the system of records; (2) USDA has determined that, as a result of the suspected or confirmed breach, there is a risk of harm to individuals, USDA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure to such agencies, entities, and persons is reasonably necessary to assist with USDA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another Federal agency or Federal entity, when USDA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach; or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

G. To the appropriate Federal, State, local, foreign, Tribal, or other agency responsible for enforcing, implementing, investigating, or prosecuting a civil or criminal violation of law, or rule or order issued pursuant thereto, when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, regulation, rule, or order, and when the information

disclosed is relevant to any enforcement, implementation, regulatory, investigative, or prosecutorial responsibility of the receiving entity.

H. To a court or adjudicative body in a proceeding when: (a) USDA or any component thereof; or (b) any employee of USDA in his or her official capacity; or (c) any employee of USDA in his or her individual capacity where DOJ has agreed to represent the employee; or (d) the United States is a party to litigation or has an interest in such litigation, and by careful review, USDA determines the records are both relevant and necessary to the litigation and the use of such records is, therefore, deemed by USDA to be for a purpose compatible with the purpose for which USDA collected the records.

I. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for OASCR, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to USDA officers and employees.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

OASCR, Records Management Services (RMS) is responsible for maintaining its program complaint records. These records are electronically stored in CRES and are under the custodial care of OASCR.

Records maintained by OASCR are accessioned to NARA, as permanent records, at the appropriate time. Electronic records are stored at the MicroPact Data Center. USDA employees also may maintain paper or electronic copies at USDA offices.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Electronic and paper records are indexed by name of complainant, agency, and address. Paper records are retrieved from NARA. Electronic records are retrieved from MicroPact Data Center. Electronic and/or paper records are retrieved from USDA employees at USDA offices.

To retrieve an individual record, an employee (with approval) would access CRES for an individual complaint file and enter the complainant's last and first name or the case number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with NARA's General Records Schedule 16 and USDA's General Records Schedule 2.3, but may be retained for a longer period as required by litigation, investigation, and/or audit. Electronic and/or paper records are retained with USDA employees at USDA offices.

USDA's General Records Schedule covers records-documenting activities related to managing relationships among the agency, its employees, and its unions and bargaining units.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are stored securely at the National Archives and Records Administration. This office is always locked when unoccupied. Access to and use of these records is limited to those persons whose official duties require such access. Electronic records are also stored at MicroPact or with the vendor who manages the system. All users are given security awareness training that covers procedures for handling sensitive information, including personally identifiable information (PII). Annual refresher training is mandatory. All USDA employees and contractors with authorized access have undergone a thorough background security investigation.

RECORD ACCESS PROCEDURES:

Per the Privacy Act of 1974, individuals who have cause to believe that OASCR might have records pertaining to them may submit a written request to the System Manager, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250. The individual must specify that he/she wishes the records maintained by OASCR to be checked and put in an envelope marked ''Privacy Act Request.''

CONTESTING RECORD PROCEDURES:

An individual desiring to contest or amend information maintained in the system should submit a written request to the System Manager. The written request should include, as appropriate, the reason for contesting it, and the proposed amendment to the information sought. The regulations governing the contesting of contents of records and appealing initial determinations of such requests are set forth at 7 CFR 1.110–1.123.

NOTIFICATION PROCEDURES:

Same as record access procedures.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

60 FR 5618, Vol. 60, No. 19, (January 30, 1995).

United States Department of Agriculture (USDA) Narrative Statement on a Modified System of Record Under the Privacy Act of 1974: USDA/OCRE–1

The U.S. Department of Agriculture's (USDA) Office of the Assistant Secretary of Civil Rights (OASCR) is modifying the system of records for OCRE–1. The system will be renamed USDA/OASCR–1, Civil Rights Enterprise System (CRES). The proposed amendments to USDA/OCRE–1 pertain to program discrimination complaints contained in CRES. Equal employment complaint records in CRES remain covered by the system of records EEOC/GOVT–1, Equal Employment Opportunity (EEO) in the Federal Government Complaint and Appeal Records (last published 81 FR 8116, Nov 17, 2016.)

The authorities for maintaining this system are 5 U.S.C. 301, 42 U.S.C. 2000d, *et seq.,* 42 U.S.C. 3608(d); 42 U.S.C. 12101, *et seq.;* 20 U.S.C. 1681, *et seq.;* 29 U.S.C. 794; 15 U.S.C. 1691, *et seq;* and 7 U.S.C. 2011, *et seq.*

CRES provides core support for the mission of Civil Rights (CR) offices both at the department and sub-agency levels. In this function, the system serves the needs of agency heads who by law are responsible for agency compliance with EEO and CR laws. CRES is implemented as a Web-based enterprise-wide complaint tracking system, consisting of a suite of applications supporting USDA and all Department agencies by tracking, processing, and managing employment and program complaints, as well as meeting regulatory reporting requirements. Currently, CRES facilitates improved management of discrimination complaints using separate modules. These modules also provide data used for various government and Federal Civil Rights reporting.

In the past, the system's servers were maintained in house, by USDA. However, due to the enormous volume, complexity, and most importantly, the sensitivity (personally identification information) of the data, it was determined that there was a need for an enterprise-wide solution for CRES. MicroPact was selected as the vendor-hosted company to manage the program and EEO data as well as maintain the servers for CRES. MicroPact Engineering provides system, network, development,

and administrative security. Further, MicroPact is Federally accredited, and is a FedRAMP Compliant Cloud Service Provider, engineering Web-based focused company that provides commercial off-the-shelf solutions, and delivers domain expertise within the area of EEO.

USDA may disclose information contained in a record in this system of records under the routine uses listed, without the consent of the individual if the disclosure is compatible with a purpose for which the record was collected, as follows:

• To the U.S. Department of Justice (DOJ), a court or other tribunal, or another party before such tribunal, when USDA, any component thereof, or any employee in his or her individual capacity where DOJ (or USDA where it is authorized to do so) has agreed to represent the employee, or the United States where USDA determines that the litigation is likely to affect directly the operations of USDA or any of its components, is a party to the litigation or has an interest in such litigation, and USDA determines that the use of such records by DOJ, the court, or other tribunal, or the other party before such tribunal is relevant and necessary to the litigation; provided, however, that in each case, USDA determines that such disclosure is compatible with the purpose for which the records were collected. In the event that materials in this system indicate a violation of law, whether civil or criminal or regulatory in nature, and whether arising by general statute, or by regulation, rule, or order issued pursuant thereto, the relevant records may be disclosed to the appropriate agency, whether Federal, State, local, or foreign, charged with the responsibility of investigation or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

• To a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual. Disclosure may be made to the U.S. Civil Rights Commission in response to its request for information.

• To appropriate agencies, entities, and persons when (1) USDA suspects or has confirmed that there has been a breach of the system of records; (2) USDA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, USDA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with USDA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

• To another Federal agency or Federal entity, when USDA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

• To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for OASCR, when necessary to accomplish an agency function related to this system of records; provided however that these individuals are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to USDA officers and employees.

• To the National Archives and Records Administration (NARA) or General Services Administration (GSA), pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

Probable or potential effects on the privacy of individuals: Although there is some risk to the privacy of individuals, that risk is outweighed by the benefit of a vendor-managed system. In addition, the safeguards in place by MicroPact protect against unauthorized disclosure. Records are accessible only to individuals who are authorized. Logical, physical, and electronic safeguards are employed to ensure security. CRES has successfully attained ''the authority to operate,'' the security assessment, and authorization process, as well as successfully attained risk assessments, to include security scanning and patching.

OMB Control Number of Collection Request. OMB Control Number: 0508–0002, title: USDA Program Discrimination Complaint Form, expires: February 28, 2021.

[FR Doc. 2018–27475 Filed 12–18–18; 8:45 am]

BILLING CODE 3410–9R–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 13, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Post-Hurricane Research and Assessment of Agriculture, Forestry, and Rural Communities in the U.S. Caribbean.

OMB Control Number: 0596–0246.

Summary of Collection: The primary authorities for this collection are the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended, which authorizes USDA agricultural research, education, and extension programs, and the Forest

and Rangeland Renewable Resources Research Act of 1978, which authorizes USDA Forest Service ''investigations, experiments, tests, and other activities . . . to obtain, analyze, develop, demonstrate, and disseminate scientific information about protecting, managing, and utilizing forest and rangeland renewable resources in rural, suburban, and urban areas'' (Pub. L. 95–307 Sec. 3). Focus groups and interviews will be conducted with a non-probabilistic, purposive sample of individuals, families, and organizations involved in or associated with agriculture, forestry, and rural communities affected by Hurricanes Irma and Maria in the U.S. Caribbean.

Need and Use of the Information: To better understand the effects of Hurricanes Irma and Maria on agriculture, forestry, and rural communities in the U.S. Caribbean and the internal and external factors that affected their vulnerabilities or resilience, U.S. Department of Agriculture (USDA)—Forest Service and Caribbean Climate Hub (CCH), seek Office of Management and Budget approval to conduct focus groups and in-depth interviews to collect information from farmers, forest owners, and other agriculture and forestry community members about their experiences with, preparations for, responses to, and recovery from these storms. This collection provides vital real-time information for ongoing recovery and restoration efforts by USDA and other entities working in Puerto Rico and the U.S. Virgin Islands, as well as valuable lessons learned for other disasters and regions.

Description of Respondents: Individuals or households.

Number of Respondents: 425.

Frequency of Responses: Reporting: Other (one time only).

Total Burden Hours: 226.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–27410 Filed 12–18–18; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Utility Service

Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act, the Rural Utilities Service (RUS) invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by February 19, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Advance and Disbursement of Funds—Telecommunications.

OMB Control Number: 0572–0023.

Type of Request: Extension of a currently approved information collection package.

Abstract: The RUS manages the Telecommunications loan program and Rural Broadband Access, to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities. RUS therefore requires Telecommunications and Broadband borrowers to submit Form 481, Financial Requirement Statement. This form implements certain provisions of the standard Rural Utilities Service loan documents by setting forth requirements and procedures to be followed by borrowers in obtaining advances and making disbursements of loan funds.

Estimate of Burden: Public reporting for this collection of information is estimated to average 1 hour per response.

Respondents: Business or other for profit, not-for-profit institutions.

Estimated Number of Respondents: 84.

Estimated Number of Responses per Respondent: 5.2.

Estimated Total Annual Burden on Respondents: 480.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Rural Business-Cooperative Service, including whether the information will have practical utility; (b) the accuracy of Rural Utility Service's estimate of the burden to collect the required information, including the validity of the strategy used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments on the paperwork burden may be sent to: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*. 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.

Copies of this information collection can be obtained from Diane M. Berger, Rural Development Innovation Center—Regulatory Team, (715) 619–3124.

Dated: December 6, 2018.

Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2018–27070 Filed 12–18–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act, the United States Department of Agriculture (USDA) Rural Development administers rural utilities programs through the Rural Utilities Service (RUS). RUS invites comments on the following information collection for which the Agency intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by February 19, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction

Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*.

Title: Emergency and Imminent Community Water Assistance Grants.

OMB Control Number: 0572–0110.

Type of Request: Extension of a currently approved information collection.

Abstract: Rural Utilities Service (RUS), an agency delivering the U.S. Department of Agriculture (USDA) administers Emergency and Imminent Community Water Assistance Grants awards grants to qualified rural communities that have experienced a significant decline in quality or quantity of water or expect such a decline to be imminent. Grants under this RUS program may be made to public bodies and private nonprofit corporations serving rural areas. Public bodies include counties, cities, townships, incorporated towns and villages, boroughs, authorities, districts, and other political subdivisions of a state. Public bodies also include Indian Tribes on Federal and State reservations and other Federally-recognized Indian tribal groups in rural areas. Applicants will provide information to be collected as part of the application and grant process through documentation, certifications, or completed application forms.

Estimate of Burden: Public reporting for this collection of information is estimated to average 7 hours per response.

Respondents: Public Bodies, Not-for-profit Institutions, and Federally-Recognized Tribes.

Estimated Number of Respondents: 52.

Estimated Total Annual Burden on Respondents: 2,924 hours.

Copies of this information collection can be obtained from Diane M. Berger, Management Analysis, Rural Development Innovation Center—Regulatory Team, (715) 619–3124, or email: *diane.berger@usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public records.

Dated: December 10, 2018.

Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2018–27073 Filed 12–18–18; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Nebraska Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Nebraska Advisory Committee (Committee) will hold a meeting on Thursday January 10, 2019 at 3 p.m. Central time. The Committee will review and discuss a project proposal to study civil rights in the state as they related to prison conditions for incarcerated individuals who are also living with mental illness.

DATES: The meeting will take place on Thursday January 10, 2019 at 3 p.m. Central.

Public Call Information: Dial: 855–719–5012, Conference ID: 4719451.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or (312) 353–8311.

SUPPLEMENTARY INFORMATION: Members of the public may listen to this discussion through the above call in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 230 S. Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Corrine Sanders at *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Nebraska Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

Welcome and Roll Call

Civil Rights in Nebraska: Prisons and Mental Health

Future Plans and Actions

Public Comment

Adjournment

Dated: December 13, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–27415 Filed 12–18–18; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2078]

Expansion of Foreign-Trade Zone 163; Ponce, Puerto Rico

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the CODEZOL, C.D., grantee of Foreign-Trade Zone 163, submitted an application to the Board for authority to expand FTZ 163 to include a site at the Ponce Regional Distribution Center (Site 17) in Ponce, Puerto Rico, adjacent to the San Juan Customs and Border Protection port of entry (B–38–2018, docketed June 13, 2018);

Whereas, notice inviting public comment has been given in the **Federal Register** (83 FR 28411–28412, June 19, 2018) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to expand FTZ 163 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13.

Dated: December 13, 2018.

Christian B. Marsh,

Acting Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2018–27425 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2077]

Reorganization of Foreign-Trade Zone 78 Under Alternative Site Framework; Nashville, Tennessee

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR Sec. 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Metropolitan Government of Nashville and Davidson County, grantee of Foreign-Trade Zone 78, submitted an application to the Board (FTZ Docket B–41–2018, docketed June 28, 2018) for authority to reorganize under the ASF with a service area of the Counties of Cannon, Cheatham, Davidson, Dickson, Macon, Maury, Montgomery, Robertson, Rutherford, Smith, Sumner, Trousdale, Williamson and Wilson, Tennessee in and adjacent to the Nashville Customs and Border Protection port of entry, FTZ 78's existing Sites 6 and 7 would be categorized as magnet sites, and existing Sites 13, 14 and 15 would be categorized as usage-driven sites;

Whereas, notice inviting public comment was given in the **Federal Register** (83 FR 31368, July 5, 2018) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 78 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, to an ASF sunset provision for magnet sites that would terminate authority for Site 7 if not activated within five years from the month of approval, and to an ASF sunset provision for usage-driven sites that would terminate authority for Sites 13, 14 and 15 if no foreign-status merchandise is admitted for a *bona fide* customs purpose within three years from the month of approval.

Dated: December 13, 2018.

Christian B. Marsh,

Acting Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2018–27427 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2076]

Reorganization of Foreign-Trade Zone 113 (Expansion of Service Area) Under Alternative Site Framework, Ellis County, Texas

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR Sec. 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Ellis County Trade Zone Corporation, grantee of Foreign-Trade Zone 113, submitted an application to the Board (FTZ Docket B–37–2018, docketed June 4, 2018) for authority to expand the service area of the zone to include Navarro County, Texas, as described in the application, adjacent to the Dallas/Fort Worth Customs and Border Protection port of entry;

Whereas, notice inviting public comment was given in the **Federal Register** (83 FR 26947, June 11, 2018) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the

requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 113 to expand the service area under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, and to the Board's standard 2,000-acre activation limit for the zone.

Dated: December 13, 2018.

Christian B. Marsh,

Acting Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2018–27424 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–78–2018]

Foreign-Trade Zone (FTZ) 99—Wilmington, Delaware; Notification of Proposed Production Activity; Bloom Energy Corporation; (Commercial Fuel Cells and Related Subassemblies); Newark, Delaware

The Delaware Department of State, grantee of FTZ 99, submitted a notification of proposed production activity to the FTZ Board on behalf of Bloom Energy Corporation (Bloom), located at sites in Newark, Delaware. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 4, 2018.

The Bloom facilities are located within Subzone 99I. The facilities are used for the production of commercial fuel cells and related subassemblies. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and 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 Bloom from customs duty payments on the foreign-status components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Bloom would be able to choose the duty rates during customs entry procedures that apply to: Piping manifolds; water distribution modules; fuel processing units; fuel cell power modules (DC generator); nickel iron alloy fuel cell power module enclosures (housings); power inverters; and, energy storage and distribution modules (duty rates range from duty free to 3.8%). Bloom would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include: Glass powder; ceramic substrates; plastic labels; plastic containers with sleeves; plastic enclosure bags; plastic cable ties; rubber grommets; adhesives; cardboard boxes; textile paper filters; zirconia alumina shaping stones; ceramic heat plating; glass fiber insulation jackets; nickel alloy wire probes; alloy steel adapters; stainless steel tubing; stainless steel coated tubing; stainless steel spacers; stainless steel pipes; stainless steel flanges; stainless steel pipe fixtures; stainless steel clamps; stainless steel screws; stainless steel washers; stainless steel cable; stainless steel spacers; nickel plates; nickel mesh; chromium alloy powder; iron and steel flexible tubing with fittings; cooling fans; prototype compressors; axial fan motors; fan cable connectors; fan mount rubber gaskets; aluminum plate-fin heat exchangers; heat exchange units; water filtering machinery; stainless steel weldments; filtering equipment; gas filtering canisters; gas filtering canister brackets; hoists; aluminum screens with frames; stainless steel valves; solenoid valves; inlet/outlet manifolds; housing units for fuel cells; iron/nickel alloy and ceramic fuel cell dielectrics; dielectric transformers for inverters; transformers 1kVA power handling capacity; power inverters; fuel cell control units; rectifier and static converter power cards; rectifier and static converter circuit boards; rectifier and static converter mounting brackets; mixed alloy rectifier and static converter casings; static converters; holding magnets; electric capacitors; electric capacitor caps; programmable controllers; printed circuit boards; electrical contactors; electrical terminators; electrical fuses; printed circuit boards; contactors; electrical controller backplanes and handles; multimodal switchboard antennas; multimodal switchboard mounting switches; internal frames for multimodal switchboards; electrical controllers; diodes; cables for telemetry equipment; electrical conductors fitted with connectors; electrical conductors for telecommunication; copper electrical conductors; cables with fitted connectors; plastic insulating fittings; thermocouples; probe wires; electrical thermocouple assemblies; thermocouple assembly terminals; gas flow meters; transducers; electricity meters; programmable load boxes; fuel cell output (harmonics, temperature and luminosity) measuring devices; mass flow controllers; power conditioning systems regulating power control in fuel cell; mixed alloy interconnecting plates; and, chromium iron interconnect plates (duty rates range from duty-free to 8.5%). The request indicates that textile paper filters will be admitted to the zone in privileged foreign status (19 CFR 146.41), thereby precluding inverted tariff benefits on such items. The request also indicates that certain materials/components are subject to special duties under Section 232 of the Trade Expansion Act of 1962 (Section 232) and Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 28, 2019.

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 Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: December 14, 2018.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2018–27461 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–222–2018]

Foreign-Trade Zone 163—Ponce, Puerto Rico; Application for Subzone; Puerto Rico Steel Products Corporation; Coto Laurel, Puerto Rico

An application has been submitted to the Foreign-Trade Zones Board (the Board) by CODEZOL, C.D., grantee of FTZ 163, requesting subzone status for the facility of Puerto Rico Steel Products Corporation, located in Coto Laurel, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as

amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on December 14, 2018.

The proposed subzone (14.57 acres) is located at 1011 Corral Falso Km. 1.2 in Coto Laurel, Puerto Rico. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 163.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 28, 2019. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 12, 2019.

A copy of the application 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 Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: December 14, 2018.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2018–27462 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–985]

Xanthan Gum From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Discontinuation of Antidumping Duty Administrative Review; 2016–2017

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Meihua Group International Trading (Hong Kong) Limited, Langfang Meihua Biotechnology Co., Ltd., and Xinjiang Meihua Amino Acid Co., Ltd. (collectively, Meihua) did not make sales of subject merchandise below normal value. Furthermore, we have discontinued the review with respect to Neimenggu Fufeng Biotechnologies Co., Ltd. (a.k.a. Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd./Xinjiang Fufeng Biotechnologies Co., Ltd. (collectively, Fufeng). The period of review (POR) is July 1, 2016, through June 30, 2017.

DATES: Applicable December 19, 2018.

FOR FURTHER INFORMATION CONTACT: Eli Lovely or Aleksandras Nakutis, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1593 and (202) 482–3147, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published its *Preliminary Results* on August 14, 2018.[1] Although Commerce calculated an antidumping duty margin for Fufeng in the *Preliminary Results,* we are discontinuing this review, with respect to Fufeng, as a result of the Court of International Trade's (CIT) final court decision in *CP Kelco US, Inc.* v. *United States.*[2] On September 20, 2018, Fufeng and Tate and Lyle submitted case briefs.[3] No other interested party filed comments.

Scope of the Order

The scope of the order covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber. Merchandise covered by the scope of this order is classified in the Harmonized Tariff Schedule of the United States at subheading 3913.90.20. Although this tariff classification is provided for convenience and customs purposes, the written description remains dispositive.[4]

Analysis of Comments Received

We addressed issues raised in the case briefs submitted by parties in this review in the Issues and Decision Memorandum, which is hereby adopted by this notice. As the review is being discontinued with respect to Fufeng, Commerce considers all issues raised concerning Fufeng moot and has not addressed them in the Issues and Decision Memorandum, with the exception of one issue raised. Appendix I to this notice provides the issue which parties raised, and that Commerce considered. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and it is available to all parties in the Central Records Unit of the main Department of Commerce building, Room B8024. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed Issues and Decision Memorandum and the electronic version are identical in content.

Changes Since the Preliminary Results

As discussed above, we are discontinuing the review with respect to Fufeng. Because we are discontinuing the review with respect to Fufeng, the dumping margin assigned to separate-rate respondents has changed since the *Preliminary Results.*

Separate Rates

In the *Preliminary Results,* we found that Fufeng, Meihua, CP Kelco (Shandong) Biological Company Limited (CP Kelco), Deosen Biochemical Ltd./Deosen Biochemical (Ordos) Ltd. (collectively Deosen), and Shanghai Smart Chemicals Co., Ltd. (Shanghai Smart) demonstrated their eligibility for a separate rate, but that the non-individually examined respondent,

[1] *See Xanthan Gum from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2016–2017,* 83 FR 40229 (August 14, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See CP Kelco US, Inc.* v. *United States,* Slip Op. 18–120 (CIT Sept. 17, 2018)(*CP Kelco US*); *see also Xanthan Gum from the People's Republic of China: Notice of Court Decision Not in Harmony With Amended Final Determination in Less Than Fair Value Investigation; Notice of Amended Final Determination Pursuant to Court Decision; Notice of Revocation of Antidumping Duty Order in Part; and Discontinuation of Fourth and Fifth Antidumping Duty Administrative Reviews in Part,* 83 FR 52205 (October 16, 2018) (*Xanthan Gum Timken*).

[3] *See* letter from Tate and Lyle, re: ''Xanthan Gum from China—Tate & Lyle Case Brief,'' dated September 20, 2018; *see also* letter from Fufeng, re: ''Fufeng Case Brief in the Fourth Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A–570–985),'' dated September 20, 2018.

[4] For the full text of the scope of the order, see Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Xanthan Gum from the People's Republic of China; 2016–2017,'' (Issues and Decision Memorandum), dated concurrently with this notice.

Hebei Xinhe Biochemical Co., Ltd., did not demonstrate its eligibility for a separate rate because it failed to file a separate rate application or a separate rate certification.[5] Thus, Commerce treated Hebei Xinhe Biochemical Co., Ltd. as part of the China-wide entity. No parties commented on our preliminary separate rate determinations. For the final results of review, we have decided to continue to grant Meihua, CP Kelco, Deosen, and Shanghai Smart separate rates status. We are discontinuing the review with respect to Fufeng.

Final Determination of No Shipments

In the *Preliminary Results,* Commerce found that A.H.A. International Co., Ltd. (AHA), and Jianlong Biotechnology Co., Ltd. (Jianlong) (previously known as Inner Mongolia Jianlong Biochemical Co., Ltd. (IMJ)) had no shipments and, therefore, no reviewable transactions during the POR.[6] No parties commented on this determination. For the final results of review, we continue to find that these companies had no shipments during the POR.

Partial Discontinuation of Antidumping Duty Administrative Review

On September 17, 2018, the CIT issued a final decision sustaining Commerce's remand redetermination wherein Fufeng's weighted-average dumping margin from the AD investigation of xanthan gum from the China changed from 8.69 percent to 0.00 percent.[7] As a result of the CIT's final court decision and Fufeng's exclusion from the AD order on xanthan gum from China, Commerce is discontinuing the review of Fufeng, during the pendency of the appeals process, because Fufeng is no longer subject to the order.[8] The CIT's decision was appealed to the United States Court of Appeals for the Federal Circuit (CAFC) on November 7, 2018.[9]

Dumping Margin for Non-Individually Examined Respondents Granted Separate Rate Status

The statute and Commerce's regulations do not address what rate to apply to respondents not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for non-selected respondents that are not examined individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins for individually-examined respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available. Where the rates for the individually examined companies are all zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act provides that Commerce may use ''any reasonable method'' to establish the all others rate. Because we preliminarily calculated a weighted-average dumping margin for Meihua of zero percent, and we are discontinuing the review with respect to Fufeng, we assigned a dumping margin equal to zero percent to individual separate rate respondents not selected for examination, which is based solely on Meihua's weighted-average dumping margin of zero percent.

Final Results of Administrative Review

We determine that the following weighted-average dumping margin exists for the POR:

Exporter	Weighted-average dumping margins (percentage)
Meihua Group International Trading (Hong Kong) Limited/Langfang Meihua Biotechnology Co., Ltd./Xinjiang Meihua Amino Acid Co., Ltd	0.00
CP Kelco (Shandong) Biological Company Limited	0.00
Deosen Biochemical Ltd./Deosen Biochemical (Ordos) Ltd	0.00
Shanghai Smart Chemicals Co., Ltd	0.00

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. We intend to instruct CBP to liquidate POR entries of subject merchandise from Meihua, CP Kelco (Shandong), Deosen, and Shanghai Smart without regard to antidumping duties.[10] Furthermore, in accordance with the *Xanthan Gum Timken,* we intend to instruct CBP to continue to suspend POR entries of subject merchandise produced and exported by Fufeng at a rate of 0.00 percent during the pendency of the appeals process.[11]

For entries that were not reported in the U.S. sales database submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.,* at the individually-examined exporter's cash deposit rate), Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.,* 154.07 percent). Additionally, if Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number will be liquidated at the China-wide rate.

Cash Deposit Requirements

The following cash deposit requirements will be effective for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed in the table above, the cash deposit rate will be the rate established in the final results of review that is listed for the exporter in the table; (2) for previously investigated or reviewed China and non-China exporters not listed in the table above

[5] *See Preliminary Results,* 83 FR at 40230.

[6] *Id.*

[7] *See CP Kelco US,* 2018 WL 4469912, at *2.

[8] *See Xanthan Gum Timken* at 83 FR 52205.

[9] *See* CAFC Notice of Docketing, *CP Kelco US. Inc.* v. *United States,* Case No. 19–1207, dated November 15, 2018.

[10] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[11] *See Xanthan Gum Timken* at 83 FR 52206.

that have separate rates, the cash deposit rate will continue to be the existing exporter-specific rate published for the most recent period; (3) for all China exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate previously established for the China-wide entity, which is 154.07 percent; and (4) for all non-China exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the China exporter that supplied that non-China exporter. The cash deposit requirements, when imposed, shall remain in effect until further notice. Furthermore, in accordance with the *Xanthan Gum Timken,* we intend to instruct CBP to continue to suspend POR entries of subject merchandise, produced and exported by Fufeng, at a cash deposit rate of 0.00 percent during the pendency of the appeals process.[12]

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing these final results of administrative review and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act.

[12] *See Xanthan Gum Timken* at 83 FR 52206.

Dated: December 12, 2018.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of Issue
A. Comment 1: Dumping Margin for Third-Country Exporters of Fufeng's Xanthan Gum

[FR Doc. 2018–27426 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Visiting Committee on Advanced Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: National Institute of Standards and Technology (NIST)'s Visiting Committee on Advanced Technology (VCAT or Committee) will meet on Wednesday, February 6, 2019, from 8:30 a.m. to 5:00 p.m. Eastern Time, and Thursday, February 7, 2019, from 8:30 a.m. to 11:30 a.m. Eastern Time.

DATES: The VCAT will meet on Wednesday, February 6, 2019, from 8:30 a.m. to 5:00 p.m. and Thursday, February 7, 2019, from 8:30 a.m. to 11:30 a.m. Eastern Time.

ADDRESSES: The meeting will be held in the Portrait Room, Administration Building, at NIST, 100 Bureau Drive, Gaithersburg, Maryland, 20899 with an option to participate via webinar. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Stephanie Shaw, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, Maryland 20899–1060, telephone number 301–975–2667. Ms. Shaw's email address is *stephanie.shaw@nist.gov.*

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 278, as amended, and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the VCAT will meet on Wednesday, February 6, 2019, from 8:30 a.m. to 5:00 p.m. Eastern Time, and Thursday, February 7, 2019, from 8:30 a.m. to 11:30 a.m. Eastern Time. The meeting will be open to the public. The VCAT is composed of not fewer than 9 members appointed by the NIST Director, eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. The purpose of this meeting is for the VCAT to review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs within the framework of applicable national policies as set forth by the President and the Congress. The agenda will include an update on major programs at NIST. In addition, the meeting will include presentations and discussions on the future of neutron facilities at NIST. The Committee also will present its initial observations, findings, and recommendations for the 2018 VCAT Annual Report. The agenda may change to accommodate Committee business. The final agenda will be posted on the NIST website at *http://www.nist.gov/director/vcat/agenda.cfm.*

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's affairs are invited to request a place on the agenda. Approximately one-half hour on Thursday, February 7, 2019, will be reserved for public comments and speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received but, is likely to be about 3 minutes each. The exact time for public comments will be included in the final agenda that will be posted on the NIST website at *http://www.nist.gov/director/vcat/agenda.cfm.* Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to VCAT, NIST, 100 Bureau Drive, MS 1060, Gaithersburg, Maryland, 20899, via fax at 301–216–0529 or electronically by email to *stephanie.shaw@nist.gov,* by 5:00 p.m. Eastern Time, Monday, January 28, 2019.

All visitors to the NIST site are required to pre-register to be admitted. Please submit your name, time of arrival, email address and phone number to Emily Luce by 5:00 p.m. Eastern Time, Thursday, January 31, 2019. Non-U.S. citizens must submit additional information; please contact Ms. Luce. Ms. Luce's email address is *emily.luce@nist.gov* and her phone number is 301–975–2661. For participants attending in person, please note that federal agencies, including NIST, can only accept a state-issued driver's license or identification card for access to federal facilities if such license or identification card is issued by a state that is compliant with the REAL ID Act of 2005 (Pub. L. 109–13), or by a state that has an extension for REAL ID compliance. NIST currently accepts other forms of federal-issued identification in lieu of a state-issued driver's license. For detailed information please contact Ms. Luce at 301–975–2661 or visit: *http://nist.gov/public_affairs/visitor/*. For participants attending via webinar, please contact Ms. Luce at 301–975–2661 for detailed instructions on how to join the webinar.

Kevin A. Kimball,

Chief of Staff.

[FR Doc. 2018–27389 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: NOAA's Bay Watershed Education and Training (B–WET) Program National Evaluation System.

OMB Control Number: 0648–0658.

Form Number(s): None.

Type of Request: Regular (revision and extension of a currently approved information collection).

Number of Respondents: 5,129.

Average Hours per Response: Awardee-respondents will complete an online survey in 60 minutes and teacher-respondents will complete two online surveys in 30 minutes each.

Burden Hours: 1,040.

Needs and Uses: This request is for an extension of a currently approved information collection.

The NOAA Office of Education's Bay Watershed Education and Training (B–WET) program seeks to contribute to NOAA's mission by supporting education efforts to create an environmentally literate citizenry with the knowledge, attitudes, and skills needed to protect watersheds and related ocean, coastal, and Great Lakes ecosystems. B–WET currently funds projects in seven regions (California, Chesapeake Bay, Great Lakes, Gulf of Mexico, Hawaii, New England, and the Pacific Northwest). B–WET has created an across-region, internal evaluation system to provide ongoing feedback on program implementation and outcomes to ensure maximum quality and efficiency of the B–WET program. The evaluation system is sustained by B–WET staff with occasional assistance from an outside contractor.

B–WET awardees and the awardees' professional development teacher-participants are asked to voluntarily complete online survey forms to provide evaluation data. One individual from each awardee organization is asked to complete a form once per year of the award, and the teacher participants are asked to complete one form at the end of their professional development program and another form at the end of the following school year.

Affected Public: Business and other for-profit organizations; not-for-profit institutions; state, local or tribal government; individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at *reginfo.gov*. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 14, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–27464 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG590

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Observer Program Standard Ex-Vessel Prices

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

ACTION: Notification of standard ex-vessel prices.

SUMMARY: NMFS publishes standard ex-vessel prices for groundfish and halibut for the calculation of the observer fee under the North Pacific Observer Program (Observer Program). This notice is intended to provide information to vessel owners, processors, registered buyers, and other participants about the standard ex-vessel prices that will be used to calculate the observer fee for landings of groundfish and halibut made in 2019. NMFS will send invoices to processors and registered buyers subject to the fee by January 15, 2020. Fees are due to NMFS on or before February 15, 2020.

DATES: The standard prices are valid on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: For general questions about the observer fee and standard ex-vessel prices, contact Alicia M. Miller at (907) 586–7471. For questions about the fee billing process, contact Carl Greene at (907) 586–7003. Additional information about the Observer Program is available on NMFS Alaska Region's website at *https://www.fisheries.noaa.gov/alaska/fisheries-observers/north-pacific-observer-program.*

SUPPLEMENTARY INFORMATION:

Background

Regulations at 50 CFR 679 subpart E, governing the Observer Program, require the deployment of NMFS-certified observers (observers) to collect information necessary for the conservation and management of the Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA) groundfish and halibut fisheries. Fishery managers use information collected by observers to monitor quotas, manage groundfish and prohibited species catch, and document and reduce fishery interactions with protected resources. Scientists use observer-collected information for stock assessments and marine ecosystem research.

The Observer Program includes two observer coverage categories—the partial coverage category and the full coverage category. All groundfish and halibut vessels and processors subject to observer coverage are included in one of these two categories. Defined at 50 CFR 679.51, the partial coverage category includes vessels and processors that are not required to have an observer or electronic monitoring (EM) at all times and the full coverage category includes vessels and processors required to have all of their fishing and processing activity observed. Vessels and processors in the full coverage category arrange and pay for observer services from a permitted observer provider. Observer coverage and EM for the partial coverage category is funded through a system of fees based on the ex-vessel value of groundfish and halibut. Throughout this notice, the term ''processor'' refers to shoreside processors, stationary floating processors, and catcher/processors in the partial coverage category.

Landings Subject to Observer Coverage Fee

Pursuant to section 313 of the Magnuson-Stevens Act, NMFS is authorized to assess a fee on all landings accruing against a Federal total allowable catch (TAC) for groundfish or a commercial halibut quota made by vessels that are subject to Federal regulations and not included in the full coverage category. A fee is only assessed on landings of groundfish from vessels designated on a Federal Fisheries Permit or from vessels landing individual fishing quota (IFQ) or community development quota (CDQ) halibut or IFQ sablefish. Within the subset of vessels subject to the observer fee, only landings accruing against an IFQ allocation or a Federal TAC for groundfish are included in the fee assessment. A table with additional information about which landings are and are not subject to the observer fee is at § 679.55(c) and is on page 2 of an informational bulletin titled ''Observer Fee Collection'' on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/resource/document/observer-fee-collection-north-pacific-groundfish-and-halibut-fisheries.*

Fee Determination

A fee equal to 1.25 percent of the ex-vessel value is assessed on the landings of groundfish and halibut subject to the fee. Ex-vessel value is determined by multiplying the standard price for groundfish by the round weight equivalent for each species, gear, and port combination, and the standard price for halibut by the headed and gutted weight equivalent. NMFS reviews each vessel landing report and determines whether the reported landing is subject to the observer fee and, if so, which groundfish species in the landing are subject to the observer fee. All IFQ or CDQ halibut in a landing subject to the observer fee will be included in the observer fee calculation. For any landed groundfish or halibut subject to the observer fee, NMFS will apply the appropriate standard ex-vessel prices for the species, gear type, and port, and calculate the observer fee associated with the landing.

Processors and registered buyers access the landing-specific, observer fee information through NMFS Web Application (*https://alaskafisheries.noaa.gov/webapps/efish/login*) or eLandings (*https://elandings.alaska.gov/*). Observer fee information is either available immediately or within 24 hours after a landing report is submitted electronically. A time lag occurs for some landings because NMFS must process each landing report through the catch accounting system computer programs to determine which groundfish in a landing accrues against a Federal TAC and are subject to the observer fee.

Under the fee system, catcher vessel owners split the fee with the registered buyers or owners of shoreside or stationary floating processors. While the owners of catcher vessels and processors in the partial coverage category are each responsible for paying their portion of the fee, the owners of shoreside or stationary floating processors and registered buyers are responsible for collecting the fees from catcher vessels, and remitting the full fee to NMFS. Owners of catcher/processors in the partial coverage category are responsible for remitting the full fee to NMFS.

NMFS sends invoices to processors and registered buyers by January 15 of each calendar year. The total fee amount is determined by the sum of the fees reported for each landing at that processor or registered buyer in the prior calendar year. Processors and registered buyers must pay the fees to NMFS using NMFS Web Application by February 15 each year. Processors and registered buyers have access to this system through a User ID and password issued by NMFS. Instructions for electronic payment will be provided on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/about/alaska-regional-office* and on the observer fee invoice to be mailed to each processor and registered buyer.

Standard Prices

This notice provides the standard ex-vessel prices for groundfish and halibut species subject to the observer fee in 2019. Data sources for ex-vessel prices are:

- For groundfish other than sablefish IFQ and sablefish accruing against the fixed gear sablefish CDQ reserve, the State of Alaska's Commercial Fishery Entry Commission's (CFEC) gross revenue data, which are based on the Commercial Operator Annual Report (COAR) and Alaska Department of Fish and Game (ADF&G) fish tickets; and
- For halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish accruing against the fixed gear sablefish CDQ reserve, the IFQ Buyer Report that is submitted to NMFS annually by each registered buyer that operates as a shoreside processor and receives and purchases IFQ landings of sablefish and halibut or CDQ landings of halibut under § 679.5(l)(7)(i).

The standard prices in this notice were calculated using the following procedures for protecting confidentiality of data submitted to or collected by NMFS. NMFS does not publish any price information that would permit the identification of an individual or business. For NMFS to publish a standard price for a particular species-gear-port combination, the price data used to calculate the standard price must represent landings from at least four different vessels to at least three different processors in a port or port group. Price data that is confidential because fewer than four vessels or three processors contributed data to a particular species-gear-port combination has been aggregated to protect confidential data.

Groundfish Standard Ex-Vessel Prices

Table 1 shows the groundfish species standard ex-vessel prices for 2019. These prices are based on the CFEC gross revenue data, which are based on landings data from ADF&G fish tickets and information from the COAR. The COAR contains statewide buying and production information, and is considered the most complete routinely collected information to determine the ex-vessel value of groundfish harvested from waters off Alaska.

The standard ex-vessel prices for groundfish were calculated by adding ex-vessel value from the CFEC gross revenue files for 2015, 2016, and 2017 by species, port, and gear category, and adding the volume (round weight equivalent) from the CFEC gross revenue files for 2015, 2016, and 2017 by species, port, and gear category, and

then dividing total ex-vessel value over the three-year period in each category by total volume over the 3-year period in each category. This calculation results in an average ex-vessel price per pound by species, port, and gear category for the 3-year period. Three gear categories were used for the standard ex-vessel prices: (1) Non-trawl gear, including hook-and-line, pot, jig, troll, and others (Non-Trawl); (2) non-pelagic trawl gear (NPT); and (3) pelagic trawl gear (PTR).

CFEC ex-vessel value and volume data are available in the fall of the year following the year the fishing occurred. Thus, it is not possible to base ex-vessel fee liabilities on standard prices that are less than two years old. For the 2019 groundfish standard ex-vessel prices, the most recent ex-vessel value and volume data available is from 2017.

If a particular groundfish species is not listed in Table 1, the standard ex-vessel price for a species group, if it exists in the management area, will be used. If price data for a particular species remained confidential once aggregated to the ALL level, data is aggregated by species group (Flathead Sole; GOA Deep-water Flatfish; GOA Shallow-water Flatfish; GOA Skate, Other; and Other Rockfish). Standard prices for the groundfish species groups are shown in Table 2.

If a port-level price does not meet the confidentiality requirements, the data are aggregated by port group. Port-group data for Southeast Alaska (SEAK) and the Eastern GOA excluding Southeast Alaska (EGOAxSE) also are presented separately when price data are available. Port-group data is then aggregated by regulatory area in the GOA (Eastern GOA, Central GOA, and Western GOA) and by subarea in the BSAI (BS subarea and AI subarea). If confidentiality requirements are still not met by aggregating prices across ports at these levels, the prices are aggregated at the level of BSAI or GOA, then statewide (AK) and ports outside of Alaska (OTAK), and finally all ports, including those outside of Alaska (ALL).

Standard prices are presented separately for non-pelagic trawl and pelagic trawl when non-confidential data is available. NMFS also calculated prices for a ''Pelagic Trawl/Non-pelagic Trawl Combined'' (PTR/NPT) category that can be used when combining trawl price data for landings of a species in a particular port or port group will not violate confidentiality requirements. Creating this standard price category allows NMFS to assess a fee on 2019 landings of some of the species with pelagic trawl gear based on a combined trawl gear price for the port or port group.

If no standard ex-vessel price is listed for a species or species group and gear category combination in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. Volume and value data for that species will be added to the standard ex-vessel prices in future years, if that data becomes available and display of a standard ex-vessel price meets confidentiality requirements.

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
Arrowtooth Flounder (121)	Kodiak	----	$0.08	$0.07	----
	CGOA	$0.09	0.08	0.07	----
	GOA	0.09	0.08	0.07	----
	AK	0.12	0.08	0.07	----
	ALL	0.12	0.08	0.07	----
Atka Mackerel (193)	Kodiak	----	0.22	----	$0.22
	CGOA	----	0.22	----	0.22
	GOA	----	0.22	----	0.22
	AK	----	0.22	----	0.22
	ALL	----	0.22	----	0.22
Black Rockfish (142)	AK	0.55	0.19	----	0.19
Bocaccio Rockfish (137)	Sitka	0.54	----	----	----
	SEAK	0.53	----	----	----
	EGOA	0.53	----	----	----
	CGOA	0.81	----	----	----
	GOA	0.56	----	----	----
	AK	0.56	----	----	----
	ALL	0.56	----	----	----
Butter Sole (126)	Kodiak	----	0.15	0.15	----
	CGOA	----	0.15	0.15	----
	GOA	----	0.15	0.15	----
	AK	----	0.15	0.15	----
	ALL	----	0.15	0.15	----
Canary Rockfish (146)	Sitka	0.51	----	----	----
	SEAK	0.43	----	----	----
	EGOAxSE	0.32	----	----	----
	Homer	0.72	----	----	----
	Seward	0.42	----	----	----
	CGOA	0.45	----	----	----
	GOA	0.43	----	----	----
	AK	0.43	----	----	----
	ALL	0.43	----	----	----
China Rockfish (149)	Sitka	1.24	----	----	----
	SEAK	1.09	----	----	----
	Cordova	0.40	----	----	----
	EGOAxSE	0.40	----	----	----
	Homer	0.77	----	----	----
	Seward	0.61	----	----	----
	CGOA	0.73	----	----	----

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE—Continued

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
	GOA	0.71	----	----	----
	AK	0.71	----	----	----
	ALL	0.71	----	----	----
Copper Rockfish (138)	Sitka	0.97	----	----	----
	SEAK	0.79	----	----	----
	EGOA	0.70	----	----	----
	Homer	0.66	----	----	----
	Seward	0.41	----	----	----
	CGOA	0.44	----	----	----
	GOA	0.59	----	----	----
	AK	0.59	----	----	----
	ALL	0.59	----	----	----
Darkblotched Rockfish (159)	GOA	0.58	----	----	----
	AK	0.58	----	----	----
	ALL	0.58	----	----	----
Dover Sole (124)	Kodiak	----	0.09	----	0.09
	CGOA	----	0.09	----	0.09
	GOA	----	0.09	----	0.09
	AK	----	0.09	----	0.09
	ALL	----	0.09	----	0.09
Dusky Rockfish (172)	Juneau	0.38	----	----	----
	Sitka	0.55	----	----	----
	SEAK	0.54	----	----	----
	EGOAxSE	0.30	----	----	----
	Homer	0.64	----	----	----
	Kodiak	0.39	0.17	0.17	----
	Seward	0.59	----	----	----
	CGOA	0.41	0.17	0.17	----
	GOA	0.42	0.17	0.17	----
	AK	0.42	0.17	0.17	----
	ALL	0.42	0.17	0.17	----
English Sole (128)	Kodiak	----	0.12	0.12	----
	CGOA	----	0.12	0.12	----
	GOA	----	0.12	0.12	----
	AK	----	0.12	0.12	----
	ALL	----	0.12	0.12	----
Flathead Sole (122)	Kodiak	----	0.15	0.15	----
	CGOA	----	0.15	0.15	----
	GOA	----	0.15	0.15	----
	AK	----	0.15	0.15	----
	ALL	----	0.15	0.15	----
Northern Rockfish (136)	Kodiak	0.22	0.16	0.16	----
	CGOA	0.23	0.16	0.16	----
	GOA	0.24	0.16	0.16	----
	AK	0.31	0.16	0.16	----
	ALL	0.31	0.16	0.16	----
Octopus (870)	Homer	0.65	----	----	----
	Kodiak	0.54	0.55	0.52	----
	CGOA	0.54	0.55	0.52	----
	GOA	0.54	0.55	0.52	----
	Dutch Harbor	0.28	----	----	----
	BS	0.40	----	----	----
	BSAI	0.40	----	----	----
	AK	0.50	0.49	0.52	----
	ALL	0.50	0.49	0.52	----
Pacific Cod (110)	Juneau	0.58	----	----	----
	Ketchikan	0.39	----	----	----
	Petersburg	0.19	----	----	----
	Sitka	0.58	----	----	----
	SEAK	0.56	----	----	----
	Cordova	0.35	----	----	----
	Whittier	0.36	----	----	----
	EGOAxSE	0.36	----	----	----
	Homer	0.37	----	----	----
	Kodiak	0.35	0.30	0.27	----
	Seward	0.36	----	----	----
	CGOA	0.35	0.30	0.27	----
	King Cove	0.26	----	----	----
	WGOA	0.26	0.26	----	0.26
	GOA	----	0.28	0.24	----

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE—Continued

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
	Dutch Harbor	0.29	0.28	----	0.28
	BS	0.29	0.27	----	0.27
	BSAI	0.30	0.27	----	0.27
	Stationary Floating Processor.	0.29	0.27	----	0.27
	AK	0.30	0.27	0.24	----
	ALL	0.30	0.27	0.24	----
Pacific Ocean Perch (141)	Kodiak	----	0.18	0.19	----
	Seward	0.22	----	----	----
	CGOA	0.22	0.18	0.19	----
	GOA	0.17	0.18	0.19	----
	AK	0.41	0.18	0.17	----
	ALL	0.41	0.18	0.17	----
Pollock (270)	Homer	0.04	----	----	----
	Kodiak	0.08	0.10	0.10	----
	Seward	0.03	----	----	----
	CGOA	0.08	0.10	0.10	----
	WGOA	----	0.12	----	0.10
	GOA	0.08	0.10	0.10	----
	Dutch Harbor	----	0.15	----	0.15
	BS	0.05	0.15	----	0.13
	BSAI	0.05	0.15	----	0.13
	Stationary Floating Processor.	----	----	----	0.12
	AK	0.08	0.10	0.10	----
	ALL	0.08	0.10	0.10	----
Quillback Rockfish (147)	Craig	0.79	----	----	----
	Juneau	0.43	----	----	----
	Ketchikan	0.75	----	----	----
	Petersburg	0.26	----	----	----
	Sitka	0.99	----	----	----
	SEAK	0.67	----	----	----
	Cordova	0.27	----	----	----
	Whittier	0.39	----	----	----
	EGOAxSE	0.35	----	----	----
	Homer	0.50	----	----	----
	Seward	0.40	----	----	----
	CGOA	0.40	----	----	----
	GOA	0.45	----	----	----
	AK	0.45	----	----	----
	ALL	0.45	----	----	----
Redbanded Rockfish (153)	Juneau	0.34	----	----	----
	Ketchikan	0.33	----	----	----
	Petersburg	0.23	----	----	----
	Sitka	0.54	----	----	----
	SEAK	0.39	----	----	----
	EGOAxSE	0.34	----	----	----
	Homer	0.35	----	----	----
	Kodiak	0.21	0.20	----	0.20
	Seward	0.37	----	----	----
	CGOA	0.34	0.20	----	0.20
	GOA	0.38	0.20	----	0.20
	AK	0.38	0.20	----	0.20
	ALL	0.38	0.20	----	0.20
Redstripe Rockfish (158)	Sitka	0.52	----	----	----
	SEAK	0.55	----	----	----
	EGOA	0.48	----	----	----
	Seward	0.70	----	----	----
	CGOA	0.53	----	----	----
	GOA	0.52	----	----	----
	AK	0.52	----	----	----
	ALL	0.52	----	----	----
Rex Sole (125)	Kodiak	----	0.35	0.35	----
	CGOA	----	0.35	0.35	----
	GOA	----	0.35	0.35	----
	AK	----	0.35	0.33	----
	ALL	----	0.35	0.33	----
Rock Sole (123)	Kodiak	----	0.19	0.19	----
	CGOA	----	0.19	0.19	----
	GOA	----	0.19	0.19	----

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE—Continued

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
	AK	----	0.19	0.19	----
	ALL	----	0.19	0.19	----
Rosethorn Rockfish (150)	SEAK	0.38	----	----	----
	EGOA	0.38	----	----	----
	Seward	0.43	----	----	----
	CGOA	0.47	----	----	----
	GOA	0.44	----	----	----
	AK	0.44	----	----	----
	ALL	0.44	----	----	----
Rougheye Rockfish (151)	Juneau	0.32	----	----	----
	Ketchikan	0.32	----	----	----
	Petersburg	0.27	----	----	----
	Sitka	0.55	----	----	----
	SEAK	0.45	----	----	----
	EGOAxSE	0.29	----	----	----
	Homer	0.37	----	----	----
	Kodiak	0.32	0.20	0.19	----
	Seward	0.41	----	----	----
	CGOA	0.36	0.20	0.19	----
	GOA	0.38	0.22	0.19	----
	AK	0.38	0.22	0.19	----
	ALL	0.38	0.22	0.19	----
Sablefish (blackcod) (710)	Kodiak	[5] n/a	2.99	2.73	----
	CGOA	[5] n/a	2.99	2.73	----
	GOA	[5] n/a	2.99	2.73	----
	AK	[5] n/a	2.99	2.63	----
	ALL	[5] n/a	2.99	2.63	----
Shortraker Rockfish (152)	Juneau	0.34	----	----	----
	Ketchikan	0.32	----	----	----
	Petersburg	0.29	----	----	----
	Sitka	0.53	----	----	----
	SEAK	0.42	----	----	----
	EGOAxSE	0.45	----	----	----
	Homer	0.37	----	----	----
	Kodiak	0.35	0.21	0.20	----
	Seward	0.40	----	----	----
	CGOA	0.39	0.21	0.21	----
	GOA	0.41	0.25	0.21	----
	BS	0.52	----	----	----
	BSAI	0.52	----	----	----
	AK	0.41	0.25	0.21	----
	ALL	0.41	0.25	0.21	----
Silvergray Rockfish (157)	Juneau	0.38	----	----	----
	Ketchikan	0.61	----	----	----
	Sitka	0.56	----	----	----
	SEAK	0.46	----	----	----
	EGOAxSE	0.43	----	----	----
	Homer	0.58	----	----	----
	Seward	0.43	----	----	----
	CGOA	0.46	----	----	0.13
	GOA	0.46	----	----	0.13
	AK	0.46	----	----	0.13
	ALL	0.46	----	----	0.13
Skate, Alaska (703)	Seward	0.45	----	----	----
	CGOA	0.45	----	----	----
	GOA	0.43	----	----	----
	AK	0.43	----	----	----
	ALL	0.43	----	----	----
Skate, Big (702)	EGOA	0.40	----	----	----
	Homer	0.39	----	----	----
	Kodiak	0.45	0.47	0.45	----
	Seward	0.40	----	----	----
	CGOA	0.45	0.47	0.45	----
	GOA	0.44	0.47	0.45	----
	AK	0.44	0.47	0.45	----
	ALL	0.44	0.47	0.45	----
Skate, Longnose (701)	Petersburg	0.40	----	----	----
	SEAK	0.40	----	----	----
	EGOAxSE	0.39	----	----	----
	Homer	0.40	----	----	----

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE—Continued

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
	Kodiak	0.45	0.46	0.45	----
	Seward	0.40	----	----	----
	CGOA	0.43	0.46	0.45	----
	GOA	0.42	0.46	0.45	----
	AK	0.42	0.46	0.45	----
	ALL	0.42	0.46	0.45	----
Skate, Other (700)	Juneau	0.03	----	----	----
	SEAK	0.33	----	----	----
	EGOA	0.33	----	----	----
	GOA	0.37	----	----	----
	AK	0.38	----	----	0.13
	ALL	0.38	----	----	0.13
Starry Flounder (129)	Kodiak	----	0.09	----	0.09
	CGOA	----	0.09	----	0.09
	GOA	----	0.09	----	0.09
	AK	----	0.09	----	0.09
	ALL	----	0.09	----	0.09
Thornyhead Rockfish (Idiots) (143)	Juneau	0.98	----	----	----
	Ketchikan	1.17	----	----	----
	Petersburg	0.95	----	----	----
	Sitka	0.99	----	----	----
	SEAK	1.00	----	----	----
	EGOAxSE	0.68	----	----	----
	Homer	0.77	----	----	----
	Kodiak	0.54	0.69	----	0.70
	Seward	0.74	----	----	----
	CGOA	0.68	0.69	----	0.70
	WGOA	0.78	----	----	----
	GOA	----	0.71	----	0.71
	AI	0.51	----	----	----
	BSAI	0.70	----	----	----
	AK	0.78	0.71	----	0.71
	Bellingham	0.93	----	----	----
	OTAK	0.93	----	----	----
	ALL	0.78	0.71	----	0.71
Tiger Rockfish (148)	Sitka	0.52	----	----	----
	SEAK	0.50	----	----	----
	EGOAxSE	0.39	----	----	----
	Homer	0.48	----	----	----
	Seward	0.41	----	----	----
	CGOA	0.43	----	----	----
	GOA	0.45	----	----	----
	AK	0.45	----	----	----
	ALL	0.45	----	----	----
Vermilion Rockfish (184)	Sitka	1.15	----	----	----
	SEAK	1.00	----	----	----
	EGOA	1.00	----	----	----
	GOA	1.00	----	----	----
	AK	1.00	----	----	----
	ALL	1.00	----	----	----
Widow Rockfish (156)	GOA	1.17	----	----	----
	AK	1.17	----	----	----
	ALL	1.17	----	----	----
Yelloweye Rockfish (145)	Craig	0.99	----	----	----
	Juneau	1.23	----	----	----
	Ketchikan	1.66	----	----	----
	Petersburg	1.12	----	----	----
	Sitka	1.90	----	----	----
	SEAK	1.69	----	----	----
	Cordova	1.01	----	----	----
	Whittier	0.94	----	----	----
	EGOAxSE	0.98	----	----	----
	Homer	0.89	----	----	----
	Kodiak	0.37	0.24	----	0.24
	Seward	0.58	----	----	----
	CGOA	0.63	0.24	----	0.24
	WGOA	0.47	----	----	----
	GOA	----	0.24	----	0.24
	BS	0.19	----	----	----
	BSAI	0.19	----	----	----

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2019 OBSERVER COVERAGE FEE—Continued

[Based on volume and value from 2015, 2016, and 2017]

Species (species code) [1 2]	Port/area [3 4]	Non-trawl	NPT	PTR	PTR/NPT
	AK	1.37	0.24	----	0.24
	Bellingham	1.14	----	----	----
	OTAK	1.14	----	----	----
	ALL	1.37	0.24	----	0.24
Yellowtail Rockfish (155)	Sitka	0.75	----	----	----
	SEAK	0.66	----	----	----
	EGOA	0.66	----	----	----
	Homer	0.59	----	----	----
	Kodiak	0.29	----	----	----
	Seward	0.85	----	----	----
	CGOA	0.54	----	----	----
	GOA	0.57	----	----	----
	AK	0.57	----	----	----
	ALL	0.55	----	----	----

---- = no landings in last 3 years or the data is confidential.

[1] If species is not listed, use price for the species group in Table 2 if it exists in the management area. If no price is available for the species or species group in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

[2] For species codes, see Table 2a to 50 CFR part 679.

[3] Regulatory areas are defined at § 679.2. (AK = Alaska; ALL = all ports including those outside Alaska; BS = Bering Sea subarea; BSAI = Bering Sea/Aleutian Islands; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

[4] If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type, or see Table 2 or Table 3.

[5] n/a = ex-vessel prices for sablefish landed with hook-and-line, pot, or jig gear are listed in Table 3 with the prices for IFQ and CDQ landings.

TABLE 2—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES GROUPS FOR 2019 OBSERVER COVERAGE FEE

[Based on volume and value from 2015, 2016, and 2017]

Species group [1]	Port/area [2 3]	Non-trawl	NPT	PTR	PTR/NPT
Flathead Sole (FSOL)	Kodiak	----	$0.15	$0.15	----
	CGOA	----	0.15	0.15	----
	GOA	----	0.15	0.15	----
	AK	----	0.15	0.15	----
GOA Deep Water Flatfish (DFL4) [4]	Kodiak	----	0.09	----	$0.09
	CGOA	----	0.09	----	0.09
	GOA	----	0.09	----	0.09
GOA Shallow Water Flatfish (SFL1) [5]	Kodiak	----	0.19	0.18	----
	CGOA	----	0.19	0.18	----
	GOA	----	0.19	0.18	----
GOA Skate, Other (USKT)	Juneau	$0.03	----	----	----
	SEAK	0.33	----	----	----
	EGOA	0.33	----	----	----
	Kodiak	----	----	----	0.44
	Seward	0.42	----	----	----
	CGOA	0.42	----	----	0.44
	GOA	0.37	----	----	0.44
Other Rockfish (ROCK) [6 7]	Juneau	0.50	----	----	----
	Ketchikan	0.36	----	----	----
	Petersburg	0.30	----	----	----
	Sitka	0.56	----	----	----
	SEAK	0.47	----	----	----
	Cordova	0.77	----	----	----
	Whittier	0.72	----	----	----
	EGOAxSE	0.74	----	----	----
	Homer	0.82	----	----	----
	Kodiak	0.36	0.18	0.21	----
	Seward	0.50	----	----	----
	CGOA	0.54	0.18	0.21	----
	WGOA	0.59	----	----	----
	GOA	----	0.18	0.21	----
	AI	0.51	----	----	----
	BS	0.71	----	----	----
	AK	----	0.18	0.21	----

---- = no landings in last 3 years or the data is confidential.

[1] If groundfish species is not listed in Table 1, use price for the species group if it exists in the management area. If no price is available for the species or species group in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

[2] Regulatory areas are defined at § 679.2. (AK = Alaska; BS = Bering Sea subarea; BSAI = Bering Sea/Aleutian Islands; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

[3] If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type combination.

[4] ''Deep-water flatfish'' in the GOA means Dover sole, Greenland turbot, Kamchatka flounder, and deepsea sole.

[5] ''Shallow-water flatfish'' in the GOA means flatfish not including ''deep-water flatfish,'' flathead sole, rex sole, or arrowtooth flounder.

[6] In the GOA:

''Other rockfish'' means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergray), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermilion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail). In the Eastern GOA only, other rockfish also includes northern rockfish, *S. polyspinis.*

''Other rockfish'' in the Western and Central Regulatory Areas and in the West Yakutat District means other rockfish and demersal shelf rockfish. The ''other rockfish'' species group in the SEO District only includes other rockfish.

''Demersal shelf rockfish'' means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

[7] ''Other rockfish'' in the BSAI includes all *Sebastes* and *Sebastolobus* species except for Pacific ocean perch, northern, shortraker, and rougheye rockfish. ''Rougheye rockfish'' includes Sebastes aleutianus (rougheye) and Sebastes melanostictus (blackspotted).

Halibut and Sablefish IFQ and CDQ Standard Ex-Vessel Prices

Table 3 shows the observer fee standard ex-vessel prices for halibut and sablefish. These standard prices are calculated as a single annual average price, by species and port or port group. Volume and ex-vessel value data collected on the 2018 IFQ Buyer Report for landings made from October 1, 2017, through September 30, 2018, were used to calculate the standard ex-vessel prices for the 2019 observer fee for halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish landings that accrue against the fixed gear sablefish CDQ reserve.

TABLE 3—STANDARD EX-VESSEL PRICES FOR HALIBUT IFQ, HALIBUT CDQ, SABLEFISH IFQ, AND SABLEFISH ACCRUING AGAINST THE FIXED GEAR SABLEFISH CDQ RESERVE FOR THE 2019 OBSERVER FEE

[Based on 2018 IFQ Buyer Reports]

Species	Port/area [1]	Price [2]
Halibut (200)	Ketchikan	$5.53
	Petersburg	5.43
	Sitka	5.28
	SEAK	5.47
	Cordova	5.55
	EGOAxSE	5.48
	Homer	5.90
	Kenai	6.22
	Kodiak	5.28
	Seward	5.52
	CGOA	5.54
	WGOA	4.88
	BS	4.95
	BSAI	4.83
	AK	5.37
	ALL	5.37
Sablefish (710)	Sitka	4.31
	SEAK	4.22
	Cordova	3.36
	EGOAxSE	3.66
	Kodiak	3.88
	Seward	3.71
	CGOA	3.82
	WGOA	3.35
	BS	2.89
	BSAI	2.89
	AK	3.80
	ALL	3.80

[1] Regulatory areas are defined at § 679.2. (AK = Alaska; ALL = all ports including those outside Alaska; AI = Aleutian Islands subarea; BS = Bering Sea subarea; CGOA = Central Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

[2] If a price is listed for the species and port combination, that price will be applied to the round weight equivalent for sablefish landings and the headed and gutted weight equivalent for halibut landings. If no price is listed for the port, use port group.

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

Dated: December 14, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–27441 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska Quota Cost Recovery Programs.

OMB Control Number: 0648–0711.

Form Number(s): None.

Type of Request: Regular (revision and extension of a currently approved information collection).

Number of Respondents: 2,047.

Average Hours per Response: 1 minute for cost recovery fee, observer coverage fee, and Value and Volume Report; 4 hours for Appeals for any person who receives an IAD for incomplete payment of a fee liability.

Burden Hours: 97.

Needs and Uses: This request is for revision and extension of an existing information collection.

Three existing collections are being merged into this collection: OMB control numbers 0648–0727, 0648–0758, and 0648–0764.

The Magnuson-Stevens Fishery and Conservation Act both authorizes and requires the collection of cost recovery fees for Limited Access Privilege (LAP) programs and Western Alaska Community Development Quota (CDQ) programs. The cost recovery fees may not exceed three percent of the ex-vessel value, and must recover costs associated with the management, data collection, and enforcement of these programs that are directly incurred by government agencies tasked with overseeing these fisheries.

In addition, NMFS collects observer coverage fees to support the funding and deployment of observers on vessels and in plants in the partial observer coverage category. The observer coverage fee must be paid by permit holders in the partial observer coverage category, *i.e.,* small catcher/processors, catcher vessels, shoreside processors, and stationary floating processors named on a Federal Fisheries Permit, or a person named on a Registered Buyer permit.

Processors that receive and purchase landings of IFQ halibut or sablefish, rockfish, groundfish, and crab subject to observer and/or cost recovery fees must submit an Ex-vessel Value and Volume report under 50 CFR 679.5 or 50 CFR 680.5 that provides information on the pounds purchased and value paid. NMFS uses this information to establish the total ex-vessel value of the fishery, to calculate standard prices, and to establish annual fee percentages in each fishery.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: Annually.

Respondent's Obligation: Mandatory.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 14, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–27463 Filed 12–18–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2018–HQ–0020]

Submission for OMB Review; Comment Request

AGENCY: Department of the Army, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 18, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Army and Air Force Exchange Service Identification and Privilege Card Application; Exchange Form 1100–016; OMB Control Number 0702–0129.

Type of Request: Extension.

Number of Respondents: 2,500.

Responses per Respondent: 1.

Annual Responses: 2,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 625.

Needs and Uses: Respondents are Exchange employee dependents and Exchange retirees who wish to become or remain eligible Exchange patrons. Exchange Form 1100–016 provides Exchange Human Resource information to verify and authorize patronage to these individuals. If verification is approved, the individual will obtain a personalized, laminated dependent card for shopping privileges.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain privileges.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: December 14, 2018.

Shelly E. Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–27448 Filed 12–18–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2015–OS–0004]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 18, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Mortuary Affairs Forms; Statement of Disposition of Military Remains, DD Form 3045; Disposition of Remains Election Statement Initial Notification of Identified Partial Remains, DD Form 3046; Disposition of Remains Election Statement Notification of Subsequently Identified Partial Remains, DD Form 3047; Disposition of Organs Retained for Extended Examination, DD Form 3048; Advanced Restorative Art of Remains, DD Form 3049; Election for Air Transportation of Remains of Casualties Dying in a Theater of Combat Operations, DD Form 3050; OMB Control Number 0704–XXXX.

Type of Request: New collection.

Number of Respondents: 900.

Responses per Respondent: 1.33.

Annual Responses: 1,200.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 300.

Needs and Uses: The information collection requirement is necessary to obtain the selection (as applicable) of the Person Authorized to Direct Disposition (PADD) or the Person Authorized to Effect Disposition (PAED) of the remains of the decedent. These forms were directed by the Secretary of Defense for transparency and standardization of the mortuary procedures as part of the Final Report of the Dover Port Mortuary Independent Review Subcommittee Implementation Plan and 180-day study. The applicable form(s) is included in the individual case file of the decedent. Currently, there is a lack of standardization across the Military Services as each Service currently utilizes different forms for these elections and they do not all capture the same information even on similar forms. Standardizing the information collected is essential in maintaining the transparency and integrity of the mortuary affairs process.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: December 14, 2018.

Shelly E. Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–27446 Filed 12–18–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0101]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice of a modified system of records.

SUMMARY: The Office of the Secretary of Defense (OSD) proposes to modify a System of Records Notice (SORN), Regional Center Persons/Activity Management System (RCPAMS), DSCA 03. This system provides a solution for Regional Center staff to manage operational, logistical and cost details about people, events, enrollments and organizations, a tool for reporting on all data related to Regional Center events, a platform for sharing common processes, terminology and data elements to facilitate efficient communication between the Regional Centers, a single view of each person with whom any of the Regional Centers have a relationship, representing the current snapshot and historical record of events and biographical information, an interface to other systems with which the Regional Centers must exchange data for use by other users and organizations, and an enterprise-class Customer Relationship Management platform to manage two-way communication between Security Assistance Network (SAN) and RCPAMS related to events and their participants.

As a result of reviewing this system of records notice (SORN), this modification updates the following categories: System location, system manager(s), purpose; categories of individuals, categories of records, routine uses, record access procedures, notification procedures, including the reformatting to coincide with the new SORN template defined in the Office of Management and Budget Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act.''

DATES: Comments will be accepted on or before January 18, 2019. This proposed action will be effective the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

* *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate of Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for

comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPDD), 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: The OSD proposes to modify a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. This notice serves to update the System of Records Notice for RCPAMS, DSCA 03, published in the **Federal Register** on June 13, 2016, Vol. 81, No. 113.

The Defense Security Cooperation Agency (DSCA) is the executive agent for five Regional Centers which offer through resident and in-region programs various seminars, courses, workshops, alumni outreach events, and research publications. The centers include: Africa Center for Strategic Studies (ACSS), Asia-Pacific Center for Security Studies (APCSS), William J. Perry Center for Hemispheric Defense Studies (CHDS), George C. Marshall European Center for Security Studies (GCMC), and Near-East-South Asia Center for Strategic Studies (NESA). As a result of reviewing this SORN, this modification updates the following categories: System location, system manager(s), categories of records, routine uses, including the reformatting of the SORN to align with the new template provided in OMB Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act.''

The OSD notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy and Civil Liberties Division website at *https://defense.gov/privacy.*

The proposed system report, as required by U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on October 11, 2018, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB).

Dated: December 14, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER

Regional Center Persons/Activity Management System (RCPAMS), DSCA 03.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

CSRA Solutions, 189 Peachtree St. NW, Atlanta GA 30303–1725.

SYSTEM MANAGER(S):

Regional Center Persons/Activity Management Program Manager, Defense Security Cooperation Agency, ATTN: BPC/ICB–RCPAMS, Program Manager, 201 12th Street South, Suite 101, Arlington, VA 22202–4306; Telephone: (703) 697–9709, email: *dsca.ncr.lmo.mbx.info@mail.mil.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 134, Under Secretary of Defense for Policy; DoD Directive (DoDD) 5105.65, Defense Security Cooperation Agency (DSCA); DoDD 5101.1, DoD Executive Agent; DoDD 5200.41, DoD Regional Centers for Security Studies; and DoDD 5132.03, DoD Policy and Responsibilities Relating to Security Cooperation.

PURPOSE(S) OF THE SYSTEM:

The primary purpose of the Regional Center Persons/Activity Management System (RCPAMS) is to improve management of education opportunities in security cooperation as provided by the Department of Defense through the standardization of business processes across the following five Regional Centers for Security Studies: Africa Center for Strategic Studies (ACSS), Asia-Pacific Center for Security Studies (APCSS), William J. Perry Center for Hemispheric Defense Studies (CHDS), George C. Marshall European Center for Security Studies (GCMC), and Near-East-South Asia Center for Strategic Studies (NESA), collectively Regional Centers. Specifically, RCPAMS will provide: (1) A solution for Regional Center staff to manage operational, logistical and cost details about people, events, enrollments and organizations; (2) a tool for reporting on all data related to Regional Center events; (3) a platform for sharing common processes, terminology and data elements to facilitate efficient communication between the Regional Centers; (4) a single view of each person with whom any of the Regional Centers have a relationship, representing the current snapshot and historical record of events and biographical information; (5) an interface to other systems with which the Regional Centers must exchange data for use by other users and organizations; and (6) an enterprise-class Customer Relationship Management platform to manage two-way communication between Security Assistance Network (SAN) and RCPAMS related to events and their participants.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD military and civilian employees, military students, contractors, alumni, and subject matter experts affiliated with the five Regional Centers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, citizenship, gender, date and place of birth, work and personal email addresses, work and home addresses, work and home telephone numbers, cell phone numbers, spouse name, marital status, full face photograph and other physical descriptions, education, employment and military information, emergency contact, visa numbers, control numbers and language capabilities.

RECORD SOURCE CATEGORIES:

The individual.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3):

a. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the DoD when necessary to accomplish an agency function related to this system of records.

b. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

c. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

d. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

e. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

f. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

g. To appropriate agencies, entities, and persons when (1) the DoD suspects or has confirmed that there has been a breach of the system of records; (2) the DoD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

h. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in paper and electronic storage media, in accordance with the safeguards mentioned below.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The records are retrieved by the individual's name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are cut off on closure of study or event and destroyed 25 years after cut off.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records are maintained in controlled areas accessible only to authorized personnel. Access to the electronic data is limited to authorized users and requires Common Access Card and is available only through systems security software inherent to the operating system and application, and all access is controlled by authentication methods to validate the approved users. Data transmission is encrypted. The information is also maintained in secured information systems which are located in controlled access facilities, guarded 24 hours a day, and seven days a week.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Signed, written requests should include the full name, current address and telephone number, and the name and number of this system of records notice.

In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager. The current OSD and Joint Staff Privacy Program rule in 32 CFR part 311 is applicable until finalization of the proposed DoD Privacy Program rule, 32 CFR part 310. Repeal of individual DoD Component Privacy rules, including part 311, will be published in the **Federal Register** after part 310 is effective.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Regional Center Persons/Activity Management Program Manager, Defense Security Cooperation Agency, ATTN: STR/TNG—RCPAMS, Program Manager, 201 12th Street South, Suite 203, Arlington, VA 22202–4306.

Signed, written requests should include the full name, current address and telephone number, and the name and number of this system of records notice.

In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

June 13, 2016, 81 FR 38148; January 28, 2013, 78 FR 5781.

[FR Doc. 2018–27455 Filed 12–18–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2018–OS–0100]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice of a modified system of records.

SUMMARY: The Office of the Secretary of Defense proposes to modify a system of records, DoD Postsecondary Education Complaint System, DPR 44 DoD. This system of records provides Uniformed Service Members, spouses, other family members the opportunity to file formal complaints when educational institutions fail to ensure that Federal military and veterans educational benefits programs are providing Service members, veterans, spouses, and other family members with information, support, and protections. This system of records is being modified to add more

protections to ensure the privacy of each individual who submits a complaint, and when a complaint is submitted on behalf of an individual.

DATES: Comments will be accepted on or before January 18, 2019. This proposed action will be effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

• *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate of Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPDD), 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense proposes to modify a system of records subject to the Privacy Act of 1974 (5 U.S.C. 552a). E.O. 13607, Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members, provides protections and enhances resources and support tools available to Service members and veterans using military tuition assistance and veterans using Post 9/11 and GI Bill benefits to pursue a higher education. The E.O. requires the DoD to ensure student protections are put into place for Service members, spouses, and other adult family members and to promptly revise regulations, instructions, guidance documents and memorandums of understanding. Additionally, E.O. 13607 encourages Federal agencies to expand oversight activities to better address military student concerns and to ensure military students and veterans receive quality educational opportunities in exchange for their federal education benefits. To ensure DoD student protections, the E.O. also directs the Secretaries of Defense, Veterans Affairs (VA), and Education, in consultation with the Directors of the Consumer Financial Protection Bureau (CFPB), the Department of Justice, and the Federal Trade Commission to develop a centralized complaint process for students receiving federal military and veteran educational benefits.

In July 2012, DoD and the aforementioned federal agencies designed a complaint intake form to be utilized by both DoD and VA to meet the Principles of Excellence (PoE) requirements. The DoD and VA intake forms contain the same data elements with slight variations as necessary to meet the requirements for both agencies respectively. DoD developed its Postsecondary Education Complaint Management System (PECS) to house the intake form and to monitor and manage incoming complaints. The DoD implemented both the Postsecondary Education Complaint Intake form (DD 2961) and the Postsecondary Education Complaint Management System on January 30, 2014.

The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *http://defense.gov/privacy.* The proposed systems reports, as required by the Privacy Act of 1974, as amended, were submitted on October 30, 2018, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 to OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

Dated: December 13, 2018.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER

DoD Postsecondary Education Complaint System (PECS), DPR 44 DoD.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Integrated Network Operations and Security Center-East (INOSC–E), 37 Elm Street, Langley AFB, VA 23665–2800.

SYSTEM MANAGER(S):

Director, Voluntary Education, Office of the Assistant Secretary of Defense for Readiness (Force Education and Training), 1500 Pentagon, Washington, DC 20301–1500, phone: 571–372–0864.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order (E.O.) 13607, Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members; and DoD Instruction (DoDI) 1322.25, Voluntary Education Programs.

PURPOSE OF THE SYSTEM:

The DoD Postsecondary Education Complaint System (PECS) provides Uniformed Service Members, spouses, other family members the opportunity to file formal complaints when educational institutions fail to follow the Principles of Excellence outlined in E.O. 13607. The PECS serves as a collaborative environment that provides DoD personnel the ability to track, manage and process submitted complaints in order to meet the requirements of the E.O. and DoDI 1322.25. DoDI 1322.25 also establishes the need for PECS and instructs the Services on handling PECS complaints. The PECS data may also be used to perform statistical and program analysis.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Uniformed Service Members, spouses, other family members who file formal complaints pursuant to E.O. 13607.

CATEGORIES OF RECORDS IN SYSTEM:

Name, complaint case ID, DoD Identification (DoD ID) number, pay grade, address, country, phone number, age range, email address, service affiliation (Service Member, spouse or family member, veteran), service branch, service status, sponsor information (service status, service branch, and pay grade), type of education benefits used, school name and mailing address, level of study, amount of out-of-pocket tuition or government tuition credit paid (academic year), education center name, education center mailing address, complaint description and resolution, name and contact information of person submitting complaint on behalf of a covered individual.

RECORD SOURCE CATEGORIES:

Data is gathered from the individual or person submitting a complaint on behalf of a covered individual.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To the Federal Trade Commission Consumer Sentinel Network for access by the Departments of Veterans Affairs, Education, Justice, and the Consumer Financial Protection Bureau for compliance with Executive Order 13607, and potential enforcement efforts.

b. To schools listed in a complaint to aid in the resolution of a case.

c. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government when necessary to accomplish an agency function related to this system of records.

d. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

e. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

f. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other agency representing the DoD determines the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

g. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

h. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

i. To appropriate agencies, entities, and persons when (1) the DoD suspects or has confirmed that there has been a breach of the system of records; (2) the DoD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

j. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in electronic storage media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information is retrieved by name or Complaint Case ID.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

System records are destroyed 3 years after the resolution of the case. Copies of closed complaint cases are transferred to the Federal Trade Commission Consumer Sentinel System.

ADMINISTRATIVE, PHYSICAL, AND TECHNICAL SAFEGUARDS:

Records are maintained on a guarded military installation in a secure building in a controlled area accessible only to authorized personnel. Physical entry is restricted by the use of cipher locks, passwords and administrative procedures which are changed periodically. The system is designed with access controls, comprehensive intrusion detection and virus protection. The application is accessed only by users who have authenticated with either DS Logon or Common Access Card (CAC). Access to any records in the system is further restricted to CAC authenticated users with role based privileges who require the data in the performance of their official duties and complete the annual information assurance and privacy training. Data is transmitted via Transport Layer Security (TLS) and Secure Sockets Layer (SSL) encryption to protect session information. Encrypted random tokens are implemented to protect against session hijacking attempts.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, Washington Headquarters Services/Executive Services Directorate, 4800 Mark Center Drive, Alexandria, VA 22350–3100.

Signed, written requests must contain full name and/or Complaint Case ID, and the system ID and name of this system of records notice.

In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records and for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Office of the Assistant Secretary of Defense for Readiness (Force Education), 1500 Pentagon, Washington, DC 20301–1500. Signed, written requests must contain full name and/or Complaint Case ID, and the system ID and name of this system of records notice.

In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

January 10, 2014, 79 FR 1840.

[FR Doc. 2018–27416 Filed 12–18–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Notice of Request for Information: Challenges and Opportunities for the American Solar Industry

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

ACTION: Request for information.

SUMMARY: The U.S. Department of Energy Solar Energy Technologies Office (SETO) seeks information to help inform its research priorities, as part of its annual planning process. The purpose of this Request for Information (RFI) is to solicit feedback from industry, academia, research laboratories, government agencies, and other stakeholders to identify areas of interest related to challenges and opportunities for the American solar industry that are appropriate for federal government funding. This is solely a request for information and not a Funding Opportunity Announcement (FOA).

DATES: Responses to the RFI must be received no later than January 7, 2019.

ADDRESSES: Responses to this RFI must be submitted electronically to the email addresses provided in each of the topic sections as described in the RFI DE–FOA–0002055 available at: *https://eere-exchange.energy.gov/FileContent.aspx?FileID=b79b612c-f2f9-49ea-846e-e74d2e6602d0.* Responses must be provided as attachments to an email. It is recommended that attachments with file sizes exceeding 25MB be compressed (*i.e.,* zipped) to ensure message delivery. Responses must be provided as a Microsoft Word (.docx) attachment to the email, and in 12 point font with 1 inch margins. Only electronic responses will be accepted.

Please identify answers by responding to a specific question or topic if applicable. Respondents may answer as many or as few questions as desired at their discretion.

EERE will not respond to individual submissions or publicly publish a compendium of responses. A response to this RFI will not be viewed as a binding commitment to develop or pursue the project or ideas discussed.

Respondents are requested to provide the following information at the start of their response to this RFI:

- Company/institution name;
- Company/institution contact;
- Contact's address, phone number, and email address.

FOR FURTHER INFORMATION CONTACT: Andrew Graves (202) 586–1071, *Andrew.Graves@ee.doe.gov.* Further instructions can be found in the RFI DE–FOA–0002055 document posted on EERE Exchange.

SUPPLEMENTARY INFORMATION: DOE posted on its website a RFI to solicit feedback from industry (including but not limited to research organizations, manufacturing organizations, catalyst manufacturers, and catalyst research consortia), academia, research laboratories, government agencies, and other solar stakeholders. The RFI DE–FOA–0002055 is available at: *https://eere-exchange.energy.gov/FileContent.aspx?FileID=b79b612c-f2f9-49ea-846e-e74d2e6602d0.*

Confidential Business Information

Because information received in response to this RFI may be used to structure future programs, funding and/or otherwise be made available to the public, respondents are strongly advised to not include any information in their responses that might be considered business sensitive, proprietary, or otherwise confidential. If, however, a respondent chooses to submit business sensitive, proprietary, or otherwise confidential information, it must be clearly and conspicuously marked as such in the response as detailed in the RFI at: *https://eere-exchange.energy.gov/FileContent.aspx?FileID=b79b612c-f2f9-49ea-846e-e74d2e6602d0.* Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

Signed in Washington, DC on December 10, 2018.

Charles Gay,

Director, Solar Energy Technologies Office.

[FR Doc. 2018–27451 Filed 12–18–18; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Procedures

Docket Number: PR19–25–000.
Applicants: Columbia Gas of Ohio, Inc.
Description: Tariff filing per 284.123(b),(e)/: Revised Statement of Operating Conditions to be effective 11/29/2018.
Filed Date: 12/12/18.
Accession Number: 20181212–5029.
Comments Due: 5 p.m. ET 1/2/19.

Docket Number: RP19–86–001.
Applicants: Southern Natural Gas Company, LLC.
Description: Tariff filing per 154.203: OFO Penalty Revisions-Compliance to be effective 11/29/2018.
Filed Date: 12/6/18.
Accession Number: 20181206–5286.
Comments Due: 5 p.m. ET 12/18/18.

Docket Numbers: RP19–261–001.
Applicants: Blue Lake Gas Storage Company.
Description: Tariff filing per 154.203: Blue Lake 501–G Settlement Implementation to be effective 1/1/2019.
Filed Date: 12/7/2018.
Accession Number: 20181207–5139.
Comments Due: 5 p.m. ET 12/19/18.

Docket Numbers: RP19–455–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20181211 Negotiated Rate to be effective 12/11/2018.
Filed Date: 2/11/18.
Accession Number: 20181211–5114.
Comments Due: 5 p.m. ET 12/24/18.

Docket Numbers: RP19–456–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits tariff filing per 154.204: Neg Rate 2018–12–11 BHS (2) to be effective 12/11/2018.

Filed Date: 12/11/18.

Accession Number: 20181211–5146.

Comments Due: 5 p.m. ET 12/24/18.

Docket Numbers: RP19–457–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: § 4(d) Rate Filing: Volume No. 2-Shell Energy North America SP341623 to be effective 1/1/2019.

Filed Date: 12/12/18.

Accession Number: 20181212–5025.

Comments Due: 5 p.m. ET 12/24/18.

Docket Numbers: RP19–458–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: § 4(d) Rate Filing: Volume No. 2-Shell Energy North America SP341624 to be effective 1/1/2019.

Filed Date: 12/12/18.

Accession Number: 20181212–5032.

Comments Due: 5 p.m. ET 12/24/18.

Docket Numbers: RP19–459–000.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: Compliance filing Limited Tariff Waiver due to Shippers' Mutual Capacity Release Mistake-KGS OER to be effective N/A.

Filed Date: 12/12/18.

Accession Number: 20181212–5072.

Comments Due: 5 p.m. ET 12/24/18.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 13, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–27474 Filed 12–18–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1999–073]

Notice of Application Accepted For Filing, Soliciting Comments, Motions To Intervene, and Protests: Wisconsin Public Service Corporation

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application for temporary variances from license requirements.

b. *Project No.:* 1999–073.

c. *Date Filed:* November 30, 2018.

d. *Applicant:* Wisconsin Public Service Corporation.

e. *Name of Project:* Wausau Project.

f. *Location:* The project is located on the Wisconsin River, in the city of Wausau, Marathon County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Todd Jastremski, *todd.jastremski@we-energies.com,* 906–779–4099, Wisconsin Public Service Corporation, 800 Industrial Park Drive, Iron Mountain, MI 49801.

i. *FERC Contact:* Ms. Diana Shannon, 202–502–6136, or *diana.shannon@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests: January 14, 2019.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests and comments 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–1999–073. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure 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. *Description of Request:* The licensee plans to perform a series of maintenance activities at the project that would require temporary variances in reservoir elevation and flow requirements contained in its license. The work would require a reservoir drawdown from mid-April to November 2019, deviating from the requirements of article 402. Flow would continue to be released downstream of the project. However, recreational flows in the east channel that are required by article 403 would cease because of the reduction in reservoir elevations during the drawdown. Deviations from these license requirements are necessary to complete the planned work. The licensee included with its filing a reservoir drawdown plan, as required by article 405. The licensee also included documentation of consultation with various parties, including the city of Wausau, National Park Service, U.S. Fish and Wildlife Service, Wisconsin Department of Natural Resources, and the Wisconsin State Historic Preservation Office.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE, Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the

requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .212 and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (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 commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 13, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–27488 Filed 12–18–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0677; FRL–9987–50]

Receipt of Information Under the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing its receipt of information submitted pursuant to a rule, order, or consent agreement issued under the Toxic Substances Control Act (TSCA). As required by TSCA, this document identifies each chemical substance and/or mixture for which information has been received; the uses or intended uses of such chemical substance and/or mixture; and describes the nature of the information received. Each chemical substance and/or mixture related to this announcement is identified in Unit I. under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT:

For technical information contact: John Schaeffer, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8173; email address: *schaeffer.john@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. Chemical Substances and/or Mixtures

Information received about the following chemical substance(s) and/or mixture(s) is provided in Unit IV.: *Acetaldehyde, reaction products with formaldehyde, by-products from (CASRN 68442–60–4).*

II. Authority

Section 4(d) of TSCA (15 U.S.C. 2603(d)) requires EPA to publish a notice in the **Federal Register** reporting the receipt of information submitted pursuant to a rule, order, or consent agreement promulgated under TSCA section 4 (15 U.S.C. 2603).

III. Docket Information

A docket, identified by the docket identification (ID) number EPA–HQ–OPPT–2013–0677, has been established for this **Federal Register** document, which announces the receipt of the information. Upon EPA's completion of its quality assurance review, the information received will be added to the docket identified in Unit IV., which represents the docket used for the TSCA section 4 rule, order, and/or consent agreement. In addition, once completed, EPA reviews of the information received will be added to the same docket. Use the docket ID number provided in Unit IV. to access the information received and any available EPA review.

EPA's dockets are available electronically at *http://www.regulations.gov* or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. 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 OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

IV. Information Received

As specified by TSCA section 4(d), this unit identifies the information received by EPA: *Acetaldehyde, reaction products with formaldehyde, by-products from (CASRN 68442–60–4).*

1. *Chemical use(s):* Acetaldehyde, reaction products with formaldehyde, by-products from, is a chemical intermediate used in processing as a reactant in the construction industrial sector.

2. *Applicable rule, Order, or Consent agreement:* Chemical testing requirements for third group of high production volume chemicals (HPV3), 40 CFR 799.5089.

3. *Information received:* EPA received the following information:

a. Physical-Chemical Properties: Boiling point.

b. Physical-Chemical Properties: Melting point.

c. Physical-Chemical Properties: Vapor pressure.

d. Physical-Chemical Properties: Partition coefficient.

e. Physical-Chemical Properties: Water solubility.

f. Biodegradation.

g. Acute toxicity to fish.

h. Daphnia immobilization study.

i. Acute oral, skin and eye irritation.

j. Chromosomal aberrations assay with Chinese hamster ovary cell.

k. Micronucleus test in bone marrow cells of CD–1 mice.

l. Rationale for conducting both the in vitro and in vivo chromosome aberration test.

m. Repeated dose oral toxicity study in rats.

n. Reproduction/Developmental toxicity screening test in rats.

o. Rationale for use of alternate data to address F1 data requirements in rats.

p. Ames test report.

The docket ID number assigned to this information is EPA–HQ–OPPT–2009–0112.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 7, 2018.

Lynn Vendinello,

Acting Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2018–27479 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9988–19–Region 6]

Underground Injection Control Program; Hazardous Waste Injection Restrictions; Petition for Exemption Reissuance—Class I Hazardous Waste Injection; Veolia ES Technical Solutions, LLC (Veolia) Port Arthur Facility

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a final decision on a UIC no migration petition reissuance.

SUMMARY: Notice is hereby given that a reissuance of an exemption to the Land Disposal Restrictions, under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, has been granted to Veolia for a Class I hazardous waste injection well located at their Port Arthur, Texas facility. The company has adequately demonstrated to the satisfaction of the EPA by the petition reissuance application and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the underground injection by Veolia of the specific restricted hazardous wastes identified in this exemption reissuance request, into Class I hazardous waste injection well WDW–160 until December 31, 2041, unless the EPA moves to terminate this exemption. Additional conditions included in this final decision may be reviewed by contacting the EPA Region 6 Ground Water/UIC Section. A public notice was issued September 11, 2018, and the public comment period closed on October 29, 2018, and no comments were received. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of November 19, 2018.

ADDRESSES: Copies of the petition reissuance and all pertinent information relating thereto are on file at the following location:

Environmental Protection Agency, Region 6, Water Division, Safe Drinking Water Branch (6WQ–S), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Philip Dellinger, Chief Ground Water/UIC Section, EPA—Region 6, telephone (214) 665–8324.

Dated: November 19, 2018.

Charles W. Maguire,

Director, Water Division.

[FR Doc. 2018–27486 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9988–20–Region 6]

Underground Injection Control Program; Hazardous Waste Injection Restrictions; Petition for Exemption Reissuance—Class I Hazardous Waste Injection; TM Corpus Christi Services L.P. (TMCC) Corpus Christi, Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a final decision on a UIC no migration petition reissuance.

SUMMARY: Notice is hereby given that a reissuance of an exemption to the Land Disposal Restrictions, under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, has been granted to TMCC for a Class I hazardous waste injection well located at their Corpus Christi, Texas facility. The company has adequately demonstrated to the satisfaction of the EPA by the petition reissuance application and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the underground injection by TMCC of the specific restricted hazardous wastes identified in this exemption reissuance request, into Class I hazardous waste injection well WDW–70 until December 31, 2028, unless the EPA moves to terminate this exemption. Additional conditions included in this final decision may be reviewed by contacting the EPA Region 6 Ground Water/UIC Section. A public notice was issued August 28, 2018, and the public comment period closed on October 15, 2018, and no comments were received. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of November 19, 2018.

ADDRESSES: Copies of the petition reissuance and all pertinent information relating thereto are on file at the following location:

Environmental Protection Agency, Region 6, Water Division, Safe Drinking Water Branch (6WQ–S), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Philip Dellinger, Chief Ground Water/UIC Section, EPA—Region 6, telephone (214) 665–8324.

Dated: November 19, 2018.

Charles W. Maguire,

Director, Water Division.

[FR Doc. 2018–27483 Filed 12–18–18; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2018–6022]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This collection of information is necessary, pursuant to 12 U.S.C. Sec. 635 (a) (1), to determine eligibility of the applicant for EXIM assistance.

DATES: Comments must be received on or before February 19, 2019, to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 92–36) or by email to *Mia.Johnson@exim.gov,* or by mail to Mia L. Johnson, Export-Import Bank of the United States, 811 Vermont Ave., NW Washington, DC 20571. The application tool can be reviewed at: *https://www.exim.gov/sites/default/files/pub/pending/eib92-36.pdf.*

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 92–36 Application for Issuing Bank Credit Limit (IBCL) Under Lender or Exporter-Held Policies.

OMB Number: 3048–0016.

Type of Review: Renewal.

Need and Use: This form is used by an insured exporter or lender (or broker acting on its behalf) in order to obtain approval for coverage of the repayment risk of an overseas bank. The information received allows EXIM staff to make a determination of the creditworthiness of the foreign bank and the underlying export sale for EXIM assistance under its programs.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 600.

Estimated Time per Respondent: 1.2 hours.

Annual Burden Hours: 720 hours.

Frequency of Reporting of Use: As needed.

Government Expenses:

Reviewing time per year: 600 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $25,500 (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $30,600.

Bassam Doughman,

IT Specialist.

[FR Doc. 2018–27482 Filed 12–18–18; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0719]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 19, 2019. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0719.

Title: Quarterly Report of Local Exchange Carriers Listing Payphone Automatic Number Identifications (ANIs).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 400 respondents; 1,600 responses.

Estimated Time per Response: 3.5 hours (8 hours for the initial submission; 2 hours per subsequent submission—for an average of 3.5 hours per response).

Frequency of Response: Quarterly reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154, 201–205, 215, 218, 219, 220, 226 and 276 of the Communications Act of 1934, as amended.

Total Annual Burden: 5,600 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the respondents wish confidential treatment of their information, they may request confidential treatment under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission adopted rules and policies governing the payphone industry under section 276(b)(1)(A) of the Telecommunications Act of 1996 (the Act) and established ''a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.'' Pursuant to this mandate, and as required by section 64.1310(d) of the Commission's rules, Local Exchange Carriers (LECs) must provide to carriers required to pay compensation pursuant to section 64.1300(a), a quarterly report listing payphone ANIs. Without provision of this report, resolution of disputed ANIs would be rendered very difficult. Carriers would not be able to discern which ANIs pertain to payphones and therefore would not be able to ascertain which dial-around calls were originated by payphones for compensation purposes. There would be no way to guard against possible fraud. Without this collection, lengthy investigations would be necessary to verify claims. The report allows carriers to determine which dial-around calls are made from payphones. The information must be provided to third parties. The requirement would be used to ensure that LECs and the carriers required to pay compensation pursuant to 47 CFR 64.1300(a) of the Commission's rules comply with their obligations under the Telecommunications Act of 1996.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2018–27471 Filed 12–18–18; 8:45 am]

BILLING CODE 6712–01–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 January 2, 2019.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Francis Philip Kavanaugh, Dana Point, California;* to acquire additional voting shares of Friendly Hills Bank, Whittier, California.

Board of Governors of the Federal Reserve System, December 13, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–27394 Filed 12–18–18; 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 January 3, 2019.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Edward J. Madden, Evanston, Illinois, individually and as trustee of the Edward J. Madden Declaration of Trust 3/6/2008;* to join the Madden Family Group and to acquire voting shares of Schaumburg Bancshares, and thereby indirectly acquire Heritage Bank of Schaumburg, both of Schaumburg, Illinois.

Board of Governors of the Federal Reserve System, December 14, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–27440 Filed 12–18–18; 8:45 am]

BILLING CODE 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 January 11, 2019.

A. Federal Reserve Bank of Atlanta (Kathryn Haney, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org*:

1. *Centerstate Bank Corporation, Winter Haven, Florida;* to merge with National Commerce Corporation, and thereby indirectly acquire National Bank of Commerce, both of Birmingham, Alabama.

Board of Governors of the Federal Reserve System, December 13, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–27395 Filed 12–18–18; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice–MG–2018–03; Docket No. 2018–0002; Sequence No. 35]

Office of Federal High-Performance Buildings; Green Building Advisory Committee; Notification of Upcoming Conference Calls

AGENCY: Office of Government-Wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: Notice of this meeting and these conference calls is being provided according to the requirements of the Federal Advisory Committee Act. This notice provides the agendas and schedules for the May 16, 2019 meeting of the Green Building Advisory Committee (the Committee), as well as the schedule for a series of conference calls for two task groups of the Committee.

DATES:

Meeting date: The spring meeting of the Committee will be held on Thursday, May 16, 2019, starting at 10 a.m. Eastern Daylight Time (EDT), and ending no later than 4 p.m. EDT.

The two subcommittees will have alternate weekly conference calls, one call every other week, beginning Wednesday, January 9, 2019, through Wednesday, May 8, 2019, from 3 p.m. to 4 p.m.

The *Building and Grid Integration Task Group, Phase II* will hold recurring, bi-weekly conference calls on Wednesdays beginning January 9, 2019, through May 1, 2019, from 3 p.m. to 4 p.m., EDT.

The *Data-Integrated Building Systems Task Group* will hold recurring, weekly conference calls on Wednesdays, beginning January 16, 2019, through May 8, 2019, from 3 p.m. to 4 p.m., EDT.

ADDRESSES: The meeting will be held at 1800 F Street NW, Room 1425, Washington, DC 20405. The in-person meeting is open to the public and the site is accessible to individuals with disabilities. The task group conference calls are open for the public to listen in. Interested individuals must register to attend as instructed below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Bloom, Group Federal Officer, Office of Federal High-Performance Buildings, Office of Government-wide Policy, General Services Administration, 1800 F Street NW, Washington, DC 20405, at email address *michael.bloom@gsa.gov.* Additional information about the Committee, including meeting materials and agendas, will be available on-line at *http://www.gsa.gov/gbac.*

SUPPLEMENTARY INFORMATION:

Background

The Administrator of GSA established the Committee on June 20, 2011 (**Federal Register**/Vol. 76, No. 118) pursuant to Section 494 of the Energy Independence and Security Act of 2007 (EISA, 42 U.S.C. 17123). Under this authority, the Committee provides independent policy advice and recommendations to GSA to advance

federal building innovations in planning, design, and operations to reduce costs, enable agency missions, enhance human health and performance, and minimize environmental impacts.

The purpose of the GBAC Meeting is to convene experts in buildings, including architects, material suppliers, construction contractors, environment, health, security and transportation to accelerate the successful transformation of the Federal building portfolio to sustainable technologies and practices.

The *Building and Grid Integration Task Group, Phase II* will build on the recommendations of the first phase of this Task Group, to prioritize federal building and grid integration strategies and develop implementation plans and scenarios with future rate structures, including consideration of EVs and energy storage.

The *Data-Integrated Building Systems Task Group* will document and recognize data-integrated building system (*e.g.,* smart building system) use cases that demonstrate the business case and quantify the multiple benefits of integrating building technologies and systems.

The conference calls will allow the task groups to develop consensus recommendations to the full Committee, which will, in turn, decide whether to proceed with formal advice to GSA based upon these recommendations.

Meeting participants will provide advice and expertise regarding how the Office of Federal High-Performance Buildings can most effectively accomplish its mission. Subcommittees will present their findings to the full committee for feedback and direction. Participants will discuss topics about which the Committee would like to engage, especially those related to market failures that the Federal government might substantially impact with cost-effective solutions.

Procedures for Attendance and Public Comment

Contact Mr. Michael Bloom at *michael.bloom@gsa.gov* to register to attend the in-person meeting or listen to any of these conference calls. To attend any of these events, submit your full name, organization, email address, and phone number, and which you would like to attend. Requests to attend the conference calls must be received by 5:00 p.m. EDT; on Friday, January 4, 2019 (GSA will be unable to provide technical assistance to any listener experiencing technical difficulties. Testing access to the Web meeting site before the calls is recommended). Requests to attend the May 16, 2019 meeting must be received by 5:00 p.m., EDT, on Friday, January 4, 2019.

Contact Mr. Bloom to register to comment during the May 16, 2019 meeting public comment period. Registered speakers/organizations will be allowed a maximum of five (5) minutes each, and will need to provide written copies of their presentations. Requests to comment at the meeting must be received by 5:00 p.m., EDT, on Friday, January 4, 2019. Written comments may be provided to Mr. Bloom by the same deadline.

May 16, 2019 Meeting Agenda

- Updates and introductions.
- Building-grid integration task group findings & recommendations.
- Lunchtime speaker (TBD).
- Data-integrated building systems task group findings & recommendations.
- Additional topics proposed by Committee members.
- Public comment.
- Next steps and closing comments.

Dated: December 12, 2018.

Kevin Kampschroer,

Federal Director, Office of Federal High-Performance Buildings, General Services Administration.

[FR Doc. 2018–27437 Filed 12–18–18; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: U.S. Repatriation Program Forms

OMB No.: 0970–0474

Description: The United States (U.S.) Repatriation Program was established by Title XI, Section 1113 of the Social Security Act (Assistance for U.S. Citizens Returned from Foreign Countries) to provide temporary assistance to U.S. citizens and their dependents who have been identified by the Department of State (DOS) as having returned, or been brought from a foreign country to the U.S. because of destitution, illness, war, threat of war, or a similar crisis, and are without available resources immediately accessible to meet their needs. The Secretary of the Department of Health and Human Services (HHS) was provided with the authority to administer this Program. On or about 1994, this authority was delegated by the HHS Secretary to the Administration for Children and Families (ACF) and later re-delegated by ACF to the Office of Refugee Resettlement. The Repatriation Program works with States, Federal agencies, and non-governmental organizations to provide eligible individuals with temporary assistance for up to 90-days. This assistance is in the form of a loan and must be repaid to the Federal Government.

The Program was later expanded in response to legislation enacted by Congress to address the particular needs of persons with mental illness (24 U.S.C. Sections 321 through 329). Further refinements occurred in response to Executive Order (E.O.) 11490 (as amended) where HHS was given the responsibility to ''develop plans and procedures for assistance at ports of entry to U.S. personnel evacuated from overseas areas, their onward movement to final destination, and follow-up assistance after arrival at final destination.'' In addition, under E.O. 12656 (53 CFR 47491), ''Assignment of emergency preparedness responsibilities,'' HHS was given the lead responsibility to develop plans and procedures in order to provide assistance to U.S. citizens and others evacuated from overseas areas.

In order to effectively and efficiently manage these legislative authorities, the Program has been divided into two major activities, Emergencies and Non-Emergencies Repatriation Activities. Operationally, these two Program activities involve different kinds of preparation, resources, and implementation. However, the core Program statute, regulations, policies and administrative procedures for these two Programs are essentially the same. The ongoing routine arrivals of individual repatriates and the repatriation of individuals with mental illness constitute the Program Non-emergency activities. Emergency Activities are characterized by contingency events such as civil unrest, war, threat of war or similar crisis, among other incidents. Depending on the type of event, number of evacuees and resources available, ACF will provide assistance utilizing two scalable mechanisms, emergency repatriations or group repatriations. Emergency repatriations assume the evacuation of 500 or more individuals, while group repatriations assume the evacuation of 50–500 individuals.

The Program provides services through agreements with the States, U.S. Territories, Federal agencies, and Non-governmental agencies. The list of Repatriation Forms is as follows:

1. *The HHS Repatriation Program: Emergency and Group Processing Form:*

Under 45 CFR 211 and 212, HHS is to make findings setting forth the pertinent facts and conclusions according to established standards to determine whether an individual is an eligible person. This form allows authorized staff to gather necessary information to determine eligibility and needed services. This form is to be utilized during emergency repatriation activities. Individuals interested in receiving Repatriation assistance will complete appropriate portions of this form. State personnel assisting with initial intake activities will use this form as a guide to perform a preliminary eligibility assessment. An authorized federal staff from the ACF will make final eligibility determinations.

2. *The HHS Repatriation Program: Privacy and Repayment Agreement Form:* Under 45 CFR 211 and 212, individuals who receive Program assistance are required to repay the federal government for the cost associated to the services received. This form authorizes HHS to release personal identifiable information to partners for the purpose of providing services to eligible repatriates. In addition, through this form, eligible repatriates agree to accept services under the terms and conditions of the Program. Specifically, eligible repatriates commit to repay the federal government for all temporary services received through the Program. This form is to be completed by eligible repatriates or authorized legal custodians. Exemption applies to unaccompanied minors and individuals eligible under 45 CFR 211, if no legal custodian is identified.

3. The HHS Repatriation Program: Refusal of Temporary Assistance Form: For individuals who are eligible to receive repatriation assistance but opt to relinquish services, this form is utilized to confirm and record repatriate's decision to refuse receiving Program assistance. This form is to be completed by eligible repatriates or authorized legal custodian. Exemption applies to unaccompanied minors and individuals eligible under 45 CFR 211, if no legal custodian is identified.

4. *The HHS Repatriation Program: Emergency and Group Repatriation Financial Form:* Under Section 1113 of the Social Security Act, HHS is authorized to provide temporary assistance directly or through utilization of the services and facilities of appropriate public or private agencies and organizations, in accordance with agreements providing for payment, as may be determined by HHS. This form is to be utilized and completed by agencies that have entered into an agreement with ORR to request reimbursement of reasonable and allowable costs, both administrative and actual temporary services.

5. *The HHS Repatriation Program: Non-emergency Monthly Financial Statement Form:* Under Section 1113 of the Social Security Act, HHS is authorized to provide temporary assistance directly or through arrangements, in accordance with agreements providing for payment, as may be determined by HHS. This form is to be utilized and completed by the States and other authorized ORR agencies to request reimbursement of reasonable and allowable costs, both administrative and actual temporary services, associated to the direct provision of temporary assistance to eligible repatriates.

6. *The HHS Repatriation Program: Repatriation Loan Waiver and Deferral Request Form:* In accordance with 45 CFR 211 & 212 individuals who have received Repatriation assistance may be eligible to receive a waiver or deferral of their repatriation loan. This form is to be completed by eligible repatriates, authorized legal custodian, or authorized agency/individual. Exemption applies to unaccompanied minors and individuals eligible under 45 CFR 211, if no legal custodian is identified.

7. *The HHS Repatriation Program: Temporary Assistance Extension Request Form:* Under 45 CFR 211 & 212 temporary assistance may be furnished beyond the 90 days eligibility period if the repatriate meets the qualifications established under Program regulations. This form is to be completed by the eligible repatriate, authorized legal custodian, or the authorized agency/individual. This form should be submitted to ORR or its designated grantee generally 14 -day prior to the expiration of the 90 days eligibility period.

8. *The HHS Repatriation Program: State Request for Federal Support Form:* During emergency repatriation activities, States activated by ORR are to use this form to request support and/or assistance from HHS, including but not limited to required pre-approval of expenditures, augmentation of State personnel, funding, reimbursement, among other things.

Respondents: Designated state, federal, and/or non-governmental agencies/individuals and eligible repatriates. Responders are authorized by 42 U.S.C. 1313 and 24 U.S.C. 321–329; Executive Order 12656 (as amended by E.O. 13074, February 9, 1998; E.O. 13228, October 8, 2001; E.O. 13286, February 28, 2003); and regulations found under 45 CFR 211 & 212.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
The HHS Repatriation Program: Emergency and Group Processing Form.	25,000 or more depending on the Emergency.	1	0.30	7,500 or more.
The HHS Repatriation Program: Privacy and Repayment Agreement Form.	1,000 will increase during emergencies.	1	0.05	50 or more.
The HHS Repatriation Program: Refusal of Temporary Assistance Form.	15 or more	1	0.05	0.75 or more.
The HHS Repatriation Program: Emergency and Group Repatriation Financial Form.	15 or more	1	0.30	4.5 or more.
The HHS Repatriation Program: Non-emergency Monthly Financial Statement Form.	52 or more	12	0.30	187 or more.
The HHS Repatriation Program: Repatriation Loan Waiver and Referral Request Form.	800 or more	1	0.30	240 or more.
The HHS Repatriation Program: State Request for Federal Support.	20 or more	1	0.30	6 or more.
The HHS Repatriation Program: Temporary Assistance Extension Request Form.	50 or more	1 or more	0.30	15 or more.

Estimated Total Annual Burden Hours: 8,003.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW, Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2018–27398 Filed 12–18–18; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5966]

Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the final guidance entitled ''Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff.'' This guidance document describes policies that FDA intends to use to implement the new Breakthrough Devices Program, established by the 21st Century Cures Act (Cures Act). The Breakthrough Devices Program supersedes and combines elements from FDA's Expedited Access Pathway (EAP), which was intended to facilitate the development and expedite review of certain devices that demonstrate the potential to address unmet medical needs, as well as the Priority Review Program, which implemented statutory criteria for granting priority review to premarket approval applications (PMAs) and applied those criteria to other types of premarket submissions for medical devices. This guidance is intended to clarify certain principles and features of the new program, the designation criteria for Breakthrough Devices, the designation request review process, the process for withdrawing from the program, as well as the recommended information device manufacturers should provide in their designation request for entrance into the program.

DATES: The announcement of the guidance is published in the **Federal Register** on December 19, 2018.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–5966 for ''Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for

information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Maureen Dreher, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm.1545, Silver Spring, MD 20993–0002, 301–796–2505.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is issuing this guidance to describe policies that FDA intends to use to implement section 515B of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360e–3, as created by section 3051 of the Cures Act (Pub. L. 114–255) and amended by section 901 of the FDA Reauthorization Act of 2017 (Pub. L. 115–52) (the ''Breakthrough Devices Program''). The Breakthrough Devices Program is a voluntary program for certain medical devices and device-led combination products that provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating diseases or conditions. This program is intended to help patients have more timely access to these medical devices by expediting their development, assessment, and review, while preserving the statutory standards for premarket approval, premarket notification (510(k)) clearance, and De Novo marketing authorization, consistent with the Agency's mission to protect and promote public health.

As part of the Breakthrough Devices Program, FDA intends to provide interactive and timely communication with the sponsor during development and throughout the review process for devices designated as Breakthrough Devices under section 515B(d)(1) of the FD&C Act and prioritize the review of associated Q-submissions, investigational device exemption (IDE) applications, PMAs, certain PMA supplements, De Novo requests, and/or 510(k)s. In addition, for Breakthrough Devices subject to PMA, FDA may consider the amount and nature of data that may be collected in the postmarket setting, rather than premarket, and the extent of uncertainty that may be appropriate in the benefit-risk profile at the time of approval. Getting the right balance between premarket and postmarket data collection—specifically, where appropriate, a greater reliance on postmarket collection—can reduce the extent of premarket data submission. Collectively, these and the other principles of the program described in this guidance are intended to support a least-burdensome approach for expediting patient access to Breakthrough Devices.

The Breakthrough Devices Program supersedes the EAP, which launched in 2015. The Breakthrough Devices Program contains features of the EAP as well as the Innovation Pathway (first piloted in 2011; pilot is now discontinued), both of which were intended to facilitate the development and expedite the review of breakthrough technologies.

The Breakthrough Devices Program also supersedes the Priority Review Program, which implemented statutory criteria for granting priority review to PMA submissions for medical devices, applied those criteria to other types of premarket submissions for medical devices, and included standard procedures to achieve an efficient priority review process.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** of October 25, 2017. FDA revised the guidance as appropriate in response to the comments. This document supersedes the guidance document ''Expedited Access for Premarket Approval and De Novo Medical Devices Intended for Unmet Medical Need for Life Threatening or Irreversibly Debilitating Diseases or Conditions,'' issued on April 13, 2015.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on the ''Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff.'' 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. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Breakthrough Devices Program; Guidance for Industry and Food and Drug Administration Staff'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1833 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part; guidance; or FDA form	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
812	Investigational Device Exemption	0910–0078
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''.	De Novo classification process	0910–0844
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-submissions	0910–0756

21 CFR part; guidance; or FDA form	Topic	OMB control No.
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073

Dated: December 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–27433 Filed 12–18–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0955–new]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 18, 2019.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When submitting comments or requesting information, please include the document identifier 0955-New-30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: National Survey of Health Information Exchange Organizations (HIO)

Abstract: Electronic health information exchange (HIE) is one of three goals specified by Congress in the 2009 Health Information Technology for Economic and Clinical Health (HITECH) Act to ensure that the $30 billion federal investment in electronic health records (EHRs) results in higher-quality, lower-cost care. The ability of providers to share data electronically is a core goal of HITECH and a central feature of a high-performing healthcare delivery system. Greater EHR adoption without data flowing between systems substantially limits quality and efficiency gains as well as reduces the value of the health IT investment.

There is growing consensus that achieving broad-based HIE is one of the most difficult components of HITECH. This is because successful HIE at scale involves coordination between many stakeholders, including but not limited to federal and state policymakers, healthcare delivery organizations, EHR and HIE vendors, and specific organizations supporting HIE, such as health information organizations (HIOs) and health information service providers (HISPs). Further, the issues requiring coordination are diverse, spanning technical standards, consent regulations, business models and incentives, workflow integration, trust and governance, and information privacy and security.

Three HIE issues have proven particularly challenging: Implementation of and use of standards, information blocking, and sustainability. The ultimate goal of our project is to administer a survey instrument to HIOs in order to generate the most current national statistics and associated actionable insights on electronic health information exchange to inform policy efforts.

Need and Proposed Use of the Information: Collecting timely, national data from HIOs in the three domains of standards, information blocking, and sustainability is valuable to inform both HIE-specific policy efforts as well as broader health system reform efforts.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
HIO Survey	200	1	20/60	67
Total				67

Terry Clark,

Assistant Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2018–27469 Filed 12–18–18; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–new]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 18, 2019.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When submitting comments or requesting information, please include the document identifier 0990–New–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Cohort 3 Teen Pregnancy Prevention Performance Measure Data.

Type of Collection: New, 0990–NEW—Office of Adolescent Health.

Abstract: The Office of Adolescent Health Requests a new clearance for the collection of performance measures from the cohort 3 Teen Pregnancy Prevention (TPP) grant recipients, awarded in Fall 2018. Phase 1 cohort 3 TPP grants shall be issued in for an anticipated 2 year period of performance. A subset of successful Phase 1 grantees will be selected for Phase 2 grants. A 3 year clearance is requested. FY2018 TPP phase 1 grant recipients will be expected to report data twice each year.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
TPP Grantee (Grantee Form)	19	2	7	266
TPP Grantee (Participant Form)	19	2	8	304
TPP Program Participant	14,250	2	10/60	4,750
Total	14,269	2	15	5,320

Terry Clark,

Office of the Secretary, Asst Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2018–27470 Filed 12–18–18; 8:45 am]

BILLING CODE 4168–11–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; Minority Health and Health Disparities Research Training Program.

Date: February 7–8, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Richard C. Palmer, DRPH, Health Scientist Administrator, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20906, (301) 451–2432, *richard.palmer@nih.gov.*

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Mentored Career Development Awards (Ks).

Date: March 4, 2019.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Gateway Building, 533K, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Xinli Nan, M.D., Ph.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, National Institutes of Health Scientific Review Branch, OERA, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–7784, *Xinli.Nan@nih.gov.*

Any interest 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.

Dated: December 13, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27375 Filed 12–18–18; 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, notice is hereby given of a meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Center for Translational ImmunoEngineering (2019/05).

Date: March 6, 2019.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: John K. Hayes, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 959, Democracy Two, Bethesda, MD 20892, (301) 451–3398, *hayesj@mail.nih.gov*.

Dated: December 13, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27381 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; Amelogenesis Model-Special Emphasis Panel.

Date: February 28, 2019.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Yun Mei, MD, Scientific Review Officer, Scientific Review Branch, NIDCR, NIH, 6701 Democracy Boulevard, Suite #670, Bethesda, MD 20892, 301–827–4639, *yun.mei@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 13, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27377 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

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 Dental and Craniofacial Research Council.

Date: January 23, 2019.

Open: 8:30 a.m. to 12:00 p.m.

Agenda: Report to the Director, NIDCR.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Closed: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Alicia J. Dombroski, Ph.D., Director, Division of Extramural Activities, Natl Inst of Dental and Craniofacial Research, National Institutes of Health, Bethesda, MD 20892, 301–594–4805, *adombroski@nidcr.nih.gov*.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcr.nih.gov/about,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 13, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27378 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Regents of the National Library of Medicine.

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 materials, 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: Board of Regents of the National Library of Medicine Extramural Programs Subcommittee.

Date: February 12, 2019.

Closed: 7:45 a.m. to 8:45 a.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Christine Ireland, Committee Management Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892, 301–594–4929, *irelanc@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine.

Date: February 12–13, 2019.

Open: February 12, 2019, 9:00 a.m. to 4:00 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: February 12, 2019, 4:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: February 13, 2019, 9:00 a.m. to 12:00 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Christine Ireland, Committee Management Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892, 301–594–4929, *irelanc@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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nlm.nih.gov/od/bor/bor.html,* where an agenda and any additional information for the meeting will be posted when available. This meeting will be broadcast to the public, and available for at viewing at *http://videocast.nih.gov* on February 12–13, 2019.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: December 13, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27387 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD); Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. A portion of this 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 for the review and discussion of grant applications. 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.

Name of Committee: National Advisory Child Health and Human Development Council.

Date: January 24–25, 2019.

Open: January 24, 2019, 1:00 p.m. to 4:30 p.m. January 25, 2019, 9:00 a.m. to 12:30 p.m.

Agenda: The agenda will include opening remarks, administrative matters, Director's Report, Division of Extramural Research Report and, other business of the Council.

Place: National Institutes of Health, 6710B Bethesda Drive, Rm. 1425, Bethesda, MD 20892.

Closed: January 25, 2019, 1:30 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710B Bethesda Drive, Rm. 1425, Bethesda, MD 20892.

Contact Person: Della Hann, Ph.D., Associate Director for Extramural Research, Director, Division of Extramural Research, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710 Rockledge Blvd., MSC 7002, Bethesda, MD 20892, 301–496–8535.

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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

In order to facilitate public attendance at the open session of Council in the main meeting room, Conference Room 1425, please contact Ms. Lisa Kaeser, Office of Legislation and Public Policy, NICHD, at 301–496–0536 to make your reservation, additional seating will be available in the meeting overflow rooms, Conference Rooms 1417 and 1411. Individuals will also be able to view the meeting via NIH Videocast. Select the following link for Videocast access instructions: *http://www.nichd.nih.gov/about/advisory/nachhd/Pages/virtual-meeting.aspx.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment program, National Institutes of Health, HHS).

Dated: December 13, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27380 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: NIDCR Special Grants Review Committee; NIDCR Special Grant Review (DSR).

Date: February 21–22, 2019.

Time: 8:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, Suite 6711, Democracy Blvd., Bethesda, MD 20817.

Contact Person: Latarsha J. Carithers, Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, Bethesda, MD 20892, 301–594–4859, *latarsha.carithers@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 13, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27376 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; RDCRN Data Management and Coordinating Center.

Date: February 27, 2019.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, Room 1087, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jing Chen, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1080, Bethesda, MD 20892–4874 *chenjing@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 13, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27383 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Regenerative Medicine.

Date: January 7, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7296, Bethesda, MD 20892.

Contact Person: Michael P. Reilly, Ph.D., Scientific Review Officer, Office of Scientific Review, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892, 301–827–7975, *reillymp@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 13, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27382 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Center for Advancing Translational Sciences.

The meetings will be open to the public as indicated below, viewing virtually by Webex.

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.

Individuals can register to view and access the meeting by the link below. *https://nih.webex.com/nih/onstage/g.php?MTID=e1d7c29f5fecb9ec0191c4bcbb71062cc.*

1. Go to ''Event Status'' on the left-hand side of page, then click ''Register''. On the registration form, enter your information and then click ''Submit'' to complete the required registration.

2. You will receive a personalized email with the live event link.

Name of Committee: Cures Acceleration Network Review Board.

Date: January 10, 2019.

Time: 11:00 a.m. to 2:30 p.m.

Agenda: Report from the Institute Director.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna L. Ramsey-Ewing, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 1072, Bethesda, MD 20892, 301–435–0809, *anna.ramseyewing@nih.gov.*

Name of Committee: National Center for Advancing Translational Sciences Advisory Council.

Date: January 10, 2019.

Open: 11:00 a.m. to 2:30 p.m.

Agenda: Report from the Institute Director and other staff.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Closed: 3:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna L. Ramsey-Ewing, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 1072, Bethesda, MD 20892, 301–435–0809, *anna.ramseyewing@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research

and Research Training, National Institutes of Health, HHS)

Dated: December 13, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27384 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, 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 Child Health and Human Development Special Emphasis Panel; Pediatric Summer Research Education Experience Programs (R25).

Date: January 3, 2019.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710 B Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Rita Anand, Ph.D., Scientific Review Officer Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6710B Rockledge Dr. Room 2137, Bethesda, MD 20834, 301–496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: December 12, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27379 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 Minority Health and Health Disparities.

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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 4–5, 2019.

Closed: February 4, 2019, 1:00 p.m. to adjournment.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Conference Rooms C, D, and E, Bethesda, MD 20892.

Open: February 5, 2019, 8:00 a.m. to 1:00 p.m.

Agenda: The agenda will include opening remarks, administrative matters, Director's report, NIH Health Disparities update, and other business of the Council.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Conference Rooms C, D, and E, Bethesda, MD 20892.

Contact Person: Dr. Joyce A. Hunter, Deputy Director, NIMHD, National Institutes of Health, National Institute on Minority Health and Heath Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 402–1366, *hunterj@nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their 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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: December 13, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–27374 Filed 12–18–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2018–0026]

Privacy Act of 1974; System of Records

AGENCY: Department of Homeland Security.

ACTION: Notice of a Modified System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security (DHS) proposes to modify a current DHS system of records titled, ''DHS/ALL–008 Accounts Receivable System of Records.'' This system of records allows DHS to collect and maintain records on accounts receivable, which enables DHS to have an accurate accounting of money it is owed. DHS is updating this system of records notice (SORN) to clarify the authorities for collection; and expand the record source categories, categories of individuals, and categories of records. DHS is also modifying routine use E and

adding routine use F to comply with the Office of Management and Budget (OMB) Memorandum M–17–12. This notice also updates the system location and includes non-substantive changes to simplify the formatting and text of the previously published notice. This modified system will be included in DHS's inventory of record systems.

DATES: Submit comments on or before January 18, 2019. This modified system will be effective upon publication. New or modified routine uses will be effective January 18, 2019.

ADDRESSES: You may submit comments, identified by docket number DHS–2018–0026 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Philip S. Kaplan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2018–0026. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions and for privacy issues, please contact: Philip S. Kaplan, *Privacy@hq.dhs.gov,* (202) 343–1717, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

DHS is modifying and reissuing the DHS/ALL–008 Accounts Receivable SORN. This system consists of both electronic and paper records collected and used by DHS and its Components and offices to maintain accounts receivable information. This information assists DHS in meeting its obligation to manage Departmental funds and ensures that the Department has an accurate accounting of all the money that it is owed to the Department.

DHS is updating this SORN to clarify its authorities to collect accounts receivable information. DHS is also updating this SORN to reflect changes to the data elements collected by Components when assessing debts owed and the ability of individuals to repay those debts. DHS is updating the category of individuals to include household members of debtors, which allows DHS to better assess the ability of debtors to repay money owed by taking into account financial contributions from spouses and children over 18 years of age. DHS is updating the category of records to include debtor date of birth, debtor employer information, debtor spouse information, and name and age of household dependents. DHS is also including in the categories of records and record source categories information accessed from the Department of Treasury's ''Do Not Pay'' program. The ''Do Not Pay'' program determines if a previous payment by DHS was improper, and thus in need of recoupment, by checking death records, federal debt records, and lists of sanctioned individuals. The DHS/ALL–008 Accounts Receivable system location was also updated to reflect the fact that financial management activities for DHS are now processed solely at DHS facilities. This SORN also modifies routine use ''E'' and adds routine use ''F'' to be in conformity with OMB Memorandum M–17–12. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

Consistent with DHS's information sharing mission, information stored in DHS/ALL–008 Accounts Receivable may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS may share information with appropriate Federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this system of records notice. Further, for awareness, DHS may disclose, pursuant to 5 U.S.C. 552a(b)(12), to consumer reporting agencies, in accordance with 15 U.S.C. 1681, *et seq.* or the Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3701, *et seq.*), to aid in the collection of outstanding debts owed to the Federal Government. Disclosure of records is limited to the individual's name, address, tax identification number or Social Security number, and other information necessary to establish the individual's identity; the amount, status, and history of the claim; and the agency or program under which the claim arose. The disclosure will be made only after the procedural requirements of 31 U.S.C. 3711(e) have been followed.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

Below is the description of the DHS/ALL–008 Accounts Receivable System of Records. In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to OMB and to Congress.

SYSTEM NAME AND NUMBER

Department of Homeland Security (DHS)/ALL–008 Accounts Receivable.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in Component offices of DHS, in both Washington, DC and field offices.

SYSTEM MANAGER(S):

The Chief Financial Officer, Financial Management Division, *ocfo-fmd@hq.dhs.gov,* Department of Homeland Security, Washington, DC 20528.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 5701 *et seq.,* Travel, Transportation, and Subsistence; 19 U.S.C. 1451; 26 U.S.C. 6401(d); 31 U.S.C. 7701(c); Chief Financial Officers Act of 1990, Public Law 101–576; Federal Debt Collection Procedures Act of 1990, Public Law 101–647; Debt Collection Improvement Act of 1996, Public Law 104–134; Digital Accountability and Transparency Act (DATA Act) of 2014, Public Law 113–101, sec. 5; and 6 CFR part 11, subpart A—Debt Collection.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to collect and maintain records of debts owed to DHS.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual or organization that is indebted to DHS. This may include: (1) Individuals; (2) household members; (3) spouses; and (4) employers.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Individual's name;
- Date of birth;
- Tax identification number, which may be a Social Security number in certain instances;
- Addresses;
- Phone numbers;
- Email addresses;
- Name of employer;
- Waiver of Debt Letter of Appeal;
- Receipts;
- Notices of debts;
- Invoices;
- Record of payments, including refunds and overpayments;
- Records of previous improper payments by DHS;
- Records relevant to determinations of an individual's or organization's eligibility to receive payments from the Federal Government, including death records, Federal debt records, and status of individuals on Federal sanctions lists;
- Number and amount of unpaid or overdue bills;
- Record of satisfaction of debt or referral for further action;
- Correspondence and documentation with debtors and creditors;
- Electronic financial institution data;
- Household Information:
  - Spouse information:
    - Date of birth;
    - Basic contact information;
    - Tax identification number, which may be a Social Security number in certain instances; and
    - Name of employer.
  - Dependent information:
    - Name;
    - Age;
    - Relationship.

RECORD SOURCE CATEGORIES:

Records are obtained from DHS, its Components and offices, and individuals submitting supporting documentation for reimbursement. Records covered by other systems of records include the Department of the Treasury/Bureau of the Fiscal Service .023—Do Not Pay Payment Verification Records, 78 FR 73923 (Dec. 9, 2013).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including Offices of the U.S. Attorneys, or other Federal agency conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any Component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity, only when DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another Federal agency or Federal entity, when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

G. To an appropriate Federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

I. To a Federal, state, or local agency so that the agency may adjudicate an individual's eligibility for a benefit.

J. To the DOJ or other Federal agency for further collection action on any delinquent debt when circumstances warrant.

K. To a debt collection agency for the purposes of debt collection.

L. To approved Federal, state, and local government agencies for any legally mandated purpose in accordance with their authorizing statute or law and where an approved Memorandum of Agreement or Computer Matching Agreement is in place between DHS and the entity.

M. To provide information to unions recognized as exclusive bargaining representatives under the Civil Service Reform Act of 1978, 5 U.S.C. 7111 and 7114.

N. To the Merit Systems Protection Board, arbitrators, the Federal Labor Relations Authority, Equal Employment Opportunity Commission, and other parties responsible for the administration of the Federal Labor-Management Relations Program for the purpose of processing any corrective actions, grievances, or conducting administrative hearings or appeals, or if needed in the performance of other similar authorized duties.

O. To Federal agencies that provide financial management services for DHS Components under a cross-servicing agreement for purposes such as budgeting, purchasing, procurement, reimbursement, reporting, and collection functions.

P. To the Government Accountability Office, DOJ, or Offices of the United States Attorney, copies of the Debt Collection Officer's file regarding the debt and actions taken to attempt to collect monies owed.

Q. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

DHS stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by an individual's name, tax identification number/Social Security number, employee identification number, or other personal identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

DHS destroys records six years after final payment or cancellation, or longer if required for a business use, in accordance with National Archives and Records Administration (NARA) General Records Schedule 1.1, Financial Management and Reporting Records, item 010, and DAA–GRS–2013–0003–0001.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DHS safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

Individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Chief Privacy Officer and Headquarters or Component's Freedom of Information Act (FOIA) Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''Contact Information.'' If an individual believes more than one Component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, Washington, DC 20528–0655. Even if neither the Privacy Act nor the Judicial Redress Act provide a right of access, certain records about you may be available under the Freedom of Information Act.

When an individual is seeking records about himself or herself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify his or her identity, meaning that the individual must provide his or her full name, current address, and date and place of birth. The individual must sign the request, and the individual's signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, an individual may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, the individual should:

- Explain why he or she believes the Department would have information on him or her;
- Identify which Component(s) of the Department the individual believes may have the information about him or her;
- Specify when the individual believes the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS Component agency may have responsive records.

If an individual's request is seeking records pertaining to another living individual, the person seeking the records must include a statement from the subject individual certifying his or her agreement for the requestor to access his or her records.

Without the above information, the Component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act or covered JRA records, see ''Record Access Procedures'' above.

NOTIFICATION PROCEDURES:

See ''Record Access Procedures.''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

80 FR 58289 (September 28, 2015); 73 FR 61885 (October 17, 2008).

Philip S. Kaplan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2018–27390 Filed 12–18–18; 8:45 am]

BILLING CODE 9110–9B–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1084]

Certain Insulated Beverage Containers, Components, Labels, and Packaging Material Thereof; Notice of Issuance of a Limited Exclusion Order Against Two Respondents Found in Default; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order (''LEO'') against certain insulated beverage containers, components thereof, labels, and packaging material thereof, that are manufactured or imported by defaulted respondents. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5468. 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 *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://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 November 24, 2017, based on a complaint and supplement, filed on behalf of Yeti Coolers, LLC of Austin, Texas (''Yeti''). 82 FR 55860–61 (Nov. 24, 2017). The amended complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain insulated beverage containers, components, labels, and packaging materials thereof by reason of infringement of U.S. Trademark Registration Nos. 5,233,441 and 4,883,074; U.S. Copyright Registration Nos. VA 1–974–722, VA 1–974–732, VA 1–974–735; and U.S. Design Patent Nos. D752,397, D780,533, D781,146, and D784,775. The complaint further alleges that an industry in the United States exists as required by section 337. The notice of investigation named thirteen respondents, including Huizhou Dashu Trading Co., Ltd. of Huizou City, China (''Huizhou Dashu'') and Huagong Trading Co., Ltd. of Wangshizhuang, China (''Huagong''). The Office of Unfair Import Investigations (''OUII'') was also named as a party.

The Commission terminated eleven of those respondents based on settlement agreements and partial withdrawals of the complaint. *See* Order No. 11 (Mar. 8, 2018), *not reviewed* Notice (Mar. 26, 2018); Order Nos. 19, 20, and 21 (Apr. 17, 2018), *not reviewed* Notice (May 11, 2018); Order No. 27 (Jun. 8, 2018), *not reviewed* Notice (Jun. 29, 2018); Order No. 29 (Sept. 27, 2018), *not reviewed* Notice (Oct. 22, 2018).

The Commission found the remaining two respondents, Huizhou Dashu and Huagong, in default for failing to respond to the complaint and notice of investigation. Order No. 29 (Sept. 27, 2018), *not reviewed* Notice (Oct. 22, 2018). The Commission also sought briefing on remedy, the public interest, and bonding, and received main and reply submissions from Yeti and OUII. In response, both Yeti and OUII requested that the Commission issue an LEO against Huizhou Dashu and Huagong. The Commission received no responses from the public.

The Commission has determined that the appropriate form of relief in this investigation is an LEO prohibiting the unlicensed entry of insulated beverage containers, components thereof, labels, and packaging material thereof that infringe one or more of U.S. Trademark Registration Nos. 5,233,441 and 4,883,074; U.S. Copyright Registration Nos. VA 1–974–722, VA 1–974–732, VA 1–974–735; and U.S. Design Patent Nos. D752,397 and D780,533, and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Huizhou Dashu and Huagong. The Commission has further determined that the LEO should also prohibit the unlicensed entry of insulated beverage containers, components thereof, labels, and packaging material thereof that infringe one or more of U.S. Design Patent Nos. D781,146 and D784,775, and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Huagong. The Commission has additionally determined that the public interest factors enumerated in Section 337(g)(l) (19 U.S.C. 1337(g)(l)) do not preclude issuance of the LEO. The Commission has determined that the bond for importation during the period of Presidential review shall be in the amount of one hundred (100) percent of the entered value of the imported subject articles of Respondent. The Commission's order was delivered to the President and the United States Trade Representative on the day of its issuance.

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: December 13, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–27413 Filed 12–18–18; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1101]

Certain Fuel Pump Assemblies Having Vapor Separators and Components Thereof; Notice of Issuance of a Limited Exclusion Order Against a Respondent Found in Default; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order against certain fuel-pump assemblies with vapor separators and components thereof of respondent Wenzhou Jushang (JS) Performance Parts Co. Ltd. of Wenzhou, China (''JSP,'' or ''Respondent''). The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5468. 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 *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://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 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), on March 2, 2018, based on a complaint filed by Carter Fuel Systems, LLC of Logansport, IN (''Complainant''). 83 FR 9027 (Mar. 2, 2018). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent No. 6,257,208 (''the '208 patent''). The notice of investigation named JSP as a sole respondent. *Id.* The Office of Unfair Import Investigations is not a party in this investigation.

On August 20, 2018, the Commission determined not to review an initial

determination (Order No. 7) that found Respondent to be in default under Commission Rule 210.16 (19 CFR 210.16), and issued a **Federal Register** Notice (''Commission Notice'') to that effect. 83 FR 42937–38 (Aug. 24, 2018). The Commission also requested briefing from the parties and the public on the issues of remedy, the public interest, and bonding. *Id.* at 42938. Complainant filed a timely written submission pursuant to the Commission Notice requesting a limited exclusion order (''LEO'') against Respondent. No other submissions were filed pursuant to the Commission Notice.

The Commission has determined that the appropriate form of relief in this investigation is an LEO prohibiting the unlicensed entry of fuel-pump assemblies with vapor separators and components thereof that infringe one or more of claims 1–5 and 7–18 of the '208 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondent. The Commission has further determined that the public interest factors enumerated in Section 337(g)(l) (19 U.S.C. 1337(g)(l)) do not preclude issuance of the LEO. The Commission has determined that the bond for importation during the period of Presidential review shall be in the amount of one hundred (100) percent of the entered value of the imported subject articles of Respondent. The Commission's order was delivered to the President and the United States Trade Representative on the day of its issuance.

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: December 13, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–27414 Filed 12–18–18; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Joint Board for the Enrollment of Actuaries gives notice of a teleconference meeting of the Advisory Committee on Actuarial Examinations (a portion of which will be open to the public) on January 7–8, 2019.

DATES: Monday, January 7, 2019, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 8, 2019, from 8:30 a.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Elizabeth Van Osten, Designated Federal Officer, Advisory Committee on Actuarial Examinations, 202–317–3648.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will hold a teleconference meeting on Monday, January 7, 2019, from 9:00 a.m. to 5:00 p.m. (EST), and Tuesday, January 8, 2019, from 8:30 a.m. to 5:00 p.m. (EST).

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2018 Pension (EA–2F) Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2019 Basic (EA–1) Examination and the May 2019 Pension (EA–2L) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the November 2018 Pension (EA–2F) Examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. (EST) on January 7, 2019, and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. (EST). Time permitting, after the close of this discussion by Advisory Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should contact the Designated Federal Officer at *nhqjbea@irs.gov* and include the written text or outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. All persons planning to attend the public session should contact the Designated Federal Officer at *nhqjbea@irs.gov* to obtain teleconference access information. Notifications of intent to make an oral statement or call in to the public session must be sent electronically to the Designated Federal Officer by no later than January 3, 2019. Any interested person also may file a written statement for consideration by the Joint Board and the Advisory Committee by sending it to: Internal Revenue Service; Joint Board for the Enrollment of Actuaries, Attn: Ms. Elizabeth Van Osten; SE:RPO, Room 3422; 1111 Constitution Avenue NW; Washington, DC 20224.

Dated: December 12, 2018.

Thomas V. Curtin, Jr.,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2018–27397 Filed 12–18–18; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Open Group, L.L.C.

Notice is hereby given that, on December 10, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The Open Group, L.L.C. (''TOG'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 4IT GROUP, Wrocław, POLAND; Amphenol SV Microwave, West Palm Beach, FL; Autopro Automation Consultants Ltd., Grande Prairie, CANADA; Bell Helicopter Textron, Inc., Fort Worth, TX; CGI Group, Inc., Montreal, CANADA; Coala Ltd., Helsinki, FINLAND; Citalid Cybersécurité, Versailles, FRANCE; Conf. Inter Das Coop Ligadas ao SICREDI, Port Alegre, BRAZIL; CXO Dynamix Business Solutions (PTY) Ltd, Pretoria, SOUTH AFRICA; Devon Energy Corporation, Oklahoma City, OK; Foresight Resilience Strategies, LLC, Bethesda, MD; FSOPN Science and Technology, Co., Ltd., Beijing, PEOPLE'S REPUBLIC OF CHINA;

Goodea Consulting s.r.o., Prague, CZECH REPUBLIC; Helium Consulting, Pune, INDIA; Grupo Magnus SAS, Bogata, COLUMBIA; Jovian Software Consulting LLC, Ada, MI; Momentum Management Consulting, Camp Hill, PA; Mundo Cognito Ltd., Penn, UNITED KINGDOM; Nova SMAR S/A, Sertãozinho, BRAZIL; Pentek, Inc., Upper Saddle River, NJ; Projexion SARL, Villeneuve d'Ascq, FRANCE; Samtec, Inc., New Albany, IN; Shell Global Solutions Int. b.v., Rijswijk, THE NETHERLANDS; SR Technologies, Inc., Davie, FL; TE Connectivity Corporation, Middletown, PA; and University of Southern California U.S.C. Energy Institute, Los Angeles, CA, have been added as parties to this venture.

Also, Cobham Aerospace Communications, Prescott, AZ; EDF Group, Paris, FRANCE; Enea Software & Services, Inc., Phoenix, AZ; Management Edge Limited, Abuja, NIGERIA; Manipal Global Education Services Private Limited, Bengaluru, INDIA; MooD International Software, York, UNITED KINGDOM; Munich Re, Munich, GERMANY; Pan Asia Training PTE Ltd, Singapore, SINGAPORE; SIGMAXYZ, Inc., Tokyo, JAPAN; Smart 360 BIZ, Cambridge, MA; Steria Limited, Hemel Hempstead, UNITED KINGDOM; The Tingle Tree Group, Bentleigh, AUSTRALIA; Thomas Production Company L.L.C., Potomac Falls, VA; Unique Factors Corporation, Rockland, CANADA; and Waterfall Security Solutions LTD, Rosh Ha'ayin, ISRAEL, have withdrawn as parties to this venture.

In addition, CTPartners has changed its name to Asseco Data Systems, Warszawa, POLAND; and IAB bvba to Envizion cvba, Mechelen, BELGIUM.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and TOG intends to file additional written notifications disclosing all changes in membership.

On April 21, 1997, TOG filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 13, 1997 (62 FR 32371).

The last notification was filed with the Department on August 31, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 17, 2018 (83 FR 46971).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–27460 Filed 12–18–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Border Security Technology Consortium

Notice is hereby given that, on November 27, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Border Security Technology Consortium (''BSTC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Advanced Detection Technology, LLC, Mooresville, NC; Analogic Corporation, Peabody, MA; Anduril Industries, Inc., Costa Mesa, CA; Deloitte Services LP, Arlington, VA; DroneShield LLC, Warrenton, VA; Intelligent Automation, Inc., Rockville, MD; Irvine Sensors Corporation, Costa Mesa, CA; Manufacturing Techniques, Inc. (MTEQ), Lorton, VA; Mason Livesay Scientific dba IB3 Global Solutions, Oak Ridge, TN; Megaray LLC, New York, NY; Siemens Postal, Parcel & Airport Logistics LLC, DFW Airport, TX; Smart Imaging Systems, Inc., Beltsville, MD; Smiths Detection, Inc., Edgewood, MD; SNA International (SNA), Alexandria, VA; and SRC, Inc., North Syracuse, NY, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and BSTC intends to file additional written notifications disclosing all changes in membership.

On May 30, 2012, BSTC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 18, 2012 (77 FR 36292).

The last notification was filed with the Department on August 21, 2018. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 17, 2018 (83 FR 46971).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–27456 Filed 12–18–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Efficacy Task Force, LLC

Notice is hereby given that, on November 14, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Efficacy Task Force, LLC has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: BASF Corporation, Florham Park, NJ; Bayer Animal Health, Shawnee, KS; Central Garden & Pet Company, Schaumburg, IL; Control Solutions, Inc., Pasadena, TX; FMC Corporation, Philadelphia, PA; McLaughlin Gormley King Company (MGK), Minneapolis, MN; SC Johnson & Son, Inc., Racine, WI; Sergeant's Pet Care Products, Inc., Omaha, NE; United Industries Corporation, Earth City, MO; and W.F. Young, Inc., East Longmeadow, MA. The general area of Efficacy Task Force, LLC's planned activity is to reach agreement with the U.S. Environmental Protection Agency (''EPA'') on data required for the reregistration of Cyfluthrin; MGK264; Permethrin; Phenothrin; Piperonyl Butoxide (PBO); Pyrethrins (PY); PY/PBO/MGK264/(S)-Methoprene/Tetramethrin Blend; PY/PBO/MGK264/(S)-Methoprene Blend; PY/PBO/MGK264/Tetramethrin Blend; PY/PBO Blends; Pyripoxyfen; and Tetramethrin (the ''Products''); to develop and own written procedural methods for the development of such data; to engage in advocacy before EPA, State and local governments, as appropriate, in support of the registration, sale, distribution, and use of the Products; and to protect

the proprietary interest in the procedural methods and existing data including, but not limited to, seeking and collecting data compensation from non-members of the Efficacy Task Force, LLC who may seek to rely upon the data and procedural methods to support their registrations, to the extent permitted by FIFRA or the data compensation laws of non-U.S. jurisdictions.

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–27459 Filed 12–18–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1753]

Request for Public Comment on Proposed Revision of NIJ Standard 0112.03 (Revision A), Autoloading Pistols for Police Officers

AGENCY: National Institute of Justice, Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) seeks feedback from the public on a proposed revision of NIJ Standard 0112.03 (Revision A), *Autoloading Pistols for Police Officers,* that specifies minimum performance requirements and test methods for semiautomatic service pistols used by U.S. law enforcement.

DATES: Comments must be received by 5 p.m. Eastern Time on March 19, 2019.

How to Respond and What to Include: The draft document can be found here: *https://nij.gov/topics/technology/standards-testing/pages/comment.aspx.* The draft document is available in both Word and pdf formats. To submit comments, NIJ encourages commenters to fill out the comment template and send it in an email to the contact listed below with ''Draft NIJ Standard 0112.04, Semiautomatic Pistols for Law Enforcement'' in the subject line. Please provide contact information with the submission of comments. All materials submitted are subject to public release under the Freedom of Information Act, and will be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes to revise the draft document. Comments should not include any sensitive personal information or commercially confidential information. If you wish to voluntarily submit confidential commercial information, but do not want it to be publicly released, you must mark that information prominently as ''CONFIDENTIAL COMMERCIAL INFORMATION'' and NIJ will, to the extent permitted by law, withhold such information from public release.

FOR FURTHER INFORMATION CONTACT: Mark Greene, Policy and Standards Division Director, Office of Science and Technology, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 307–3384; email address: *mark.greene2@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This draft document is a proposed revision of NIJ Standard 0112.03 (Revision A), *Autoloading Pistols for Police Officers,* published in 1999 and found here: *https://www.ncjrs.gov/pdffiles1/nij/249929.pdf.* The final version of this document is anticipated to be published in late 2019 as NIJ Standard 0112.04, *Semiautomatic Pistols for Law Enforcement.* Its primary purpose will be for use by the NIJ Compliance Testing Program (CTP) for testing and evaluation of semiautomatic pistols submitted to the program for certification by NIJ. It will be used by both ballistics laboratories that test firearms and firearms manufacturers participating in the NIJ CTP. This standard will be included in the scope of accreditation used by the National Voluntary Laboratory Accreditation Program (NVLAP) to accredit ballistics laboratories. For more information on NIJ's voluntary standards, please visit *https://www.nij.gov/standards.* More information on the Autoloading Pistols CTP is available at *https://justnet.org/compliant/Autoloading-Pistols.html.*

David B. Muhlhausen,

Director, National Institute of Justice.

[FR Doc. 2018–27392 Filed 12–18–18; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1754]

Request for Public Comment on Proposed NIJ Standard Entitled Patrol Rifles for Police Officers

AGENCY: National Institute of Justice, Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) seeks feedback from the public on a proposed NIJ Standard entitled *Patrol Rifles for Law Enforcement* that specifies minimum performance requirements and test methods for patrol rifles used by U.S. law enforcement.

DATES: Comments must be received by 5 p.m. Eastern Time on March 19, 2019.

How to Respond and What to Include: The draft document can be found here: *https://nij.gov/topics/technology/standards-testing/pages/comment.aspx.* The draft document is available in both Word and pdf formats. To submit comments, NIJ encourages commenters to fill out the comment template and send it in an email to the contact listed below with ''Draft NIJ Standard Patrol Rifles for Law Enforcement'' in the subject line. Please provide contact information with the submission of comments. All materials submitted are subject to public release under the Freedom of Information Act, and will be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes to revise the draft document. Comments should not include any sensitive personal information or commercially confidential information. If you wish to voluntarily submit confidential commercial information, but do not want it to be publicly released, you must mark that information prominently as ''CONFIDENTIAL COMMERCIAL INFORMATION'' and NIJ will, to the extent permitted by law, withhold such information from public release.

FOR FURTHER INFORMATION CONTACT: Mark Greene, Policy and Standards Division Director, Office of Science and Technology, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 307–3384; email address: *mark.greene2@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This draft document specifies minimum performance requirements and test methods for patrol rifles used by U.S. law enforcement. The final version of this document is anticipated to be published in late 2019 as a new NIJ Standard entitled *Patrol Rifles for Law Enforcement.* Its primary purpose will be for use by the NIJ Compliance Testing Program (CTP) for testing and evaluation of patrol rifles submitted to the program for certification by NIJ. It will be used by both ballistics laboratories that test firearms and firearms manufacturers participating in the NIJ CTP. This standard will be included in the scope of accreditation used by the National Voluntary Laboratory Accreditation Program (NVLAP) to accredit ballistics laboratories. For more information on

NIJ's voluntary standards, please visit *https://www.nij.gov/standards.*

David B. Muhlhausen,

Director, National Institute of Justice.

[FR Doc. 2018–27396 Filed 12–18–18; 8:45 am]

BILLING CODE 4410–18–P

NUCLEAR REGULATORY COMMISSION

Meeting of the Advisory Committee on Reactor Safeguards (ACRS) Subcommittee on NuScale

The ACRS Subcommittee on NuScale will hold a meeting on December 18, 2018, at U.S. Nuclear Regulatory Commission, Three White Flint North, 11601 Landsdown Street, Conference Rooms 1C3–1C5, North Bethesda, MD 20852.

The meeting will be open to public attendance with the exception of portions that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4). The agenda for the subject meeting shall be as follows:

Tuesday, December 18, 2018—1:00 p.m. Until 5:00 p.m.

The Subcommittee will review Chapters 2, ''Site Characteristics and Site Parameters,'' and Chapter 17, ''Quality Assurance and Reliability Assurance,'' of the safety evaluation report with open items associated with the NuScale design certification application. The Subcommittee will hear presentations by and hold discussions with the NRC staff, NuScale and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Michael Snodderly (Telephone 301–415- 2241 or Email: *Michael.Snodderly@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. The public bridgeline number for the meeting is 866–822–3032, passcode 8272423. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 4, 2017 (82 FR 46312).

Detailed meeting agendas and meeting transcripts are available on the NRC website at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the website cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the Three White Flint North building, 11601 Landsdown Street, North Bethesda, MD 20852. After registering with Security, please proceed to conference room 1C3–1C5, located directly behind the security desk on the first floor. You may contact Kendra Freeland (Telephone 301–415–6702 or 301–415–7998) for assistance or to be escorted to the meeting room.

Dated: December 13, 2018.

Alesha Bellinger,

Chief, Program Management, Policy Development & Analysis, Advisory Committee on Reactor Safeguards.

[FR Doc. 2018–27418 Filed 12–18–18; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84812; File No. SR–NASDAQ–2018–079]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Nasdaq Rules 5705 and 5710 To Adopt a Disclosure Requirement for Certain Securities

December 13, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2018, 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 amend Nasdaq Rules 5705 and 5710 to adopt a disclosure requirement for certain securities that seek to provide a return based on a specified multiple or inverse multiple of an underlying index or reference asset. Nasdaq is also proposing to amend Nasdaq Rules 5705 and 5710 to include certain defined terms.

The text of the proposed rule change is available on the Exchange's website 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq rules allow the listing of securities that seek to exceed by a multiple the performance (leveraged) or exceed by a multiple the inverse of the performance (inverse) of an underlying index or reference asset. Some of these products are designed to track the daily performance of an underlying instrument and holding these products for longer than a day can result in investment returns that are significantly different than the target return. Nasdaq believes that some investors may not fully understand this risk and therefore proposes to amend Nasdaq Rules

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

5705(b) (Index Fund Shares) and 5710 (Securities Linked to the Performance of Indexes and Commodities (Including Currencies) to adopt an additional disclosure requirement.

Specifically, the Exchange is proposing to amend Nasdaq Rule 5705(b)(1)(B) and Nasdaq 5710(d) to provide that issuers of leveraged or inverse products that seek returns on a daily basis (''Multiple/Inverse Daily Products'') must provide additional website disclosure that highlights the daily return feature of these products including the risks associated with holding these products for longer than one day. The Exchange is also making clarifying changes to existing rule language.

Currently, Nasdaq Rule 5705(b)(1)(B)(iv), which applies to issuers of Index Fund Shares, requires that issuers make daily public website disclosure of the holdings of leveraged and inverse products.[3] The Exchange proposes to amend this rule to require that issuers of Multiple/Inverse Daily Products include on the product website a statement that the product seeks returns for a single day and due to the compounding of returns, holding periods of longer than one day can result in investment returns that are significantly different than the product's target returns. The disclosure would also direct investors to consult the prospectus for further information on the calculation of the returns and other risks associated with investing in this type of product. While issuer websites already typically contain language similar to the disclosure proposed herein, Nasdaq believes that providing example language enhances the transparency of the proposed listing standard.

Additionally, the Exchange proposes to amend Nasdaq Rule 5705(b)(1)(B) to define certain terms and clarify the rules. Nasdaq also proposes to amend the preamble of Nasdaq Rule 5710 to include a definition for ''Closing Indicative Value''.

In addition, Nasdaq proposes to modify Nasdaq Rule 5710(d), which relates to Linked Securities, to include the same disclosure requirement for Multiple/Inverse Daily Products that are Linked Securities. Further, the Exchange proposes to amend Nasdaq Rule 5710(d) to clarify that the limitations on leverage and inverse multiples are based on the Closing Indicative Value (definition as proposed herein) and measured on a daily basis, up to, and including the date of maturity or redemption, as applicable. Nasdaq believes that this more closely aligns the application of the listing standards to the proposed disclosure requirements, as well as the daily values that determine the daily performance of such products.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(5) of the Act,[5] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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 amendments requiring additional disclosure for Multiple/Inverse Daily Products would enhance investor protection and provide investors with valuable information regarding the investment risks associated with these products. Further, the additional proposed amendments, including amending Nasdaq Rule 5710(d) to include a definition of Closing Indicative Value, will provide for additional transparency around listing standards and more closely aligns the application of such listing standards to the proposed disclosure requirements.

As such, the Exchange believes the proposed amendment is consistent with the investor protection requirement of Section 6(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed amendments are not intended to address competitive issues, but rather to provide additional website disclosure that highlights the daily return feature of Multiple/Inverse Daily Products, including the risks associated with holding these products for longer than one day. The Exchange believes that this change will provide additional investor protection through enhanced transparency around the investment risk associated with Multiple/Inverse Daily Products. Nasdaq also believes that adding a definition for Closing Indicative Value to Nasdaq Rule 5710 will provide for additional clarity around listing standards and more closely align the application of such listing standards to the proposed disclosure requirements.

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

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 Exchange consents, the Commission shall: (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 NASDAQ–2018–079 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 NASDAQ–2018–079. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/*

[3] Nasdaq Rule 5705(b)(1)(B)(iv) requires: ''Daily public website disclosure of portfolio holdings that will form the basis for the calculation of the net asset value by the issuer of such series, including, as applicable, the following instruments: a. The identity and number of shares held of each specific equity security; b. The identity and amount held for each specific fixed income security; c. The specific types of Financial Instruments and characteristics of such Financial Instruments; and d. Cash equivalents and the amount of cash held in the portfolio.''

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number NASDAQ–2018–079, and should be submitted on or before January 9, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27409 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84820; File No. SR–IEX–2018–23]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Proposed Rule Change To Modify the Resting Price of Discretionary Peg Orders December 13, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 30, 2018, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (''Act''),[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to modify the resting price of Discretionary Peg orders to be equal to the less aggressive of one (1) MPV[6] less aggressive than the primary quote (*i.e.,* the NBB for buy orders and NBO for sell orders) or the order's limit price, rather than the primary quote.

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] *See* Rule 11.210.

II. Self-Regulatory Organization's Statement of the Purpose of, and the 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

The purpose of this proposed rule filing is to modify the resting price of Discretionary Peg orders to be equal to the less aggressive of one (1) MPV[7] less aggressive than the primary quote or the order's limit price, rather than the primary quote. Currently, the Exchange offers three types of pegged orders—primary peg, midpoint peg, and Discretionary Peg—each of which are non-displayed orders that upon entry into the System and while resting on the Order Book, are automatically pegged to a reference price based on the national best bid and offer (''NBBO'').

[7] *See* Rule 11.210.

As set forth in Rule 11.190(b)(10), a Discretionary Peg order is a pegged order that upon entry into the System, the price of the order is automatically adjusted to be equal to the less aggressive of the Midpoint Price[8] or the order's limit price, if any. Furthermore, when unexecuted shares of a Discretionary Peg order are posted to the Order Book, the price of the order is automatically adjusted by the System to be equal to and ranked at the primary quote or the order's limit price, and is automatically adjusted by the System in response to changes in the NBB (NBO) for buy (sell) orders up (down) to the order's limit price, if any.

In order to meet the limit price of active orders on the Order Book, a Discretionary Peg order will exercise the least amount of price discretion necessary from the Discretionary Peg order's resting price to its discretionary price (*i.e.,* the less aggressive of the Midpoint Price or the Discretionary Peg order's limit price, if any), except during periods of quote instability as defined in Rule 11.190(g), discussed further below. When exercising price discretion, a Discretionary Peg order maintains time priority at its resting price and is prioritized behind any non-displayed interest at the discretionary price for the duration of that book processing action. If multiple Discretionary Peg orders are exercising price discretion during the same book processing action, they maintain their relative time priority at the discretionary price. In the event the NBBO becomes locked or crossed, Discretionary Peg orders resting on or posting to the Order Book are priced one (1) MPV less aggressive than the locking or crossing price.[9]

Pursuant to Rule 11.190(g), the Exchange utilizes real time relative quoting activity of certain Protected Quotations[10] and a proprietary mathematical calculation (the ''quote instability calculation'') to assess the probability of an imminent change to the current Protected NBB to a lower price or Protected NBO to a higher price for a particular security (''quote instability factor''). When the quoting activity meets predefined criteria and the quote instability factor calculated is greater than the Exchange's defined quote instability threshold, the System treats the quote as unstable and the crumbling quote indicator (''CQI'') is on at that price level for two milliseconds,

[8] *See* Rule 11.160(t).

[9] *See* Rule 11.190(h)(3)(C)(ii) and (D)(ii).

[10] Pursuant to Rule 11.190(g), the Protected Quotations of the New York Stock Exchange, Nasdaq Stock Market, NYSE Arca, Nasdaq BX, Cboe BZX Exchange, Cboe BYX Exchange, Cboe EDGX Exchange, and Cboe EDGA Exchange.

or until the CQI triggers again. During all other times, the quote is considered stable, and the CQI is off. The System independently assesses the stability of the Protected NBB and Protected NBO for each security.

When the CQI is on, Discretionary Peg orders do not exercise price discretion to meet the limit price of an active (*i.e.,* taking) order. However, Discretionary Peg orders are eligible for execution at their resting price (*i.e.,* at the NBB (NBO) for buy (sell) orders) when the CQI is on. Therefore, when IEX determines the quote to be unstable, Discretionary Peg orders are protected from trading more aggressively at a price that appears to be unstable, and thus imminently stale, between the primary quote and the Midpoint Price. However, Discretionary Peg orders remain susceptible to trading at the primary quote under such circumstances. For example, based on a recent analysis of data for May and June of 2018, the Exchange identified that 90% of Discretionary Peg order executions trade within the NBBO when the CQI is off, 88% of which execute at the Midpoint Price. However, of the remaining 10% of Discretionary Peg order executions that occur at the primary quote, 31% occur when the CQI is on.[11] Said differently, 31% of Discretionary Peg executions at the primary quote occur when IEX has determined the primary quote to be in transition to a less aggressive (more advantageous) price.

Therefore, in order to further protect resting Discretionary Peg orders from execution at a stale price, the Exchange proposes to modify the resting price of Discretionary Peg orders to be equal to the less aggressive of one (1) MPV less aggressive than the primary quote or the order's limit price, rather than the primary quote.

As proposed, upon entry into the System, Discretionary Peg orders will continue to be priced to the less aggressive of the Midpoint Price or the orders limit price (*i.e.,* Discretionary Peg orders will continue to remove liquidity up to the Midpoint Price, subject to the order's limit price). Similarly, after posting to the Order Book, Discretionary Peg orders will continue to exercise the least amount of price discretion up (down) to the less aggressive of the Midpoint Price or the orders limit price, if any, to meet the limit price of active orders on the Order Book when the CQI is off.[12] Moreover, Discretionary Peg orders will continue to be available for execution at their resting price (*i.e.,* the less aggressive of one (1) MPV less aggressive than the primary quote or the orders limit price) when the CQI is on. Furthermore, if the System determines the NBB (NBO) for a particular security to be an unstable quote, it will restrict buy (sell) Discretionary Peg orders in that security from exercising price discretion to trade against interest at or above (below) the NBB (NBO). The Exchange is not proposing to modify the handling of Discretionary Peg orders resting on or posting to the Order Book in locked and crossed markets. Thus, in the event the NBBO becomes locked or crossed, Discretionary Peg orders resting on or posting to the Order Book will continue to be priced one (1) MPV less aggressive than the locking or crossing price.[13]

Lastly, the Exchange is also proposing to make conforming changes to the description of the resting price of Discretionary Peg orders for purposes of ranking and priority in the Regular Market Session Opening Process for Non-IEX-Listed Securities, and IEX Auctions.[14]

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6(b)[15] of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes the proposed rule change is consistent with the protection of investors and the public interest because it is designed to protect resting Discretionary Peg orders from adverse selection by limiting execution at the primary quote when the Exchange's probabilistic model identifies that the primary quote appears to be moving adversely to them, thereby reducing the potential to execute at an imminently stale price and enhancing the overall execution experience of Discretionary Peg orders.

In addition, the Exchange believes that such protection is consistent with the protection of investors and the public interest because it may incentivize the entry of additional resting Discretionary Peg orders on the Exchange, thereby increasing the overall liquidity profile on the Exchange to the benefit of all market participants. Moreover, as noted in the Purpose section, resting Discretionary Peg orders generally provide liquidity and opportunities for price improvement to market participants removing liquidity on the Exchange during periods of quote stability. By incentivizing the entry of additional Discretionary Peg orders, the Exchange believes that the proposed changes may enhance the overall execution experience for other market participants removing liquidity on the Exchange during periods of quote stability.

Further, IEX believes that the proposal is consistent with protection of investors and the public interest in that the Discretionary Peg order type is designed to assist Members in obtaining best execution for their customers (and proprietary orders) by providing an opportunity to execute at the NBBO, but limiting executions at the NBBO when the NBBO appears to be unstable, thereby reducing the potential to execute at an imminently stale price.

In addition, as noted in the Purpose section, the proposed resting price for Discretionary Peg orders will be the same as the resting price of Primary Peg orders pursuant to Rule 11.190(b)(8).[17] Thus, IEX does not believe that the proposed changes raise any new or novel issues that have not already been considered by the Commission in connection with existing order types offered by the Exchange.[18]

Finally, the Exchange believes that the conforming change to the description of the resting price of Discretionary Peg orders for purposes of ranking and priority in the Regular

[11] The remaining 69% execute at the primary quote when the CQI is off because the limit price of the active orders removing the Discretionary Peg orders were priced at least as aggressive as the primary quote.

[12] The Exchange notes that the proposed resting price for Discretionary Peg orders will be the same as the resting price of Primary Peg orders pursuant to Rule 11.190(b)(8). Thus, as proposed, both Discretionary Peg and Primary Peg orders will rest at the less aggressive of one (1) MPV less aggressive than the primary quote or the order's limit price in relative time priority. Furthermore, when the CQI is off, Primary Peg orders are eligible to exercise discretion up (down) to the NBB (NBO) for buy (sell) orders up (down) to the order's limit price. Thus, as proposed, when exercising discretion, Primary Peg and Discretionary Peg orders will compete for execution with orders removing liquidity at the primary quote based on relative time priority.

[13] *See supra* note 9.

[14] *See* proposed Rule 11.231(a)(1)(iii) and Rule 11.350(b)(1)(A)(i)(c), respectively.

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(5).

[17] As proposed, both Discretionary Peg and Primary Peg orders will rest at the less aggressive of one (1) MPV less aggressive than the primary quote or the orders limit price in relative time priority.

[18] *See* Securities Exchange Act Release No. 80223 (March 13, 2017), 82 FR 14240 (March 17, 2017) (SR–IEX–2016–18).

Market Session Opening Process for Non-IEX-Listed Securities is consistent with the protection of investors and the public interest because it will make the Exchange's rules more accurate and complete, and descriptive of the System's functionality.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX 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. With regards to inter-market competition, the proposed resting price for Discretionary Peg orders will be the same as the resting price of Primary Peg orders pursuant to Rule 11.190(b)(8), and thus the Exchange believes that no new inter-market burdens are being imposed.[19] Furthermore, the Exchange notes that other markets are free to adopt similar rules for comparable order types to the extent that the proposed changes pose a competitive threat to their business. In this regard, the Exchange notes that NYSE American LLC has adopted a rule copying an earlier iteration of the Exchange's Discretionary Peg order type and quote stability calculation.[20] Accordingly, the Exchange also believes that the proposed rule change will not result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act.

With regards to intra-market competition, the proposed change will modify the resting price of all Discretionary Peg orders and will therefore be applied equally to all Members using the Discretionary Peg order type. Moreover, the Exchange does not believe that the proposed change to the resting price of Discretionary Peg orders will result in any burden on Members seeking to cross the spread and execute at the far side quote (the NBO (NBB) for buy (sell) orders). To the contrary, the proposed change would provide potential benefits to such Members. As discussed above, the enhanced benefits and protections offered by the Discretionary Peg order, as proposed, is intended in part to incentivize additional resting Discretionary Peg orders to be entered on the Exchange. Thus, Members seeking to cross the spread may be more likely to obtain price improvement for their liquidity removing orders to the extent such orders execute against a Discretionary Peg order during times when the CQI is off.

Moreover, as discussed in the Purpose and Statutory Basis sections, resting Discretionary Peg orders generally provide liquidity and opportunities for price improvement to market participants removing liquidity on the Exchange during periods of quote stability. Thus, the Exchange further believes that by enhancing the performance of Discretionary Peg orders, and thereby incentivizing additional order flow, the proposed changes may enhance the overall execution experience for other market participants seeking to cross the spread and execute at the far side quote during periods of quote stability, which is consistent with the protection of investors and the public interest.

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 (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (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–IEX–2018–23 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–IEX–2018–23. This file number should be included in the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Section, 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 will also be available for inspection and copying at the IEX's principal office and on its internet website at *www.iextrading.com.* All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–IEX–2018–23 and should be submitted on or before January 9, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27403 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[19] *Id.*

[20] *See* NYSE American Rule 7.31E(h)(3)(D).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84817; File No. SR–CboeEDGX–2018–037]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Permit the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options on a Pilot Basis

December 13, 2018.

On October 11, 2018, Cboe EDGX Exchange, Inc. 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 permit the listing and trading of P.M.-settled series on certain broad-based index options on a pilot basis. The proposed rule change was published for comment in the **Federal Register** on October 30, 2018.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 14, 2018. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 28, 2019 as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–CboeEDGX–2018–037).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27404 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84481 (Oct. 24, 2018), 83 FR 54624.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84818; File No. SR–NYSEArca–2018–75]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Regarding the Listing and Trading of Shares of the PGIM Ultra Short Bond ETF

December 13, 2018.

I. Introduction

On October 12, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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 modify the rule governing the listing and trading of shares (''Shares'') of the PGIM Ultra Short Bond ETF (''Fund''). The Commission previously approved the listing and trading of the Shares subject to a representation that the Fund's investments in OTC derivatives would not exceed 20% of the Fund's net assets.[3] The Exchange now seeks to permit the Fund to invest up to 50% of its net assets in OTC derivatives under certain circumstances.

The proposed rule change was published for comment in the **Federal Register** on October 31, 2018.[4] On November 7, 2018, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The Commission has not received any comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Shares are Managed Fund Shares that do not satisfy all of the criteria for generic listing set forth in Commentary .01 to NYSE Arca Rule 8.600–E. Thus, the Exchange currently lists and trades the Shares pursuant to a rule (''Listing Rule'') approved by Commission.[6] The Listing Rule requires that the Fund's portfolio meet all requirements of Commentary .01 to NYSE Arca Rule 8.600–E except for those set forth in Commentary .01(a)(1), Commentary .01(b)(4) and Commentary .01(b)(5).[7] Accordingly, the Listing Rule limits the Fund's investments in OTC derivatives to 20% of the Fund's assets and, for purposes of calculating this limit, the portfolio's investment in OTC derivatives is calculated using the aggregate gross notional value of the OTC derivatives.[8]

The Exchange proposes to allow: (1) Up to 50% of the Fund's assets to be invested in OTC derivatives that are used to reduce currency, interest rate, credit, or duration risk arising from the Fund's investments (''Hedging Derivatives''); and (2) up to 20% of the Fund's assets to be invested in OTC derivatives other than Hedging Derivatives. For purposes of calculating the proposed alternative limits, the portfolio's investments in OTC derivatives would be calculated using the aggregate gross notional value of the OTC derivatives.

According to the Exchange, the Fund's adviser and sub-adviser believe that it is important to provide the Fund with additional flexibility to manage risk associated with its investments and, depending on market conditions, it may be necessary for the Fund to utilize additional OTC derivatives for this purpose.[9] Generally, according to the Exchange, OTC derivatives may be customized to a greater degree than exchange-listed derivatives, which may allow the Fund to better hedge its assets and may mitigate trading its costs.[10]

The Exchange also states that the Commission has previously approved an exception from the requirements of Commentary .01(e) relating to investments in OTC derivatives similar to those proposed with respect to the Fund.[11]

III. Discussion

After careful review, the Commission finds that the Exchange's proposed rule change, as modified by Amendment No. 1, to amend the Listing Rule applicable to the Shares consistent with the Act and the rules and regulations

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83319 (May 24, 2018), 83 FR 25097 (May 31, 2018) (SR–NYSEArca–2018–15) (''Prior Order'').

[4] *See* Securities Exchange Act Release No. 84486 (Oct. 25, 2018), 83 FR 54794 (''Notice'').

[5] In Amendment No. 1, the Exchange: (1) Corrected its description of the current listing rule applicable to the Shares; (2) clarified the scope of the Fund's permitted investments in over-the-counter (''OTC'') derivatives; (3) supplemented its arguments in support of the proposed rule change; and (4) made technical changes. Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-nyseArca-2018-75/srnysearca201875-4628265-176398.pdf.* Amendment No. 1 is not subject to notice and comment because it does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues.

[6] *See* Prior Order, *supra* note 3.

[7] *See id.*

[8] *See* Commentary .01(e) to NYSE Arca Rule 8.600–E.

[9] *See* Notice, *supra* note 3, 83 FR at 59794.

[10] *See id.*

[11] *See id.*, 83 FR at 54794, n.10.

thereunder applicable to a national securities exchange.[12] The Exchange proposes to modify only the Listing Rule's limit on OTC derivatives, and the proposed alternative limits are substantially similar to OTC derivatives limits for another issue of Managed Fund Shares that also invests principally in fixed-income securities.[13] The Commission approved a listing rule allowing that fund to similarly invest up to: (1) 50% of its assets in OTC derivatives to reduce currency, interest rate, or credit risk arising from the fund's investments; and (2) 20% of its assets in OTC derivatives other than OTC derivatives used to hedge the fund's portfolio against currency, interest rate, or credit risk.[14]

For the foregoing reason, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with of the Act 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,[15] that the proposed rule change (SR–NYSEArca–2018–75), as modified by Amendment No. 1 be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27407 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[12] 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).

[13] *See* Securities Exchange Act Release No. 80657 (May 11, 2017), 82 FR 22702 (May 17, 2017) (SR–NYSEArca–2017–09). The Commission also notes that the proposed alternative limits are consistent with derivatives requirements in listing rules for another issue of Managed Fund Shares. *See* Securities Exchange Act Release No. 84047 (September 6, 2018), 83 FR 46200 (September 12, 2018) (SR–NASDAQ–2017–128).

[14] *See* Securities Exchange Act Release No. 80657, *supra* note 13. The addition of duration risk to the uses of Hedging Derivative in the current proposal does not alter the Commission's analysis.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84819; File No. SR–NYSEArca–2018–90]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Fees and Charges

December 13, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 3, 2018, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (''Fee Schedule''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule by increasing the credit applicable to the Retail Order Step-Up Tier 2, as described below.

The Exchange currently has a Retail Order Step-Up Tier 2 credit of $0.0035 per share for Retail Orders[4] that provide displayed liquidity during the month in Tape A, Tape B and Tape C Securities that applies to ETP Holders, including Market Makers, that provide liquidity an average daily share volume per month of 1.10% or more of the U.S. CADV, and execute an ADV of Retail Orders with a time-in-force designation of Day that add or remove liquidity during the month that is an increase of 0.35% or more of the U.S. CADV above their April 2018 ADV taken as a percentage of U.S. CADV. Retail Orders with a time-in-force designation of Day that remove liquidity from the Book are not charged a fee.[5] The Exchange proposes to increase the current credit for Retail Orders that provide displayed liquidity during the month in Tape A, Tape B and Tape C Securities to $0.0038 per share. The Exchange is not proposing any other change to the Retail Order Step-Up Tier 2.

For all other fees and credits, tiered or basic rates apply based on a firm's qualifying levels.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] A Retail Order is an agency order that originates from a natural person and is submitted to the Exchange by an ETP Holder, provided that no change is made to the terms of the order to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR–NYSEArca–2012–77).

[5] *See* Securities Exchange Act Release No. 83828 (August 10, 2018), 83 FR 40816 (August 16, 2018) (SR–NYSEArca–2018–58). An ETP Holder that qualifies for the Retail Order Step-Up Tier 2 also receives a credit of $0.0035 per share for orders (not just Retail Orders) that provide displayed liquidity to the order book in Tape C Securities, and an incremental credit of $0.0002 per share for orders that provide non-displayed liquidity to the order book in Tape C Securities. The incremental credit is in addition to the ETP Holder's or Market Maker's Tiered or Basic Rate credit(s). Pursuant to the Retail Order Step-Up Tier 2, ETP Holders and Market Makers pay a fee of $0.0027 per share for orders that take liquidity from the order book in Tape C Securities.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

The Exchange believes that the amendment to the Retail Order Step-Up Tier 2 is reasonable, equitable and not unfairly discriminatory because the proposed amendment would apply uniformly to all similarly situated ETP Holders and Market Makers that send orders to the Exchange. The Exchange believes providing increased credits for Retail Orders that provide displayed liquidity in Tape A, Tape B and Tape C Securities will incentivize ETP Holders to send a greater number of such orders to the Exchange and therefore provide greater liquidity that supports the quality of price discovery and promotes market transparency. The Exchange further believes that the proposed increased credit would create an added financial incentive for ETP Holders to bring additional retail order flow to a public market. The Exchange believes that by recalibrating the credits for providing liquidity will attract additional order flow and liquidity to the Exchange, thereby contributing to price discovery on the Exchange and benefiting investors generally.

The Exchange believes the Retail Order Step-Up Tier 2 is equitable and not unfairly discriminatory because it is available to all ETP Holders and Market Makers on an equal basis and provides discounts that are reasonably related to the value to the Exchange's market quality associated with higher volumes. The Exchange does not believe that it is unfairly discriminatory to offer increased credits to ETP Holders and Market Makers as these participants would be subject to additional volume requirements.

The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because maintaining or increasing the proportion of Retail Orders in exchange-listed securities that are executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) would contribute to investors' confidence in the fairness of their transactions and would benefit all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection. This aspect of the proposed rule change also is consistent with the Act because all similarly situated ETP Holders would pay the same rate, as is currently the case, and because all ETP Holders would be eligible to qualify for the rates by satisfying the related threshold, where applicable. Furthermore, the submission of Retail Orders is optional for ETP Holders, in that an ETP Holder could choose whether to submit Retail Orders and, if it does, the extent of its activity in this regard.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[8] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed rule change would encourage the submission of additional liquidity to a public exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders and Market Makers. The Exchange believes that this could promote competition between the Exchange and other execution venues, including those that currently offer comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution. The Exchange also believes that the proposed rule change is consistent with the Act because it strikes an appropriate balance between fees and credits, which will encourage submission of orders to the Exchange, thereby promoting competition.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and to attract order flow to the Exchange. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed changes will impair the ability of ETP Holders or competing order execution venues to maintain their competitive standing in the financial markets.

[8] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[9] of the Act and subparagraph (f)(2) of Rule 19b–4[10] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2018–90 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–NYSEArca–2018–90. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/*

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(2)(B).

rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2018–90 and should be submitted on or before January 9, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27408 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84814; File No. SR–BOX–2018–36]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC (''BOX'') Facility To Establish Separate Fees and Credits on PIP and COPIP Transactions for SPY Options

December 13, 2018.

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 November 30, 2018, BOX Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule on the BOX Market LLC (''BOX'') options facility. While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on December 1, 2018. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section I.B, PIP and COPIP Transactions and Section III, Liquidity Fees and Credits of the BOX Fee Schedule. Specifically, the Exchange proposes to establish separate fees and credits on PIP and COPIP Transactions for options overlying the Standard and Poor's Depositary Receipts Trust (''SPY'').[5]

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] Options overlying Standard and Poor's Depositary Receipts/SPDRs (''SPY'') are based on the SPDR exchange-traded fund (''ETF''), which is designed to track the performance of the S&P 500 Index.

First, the Exchange proposes to establish PIP and COPIP Transaction[6] fees for options overlying SPY. Specifically, the Exchange proposes a $0.05 fee for Professional Customers, Broker Dealers and Market Makers for SPY PIP or COPIP Orders. Public Customers will not be charged for SPY PIP or COPIP Orders. The Exchange notes that the proposed SPY fees are identical to the current PIP and COPIP Order fees. For SPY Improvement Orders, the Exchange proposes a $0.05 fee for all account types. For SPY Primary Improvement Orders, the Exchange proposes to establish a flat per contract execution fee of $0.02.

The Exchange notes that all SPY transactions executed through the PIP and COPIP auction mechanisms will be included in the calculation of Customer Volume in Multiply Listed Options Classes for purposes of the Primary Improvement Order tiered execution fee and BOX Volume Rebate in Section I.B of the BOX Fee Schedule. However, the tiered execution fee and rebates defined in Section I.B will not apply to executions in SPY. The Exchange believes that the proposed fees discussed above are reasonable as they are similar to another options exchange.[7]

Lastly, the Exchange proposes to establish liquidity fees and credits for SPY executions in the PIP or COPIP auction mechanisms. Currently, in Section III.A of the Fee Schedule, a Public Customer PIP or COPIP Order receives a ''removal'' credit while the corresponding Primary Improvement Order and any Improvement Order are charged an ''add'' fee. The Exchange proposes a $0.45 fee for all SPY PIP and COPIP transactions that add liquidity and a $0.45 credit for all SPY COPIP and PIP transactions that remove liquidity.

[6] Transactions executed through Price Improvement Period (''PIP'') and the Complex Order Price Improvement Period (''COPIP'') auction mechanisms. All COPIP transactions will be charged per contract per leg.

[7] *See* Nasdaq Phlx LLC (''Phlx'') Pricing Schedule Section 3, Part C. Phlx assesses a $0.05 per contract fee for all PIXL Initiating Orders in SPY (PIXL is Phlx's price improvement mechanism similar to BOX's PIP mechanism). Further, Phlx assesses a $0.38 per contract fee to non-Customers when their PIXL Order is contra to an Initiating Order; unless the PIXL Order is a Public Customer, in which case the fee is $0.00 per contract. Next, the Exchange believes the $0.02 per contract Primary Improvement Order fee for SPY executions is reasonable when compared to Phlx's fees for similar transactions. The Exchange also notes the proposed SPY PIP and COPIP Order Fees are identical to the PIP and COPIP Order Fees that currently apply to all options. The Exchange is simply carving out a separate section for all SPY PIP and COPIP transactions.

Further, under the BOX Fee schedule, when Non-Public Customer PIP or COPIP orders do not trade with its Primary Improvement Order, the Primary Improvement Order receives a ''removal'' credit and any corresponding Improvement Order responses are charged an ''add'' fee. For these types of executions the Exchange proposes a $0.45 fee for all SPY PIP and COPIP transactions that add liquidity and a $0.45 credit for all SPY PIP and COPIP transactions that remove liquidity. The Exchange notes that the proposed fees and credits are similar to fees at another options exchange.[8] Lastly, the Exchange notes that it is updating the footnotes throughout the Fee Schedule to accommodate the addition of new footnotes related to the changes discussed above.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5)of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange's proposal to adopt new pricing for PIP and COPIP SPY executions is reasonable, equitable, and not unfairly discriminatory because pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in the most actively traded options classes.[10] The Exchange notes that another options exchange has a similar pricing structure for SPY in their respective price improvement mechanism.[11]

The Exchange believes that the proposed fees for SPY PIP and COPIP Orders are reasonable, equitable and not unfairly discriminatory. As noted above, these fees are identical to the current PIP and COPIP Order fees assessed on the Exchange.

The Exchange believes that the proposed SPY Improvement Order fees are equitable and not unfairly discriminatory as the decreased fees will encourage market participants to take advantage of the new pricing structure and respond to more SPY PIP and COPIP Orders. The Exchange believes it is reasonable to assess lower fees to transact SPY Improvement Orders (compared to Penny and Non-Penny Improvement Orders) because the Exchange seeks to incentivize market participants to transact a greater number of SPY option transactions in the PIP or COPIP mechanisms.

The Exchange's proposal to assess a flat fee for SPY Primary Improvement Orders is reasonable, equitable and not unfairly discriminatory. Specifically, the Exchange is proposing a flat $0.02 per contract fee which is the same as the highest volume tier for all other Primary Improvement Orders.[12] The Exchange believes that the proposed fee will encourage Participants to submit Primary Improvement Orders to the Exchange, thus increasing order flow to BOX's auction mechanisms and benefitting all market participants.

Further, the Exchange believes exempting SPY COPIP and PIP Orders from the BVR is reasonable, equitable and not unfairly discriminatory. The Exchange notes that the BVR is meant to incentivize order flow, which the Exchange believes is already achieved by assessing lower fees for SPY PIP and COPIP Orders.

The Exchange believes including SPY transactions in the Customer Volume in Multiply Listed Options Classes for purposes of the Primary Improvement Order tiered execution fee and BOX Volume Rebate is reasonable as it will allow market participants to benefit from SPY PIP and COPIP volume in terms of qualifying for these volume based thresholds in Section I.B.1 of the Fee Schedule. Lastly, the Exchange believes the proposed change is equitable and not unfairly discriminatory because the Exchange includes the SPY PIP and COPIP transaction volume regardless of account type.

The Exchange believes that the proposed changes to Section III (Liquidity Fees and Credits) are equitable and not unfairly discriminatory in that the fees and credits apply to all categories of participants and across all account types. The Exchange notes that liquidity fees and credits on BOX are meant to offset one another in any particular transaction. The liquidity fees and credits do not directly result in revenue to BOX, but simply allows BOX to provide incentives to Participants to attract order flow. The Exchange also believes the proposed liquidity fees and credits for SPY PIP and COPIP transactions are reasonable as they mirror the structure of liquidity fees and credits currently in place for PIP and COPIP transactions on BOX. Further, the Exchange notes that Phlx assesses fees and offers rebates for removing or adding liquidity in SPY.[13]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed pricing for SPY options in PIP and COPIP transactions promotes competition in this highly liquid option. The Exchange does not believe that the proposed changes will burden competition by creating a disparity between the fees an Initiating Participant in the PIP or COPIP auction pays and the fees a competitive responder pays that would result in certain Participants being unable to compete with initiators. In fact, the Exchange believes that these changes will not impair these Participants from adding liquidity and competing in the auction mechanisms and will help promote competition by providing incentives for market participants to submit SPY PIP or COPIP order flow to BOX and thus, create a greater opportunity for customers to receive additional price improvement.

Further, the Exchange believes that the proposed liquidity fees and credits for SPY PIP and COPIP transactions will not impose a burden on competition. Rather, BOX believes that the changes

[8] *See* Phlx Pricing Schedule, Section 3, Part A. The Exchange notes that Phlx offers rebates ranging from $0.15 to $0.35 to Specialists and Market Makers for adding liquidity in SPY. Further, Phlx assesses a $0.48 fee for Market Makers, Broker Dealers and Professionals and a $0.45 fee for Public Customers for removing liquidity in SPY. As discussed herein, the Exchange proposes to assess fees for adding liquidity in SPY and offer credits for removing liquidity in SPY. The Exchange believes this is reasonable as the proposed change mirrors the structure of the liquidity fees and credits currently in place in the BOX Fee Schedule for PIP and COPIP transactions.

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] The Exchange is proposing to decrease the fees for SPY Improvement Orders, which are responses in the PIP and COPIP mechanisms, to $0.05 for all types of Participants; as well as assess a flat $0.02 fee for SPY Primary Improvement Orders. The Exchange believes these decreased fees are reasonable and will result in increased SPY order flow to BOX's auction mechanisms.

[11] *See supra* note 7.

[12] The Exchange notes that under the volume base tiered fee structure for Primary Improvement Orders, a majority of BOX Participants reach the highest tier and are assessed the $0.02 fee for their Primary Improvement Orders. Further, Improvement Orders are assessed $0.12 for Professional Customers and Broker Dealers and Market Makers and $0.15 for Public Customers. Under this proposal, SPY Primary Improvement Orders will be assessed the $0.02 flat fee and the SPY Improvement Order will be charged $0.05 (regardless of account type), a substantially less differential than what is currently assessed today for SPY transactions.

[13] *See supra* note 8.

will result in Participants being charged or credited appropriately for their PIP and COPIP transactions and is designed to enhance competition in Auction transactions on BOX. Submitting an order is entirely voluntary and Participants can determine which type of order they wish to submit, if any, to the Exchange.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing exchanges. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the

Exchange Act [14] and Rule 19b–4(f)(2) thereunder,[15] because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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–BOX–2018–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2018–36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2018–36, and should be submitted on or before January 9, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27411 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84816; File No. SR–CboeBZX–2018–066]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Permit the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options on a Pilot Basis

December 13, 2018.

On October 11, 2018, Cboe BZX Exchange, Inc. 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 permit the listing and trading of P.M.-settled series on certain broad-based index options on a pilot basis. The proposed rule change was published for comment in the **Federal Register** on October 30, 2018.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 14, 2018. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 28, 2019 as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84480 (Oct. 24, 2018), 83 FR 54635.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

proposed rule change (File Number SR–CboeBZX–2018–066).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27406 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84810; File No. SR–ICEEU–2018–021]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the F&O Stress Testing Policy [1]

December 13, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 6, 2018, ICE Clear Europe Limited (''ICE Clear Europe'' or ''The Clearing House'') 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 ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(4)(ii) thereunder,[5] so that the proposal was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe proposes to update and formalize its Futures and Options Stress Testing Policy (the ''F&O Stress Testing Policy'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe proposes to update and formalize its F&O Stress Testing Policy. The Clearing Risk Department is the owner of the F&O Stress Testing Policy and is responsible for ensuring that it remains up-to-date and that it is reviewed in accordance with policy requirements. The policy is to be reviewed annually by the F&O Risk Committee and the Board Risk Committee.

The objective of the F&O Stress Testing Policy is to ensure the F&O Guaranty Fund is adequate to cover at least the two largest Clearing Member uncollateralised losses (*i.e.,* losses over Clearing Member account's requirements). The F&O Guaranty Fund protects the Clearing House against losses over and above margin that may be experienced during periods of extreme market volatility. Stress tests are used to test the adequacy of the F&O Guaranty Fund size.

The F&O Stress Testing Policy describes ICE Clear Europe's stress test principles, including frequency and reporting. The stress test results of Clearing Member portfolios are calculated daily and reported internally on a daily basis. The F&O Risk Committee reviews historical daily stress test results on a bi-monthly basis. The Clearing House will review internally the stress scenarios on a regular basis and inform the F&O Risk Committee where additions or changes to the scenarios employed have a material impact on the stress results. The F&O Stress Testing Policy also provides an overview of ICE Clear Europe's stress loss calculation and stress shock calibration methodologies.

The F&O Stress Testing Policy describes and defines the types of F&O stress testing scenarios and their application. The Clearing House has two types of scenarios used to size the F&O Guaranty Fund: Historical and theoretical scenarios. The historical stress scenarios aim to select the most significant historic events in terms of extreme price movement of the relevant underlyings, and then replicate as accurately as possible the historic event that has been selected across the full range of cleared products and apply these stress tests to contemporary positions. Theoretical scenarios are constructed using plausible combinations of extreme price moves that are not contained within the set of historical scenarios, including group or sector specific stresses. The development of these hypothetical and extreme scenarios is tailored to the specific risks of the products and markets served. They are designed to measure the response of Clearing Members' portfolios to extreme conditions, and to assess the sufficiency of the available Guaranty Fund. Additionally, for other theoretical scenarios, ICE Clear Europe constructs theoretical scenarios, which are constructed of changes to macroeconomic events that are considered plausible given qualitative analysis of current market and geopolitical conditions. These scenarios are labelled ''hypothetical''.

The policy also describes ICE Clear Europe's reverse stress testing practices, which act as a tool to supplement existing stress analysis. Such scenarios follow the similar frequency and reporting as the standard stress test scenarios. Rather than sizing the F&O Guaranty Fund, these scenarios examine the magnitude of the stress required to exhaust the F&O Guaranty Fund size. Both historical reverse stress tests and theoretical reverse stress tests are performed. Reverse stress test scenarios results are reviewed and presented monthly to the F&O Risk Committee.

The F&O Stress Testing Policy describes how ICE Clear Europe aggregates stress test results. The uncollateralised stress losses across all scenarios per Clearing Member and sub-account [6] are calculated. The worst case result for each Clearing Member, by sub-account including segregated sponsored principal accounts, is then compared with the margin account's requirements in respect of the Clearing Member. Where the stress testing result is greater than the margin account's requirements, by sub-account, this modelled loss above requirement or shortfall is recorded as an uncollateralised stress testing loss. In order to derive the two largest uncollateralised losses, individual uncollateralised stress loss at each Clearing Member account is aggregated into the financial institution group.

The F&O Stress Testing Policy also describes how stress test results are reviewed and escalated. As noted above, daily stress testing results must be

[6] 17 CFR 200.30–3(a)(31).

[1] Capitalized terms used but not defined herein have the meanings specified in the Rules.

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(4)(ii).

[6] Sub-account refers to the definition of Margin Account as per the Rules.

reviewed daily by Senior Clearing Risk Department staff. A bi-monthly summary of any significant events in the stress testing will be presented to the F&O Risk Committee. Further, trigger levels will be set to flag certain events, *e.g.* when a Clearing Member's stressed losses exceed a predetermined percentage of its Original Margin requirement (but the change is not affecting the Guaranty Fund). In the event of a trigger of such event, Senior Clearing Risk Department staff will determine what action to follow, dependent on the nature of the event and Clearing Member to which it applies. The F&O Stress Testing Policy contains a non-exhaustive list of available actions.

The F&O Stress Testing Policy also includes reference to the Board risk appetite, and lists the escalation and notification protocols for each risk appetite metric. Each risk appetite metric is calculated as per its predetermined frequency, has a defined threshold in accordance with the latest calibration process, and is routinely reported to the Board and its committees as part of the Risk Appetite Metric Dashboard.

(b) Statutory Basis

ICE Clear Europe believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [7] and the regulations thereunder applicable to it, including the standards under Rule 17Ad–22.[8] Section 17A(b)(3)(F) of the Act [9] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The F&O Stress Testing Policy sets forth the methodology by which ICE Clear Europe ensures that the Guaranty Fund is adequate to cover at least the two largest Clearing Member uncollateralised losses (*i.e.* losses over Clearing Member account's requirements), in order to identify any potential deficiencies. Such testing ensures that ICE Clear Europe maintains the appropriate level of risk management resources to cover losses in the case of a default. As such, the proposed changes enhance ICE Clear Europe's ability to manage risk, and therefore enhance ICE Clear Europe's ability to promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions and contribute to the safeguarding of securities and funds in ICE Clear Europe's custody or control, within the meaning of Section 17A(b)(3)(F) of the Act.[10]

In addition, the proposed rule change is consistent with the relevant requirements of Rule 17Ad–22,[11] and in particular Rule 17Ad–22(e)(4).[12] Rule 17Ad–22(e)(4)(ii) [13] requires, in relevant part, that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by, for covered clearing agencies that are clearing agencies involved in activities with a more complex risk profile, maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. The F&O Stress Testing Policy contains stress testing practices designed to test the sufficiency of ICE Clear Europe's F&O Guaranty Fund, and ensure that ICE Clear Europe maintains sufficient financial resources to withstand a default by the two Clearing Member families to which it has the largest aggregate exposure in extreme, but plausible market conditions, in accordance with Rule 17Ad–22(e)(4)(ii).[14]

Rule 17Ad–22(e)(4)(vi)(A) [15] requires, in relevant part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to test the sufficiency of its total financial resources available to meet the minimum financial resource requirements under Rule 17Ad–22(e)(4)(i) through (iii) [16] by conducting stress testing of its total financial resources once each day using standard predetermined parameters and assumptions. The F&O Stress Testing Policy describes and defines the types of F&O stress testing scenarios and their application. ICE Clear Europe uses the results of the stress testing scenarios to determine the sufficiency of its financial resources on a daily basis. Thus, the proposed rule change is consistent with the requirement of Rule 17Ad–22(e)(4)(vi)(A).[17]

Rules 17Ad–22(e)(4)(vi)(B) through (D) [18] require, in relevant part, that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to: (i) Conduct a comprehensive analysis on at least a monthly basis of the existing stress testing scenarios, models, and underlying parameters and assumptions, and consider modifications to ensure they are appropriate for determining the covered clearing agency's required level of default protection in light of current and evolving market conditions; (ii) conduct a comprehensive analysis of stress testing scenarios, models, and underlying parameters and assumptions more frequently than monthly when the products cleared or markets served display high volatility or become less liquid, or when the size or concentration of positions held by the covered clearing agency's participants increases significantly; and (iii) report the results of the analyses described above to appropriate decision makers at the covered clearing agency, including but not limited to, its risk management committee or board of directors.

Specifically, the F&O Stress Testing Policy contains certain requirements regarding routine review of the policy, including a requirement that the policy be kept up-to-date and annual review by ICE Clear Europe's F&O Risk Committee and the Board Risk Committee. The F&O Stress Testing Policy also includes a notification and escalation process, which could, depending on the extent of the breach of pre-established thresholds could require a particular response and review of the response by the Executive Risk Committee or the Board Risk Committee. Further, the F&O Stress Testing Policy describes how stress test results are reviewed and escalated. Daily stress testing results must be reviewed daily by Senior Clearing Risk Department staff, and stress testing results are reported to the F&O Risk Committee. The F&O Stress Testing Policy also includes reference to Board escalation and notification protocols, based on pre-defined risk appetite metrics. As described above, the F&O

[7] 15 U.S.C. 78q–1.

[8] 17 CFR 240.17Ad–22.

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] Id.

[11] 17 CFR 240.17Ad–22.

[12] 17 CFR 240.17Ad–22(e)(4).

[13] 17 CFR 240.17Ad–22(e)(4)(ii).

[14] Id.

[15] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[16] 17 CFR 240.17Ad–22(e)(4)(i)–(iii).

[17] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[18] 17 CFR 240.17Ad–22(e)(4)(vi)(B)–(D).

Stress Testing Policy sets forth ICE Clear Europe's processes for review of the policy and stress testing results, and oversight by ICE Clear Europe's Board and certain of its committees. As such, the proposed rule change is consistent with the requirement of Rule 17Ad–22(e)(4)(vi)(B) through (D).[19]

Rule 17Ad–22(e)(2)[20] requires, in relevant part, that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and that specify clear and direct lines of responsibility. As detailed above, the F&O Stress Testing Policy sets forth the governance process for changes to the policy, as well as details the oversight by ICE Clear Europe's Board and certain of its committees of the stress testing results. As such, ICE Clear Europe believes the changes are reasonably designed to meet the requirements of 17Ad–22(e)(2).[21]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The F&O Stress Testing Policy applies uniformly across all F&O Clearing Members. ICE Clear Europe does not believe that the formalization of the F&O Stress Testing Policy will otherwise impact competition among Clearing Members or other market participants, or affect the ability of market participants to access clearing generally. Therefore, ICE Clear Europe does not believe the proposed rule changes impose any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

[19] Id.

[20] 17 CFR 240.17Ad–22(e)(2).

[21] Id.

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 and paragraph (f) of Rule 19b–4 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.

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–ICEEU–2018–021 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICEEU–2018–021. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2018–021 and should be submitted on or before January 9, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27405 Filed 12–18–18; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 10634]

Notice of Public Meeting

The Department of State will conduct an open meeting at 9:30 a.m. on Wednesday, January 9, 2019, at the headquarters of the Radio Technical Commission for Maritime Services (RTCM) in Suite 705, 1621 N Kent Street, Arlington, Virginia 22209. The primary purpose of the meeting is to prepare for the 6th session of the International Maritime Organization's (IMO) Sub-Committee on Navigation, Communication, and Search and Rescue, to be held at the IMO Headquarters, United Kingdom, January 21–25, 2019.

The agenda items to be considered include:

—Decisions of other IMO bodies
—Routing measures and mandatory ship reporting systems
—Updates to the LRIT system
—Application of the ''Indian Regional Navigation Satellite System (IRNSS)'' in the maritime field and development of performance standards for shipborne IRNSS receiver equipment
—Revised General requirements for shipborne radio equipment forming part of the GMDSS and for electronic navigational aids (resolution A.694(17)) relating to Built-In Integrity testing (BIIT) for navigation equipment
—Guidelines on standardized modes of operation, S-mode
—Develop guidance on definition and harmonization of the format and

[22] 17 CFR 200.30–3(a)(12).

structure of Maritime Service Portfolios (MSPs)

—Updating of the GMDSS master plan and guidelines on MSI (maritime safety information) provisions

—Consequential work related to the new Polar Code

—Revision of SOLAS chapters III and IV for Modernization of the GMDSS, including related and consequential amendments to other existing instruments (2021)

—Response to matters related to the Radiocommunication ITU R Study Group and ITU World Radiocommunication Conference

—Measures to protect the safety of persons rescued at sea

—Developments in GMDSS satellite services

—Revised Performance Standards for EPIRBs operating on 406 MHz (resolution A.810(19)) to include Cospas-Sarsat MEOSAR and second generation beacons

—Further development of the provision of global maritime SAR services

—Guidelines on harmonized aeronautical and maritime search and rescue procedures, including SAR training matters

—Amendments to the IAMSAR Manual

—Unified interpretation of provisions of IMO safety, security, and environment-related Conventions

—Biennial status report and provisional agenda for NCSR 7

—Election of Chair and Vice-Chair for 2020

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, George Detweiler, by email at *George.H.Detweiler@uscg.mil,* by phone at (202) 372–1566, or in writing at 2703 Martin Luther King Jr. Ave. SE, Stop 7418, Washington, DC 20593–7418 not later than January 2, 2019, 7 days prior to the meeting. Requests made after January 2, 2019 might not be able to be accommodated. In the case of inclement weather where the U.S. Government is closed or delayed, a public meeting may be conducted virtually by calling (202) 475–4000 or 1–855–475–2447, Participant code: 887 809 72. The meeting coordinator will confirm whether the virtual public meeting will be utilized. Members of the public can find out whether the U.S. Government is delayed or closed by visiting *www.opm.gov/status/.*

Joel C. Coito,

Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.

[FR Doc. 2018–27419 Filed 12–18–18; 8:45 am]

BILLING CODE 4710–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36235]

Great Northwest Railroad, L.L.C.—Amendment of Trackage Rights Exemption Containing Interchange Commitment—Union Pacific Railroad Company

Great Northwest Railroad, L.L.C. (GRNW) has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) to amend its existing overhead trackage rights over a rail line owned by Union Pacific Railroad Company (UP). GRNW states that the existing trackage rights extend over UP's line of railroad between milepost 10.46 at Riparia, Wash., and milepost 267.10 at Ayer, Wash. (the Line). The total distance is approximately 15.10 miles.[1]

GRNW states that the amended trackage rights agreement between it and UP (the Amendment) will permit GRNW to provide local service to a new facility locating on the Line.

According to GRNW, the Amendment includes an interchange commitment. As required under 49 CFR 1180.4(g)(4), GRNW has provided additional information regarding the interchange commitment.

The transaction may be consummated on or after January 2, 2019, the effective date of the exemption (30 days after the verified notice of exemption was filed).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed by December 26, 2018 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36235, must be filed with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Karl Morell & Associates, 440 1st Street NW, Suite 440, Washington, DC 20001.

Board decisions and notices are available on our website at *www.stb.gov.*

Decided: December 13, 2018.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Raina Contee,

Clearance Clerk.

[FR Doc. 2018–27468 Filed 12–18–18; 8:45 am]

BILLING CODE 4915–01–P

[1] GRNW states that it acquired incidental overhead trackage rights on the Line by assignment from Camas Prairie RailNet, Inc. *Great N.W. R.R.—Acquis. & Operation Exemption—Camas Prairie RailNet, Inc.,* FD 34474 (STB served Mar. 19, 2004).

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of modification of action.

SUMMARY: In accordance with the direction of the President, the U.S. Trade Representative (Trade Representative) has determined to modify the action being taken in this Section 301 investigation by postponing the date on which the rate of the additional duties will increase to 25 percent for the products of China covered by the September 2018 action in this investigation. As set out in this notice, the rate of additional duty for the products covered by the September 2018 action will increase to 25 percent on March 2, 2019.

DATES: On March 2, 2019 at 12:01 a.m. Eastern Standard Time, the rate of additional duty will increase to 25 percent with respect to products covered by the September 2018 action.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, contact Assistant General Counsels Arthur Tsao or Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For questions on customs classification or implementation of additional duties on products covered by the September 2018 action, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. September 2018 Action

For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), and 83 FR 40823 (August 16, 2018).

In a notice published on September 21, 2018 (83 FR 47974), the Trade Representative, at the direction of the President, announced a determination to modify the action being taken in the investigation by imposing additional duties on products of China with an annual trade value of approximately $200 billion. The rate of additional duties initially was 10 percent. Those additional duties were effective starting on September 24, 2018, and currently are in effect. Under Annex B of the September 21 notice, the rate of additional duty was set to increase to 25 percent on January 1, 2019. In the September 21 notice, the Trade Representative stated that he would continue to consider the actions taken in this investigation, and if further modifications were appropriate, he would take into account the extensive public comments and testimony previously provided in response to the notices published on July 17, 2018 (83 FR 33608) and August 7, 2018 (83 FR 38760).

On September 28, 2018 (83 FR 49153), the Trade Representative issued a conforming amendment and modification of the September 21 action. We refer to the September 21 action, as modified by the September 28 notice, as the 'September 2018 action.'

B. Determination To Modify September 2018 Action

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301 investigation. *See https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/* (the 'December 1 Statement'). The December 1 Statement notes that the President ''agreed that on January 1, 2019, he will leave the tariffs on $200 billion worth of product at the 10% rate, and not raise it to 25% at this time . . . Both parties agree that they will endeavor to have this transaction completed within the next 90 days. If at the end of this period of time, the parties are unable to reach an agreement, the 10% tariffs will be raised to 25%.'' The end of the 90-day period mentioned in the December 1 Statement is March 1, 2019.

Section 301(b) of the Trade Act of 1974, as amended (Trade Act), requires the Trade Representative to ''take all appropriate and feasible action authorized under [Section 301(c)] to obtain the elimination of [the] act, policy, or practice [under investigation].'' Section 307(a)(1) of the Trade Act provides, in relevant part, that the Trade Representative ''may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under Section 301 if . . . the burden or restriction on United States commerce . . . of the acts, policies, and practices, that are the subject of such action has increased or decreased, or such action is being taken under Section [301(b)] of this title and is no longer appropriate.'' In light of the outcome of the December 1 meeting, and at the direction of the President, the Trade Representative has determined that it no longer is appropriate for the rate of duty under the September 2018 action to increase to 25 percent on January 1, 2019, and that the rate of duty under the September 2018 action instead should increase to 25 percent on March 2, 2019 (which is the day following the end of the 90-day period mentioned in the December 1 Statement).

The Trade Representative's decision to modify the September 2018 action takes into account the extensive public comments and testimony, as well as advice from advisory committees, concerning the actions proposed in the notices issued in advance of the September 2018 action (83 FR 33608 and 83 FR 38760). Those notices, among other things, requested comments on whether the rate of additional duties should be 10 percent or 25 percent. The Trade Representative's decision also reflects the advice of the interagency Section 301 Committee.

As noted above, Annex B to the September 21 notice increased the rate of additional duties for the September 2018 action to 25 percent on January 1, 2019. The Annex to this notice supersedes Annex B to the September 21 notice, and provides that the rate of additional duties for the September 2018 action will increase to 25 percent on March 2, 2019.

Annex

(Superseding Annex B of the Notice Published at 83 FR 47974)

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. Eastern Standard Time on March 2, 2019, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified:

1. By deleting ''10%'' in the Rates of Duty 1-General column of headings 9903.88.03 and 9903.88.04, and inserting ''25%'' in lieu thereof; and

2. by deleting ''10 percent'' each place that it appears in U.S. Notes 20(e) and 20(g) to subchapter III of chapter 99 and inserting ''25 percent'' in lieu thereof.

Robert Lighthizer,

United States Trade Representative.

[FR Doc. 2018–27458 Filed 12–18–18; 8:45 am]

BILLING CODE 3290–F9–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case ID DPRK2–12505]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 10, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. CHOE, Ryong Hae (a.k.a. CH'OE, Ryong-hae); DOB 15 Jan 1950; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Director of the Workers' Party of Korea Organization and Guidance Department (individual) [DPRK2].

Designated pursuant to Section 1(a)(iii) of Executive Order 13687 of January 2, 2015, ''Imposing Additional Sanctions with Respect to North Korea'' (E.O. 13687) for being an official of the Workers' Party of Korea.

2. JONG, Kyong Thaek (a.k.a. CHO'NG, Kyo'ng-t'aek), Pyongyang, Korea, North; DOB 01 Jan 1961 to 31 Dec 1963; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Minister of State Security (individual) [DPRK2].

Designated pursuant to Section 1(a)(ii) of E.O. 13687 for being an official of the Government of North Korea.

Also designated pursuant to Section 1(a)(iii) of E.O. 13687 for being an official of the Workers' Party of Korea.

3. PAK, Kwang Ho (a.k.a. PAK, Kwang-ho); DOB 01 Jan 1946 to 31 Dec 1948; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Director of the Propaganda and Agitation Department (individual) [DPRK2].

Designated pursuant to Section 1(a)(iii) of E.O. 13687 for being an official of the Workers' Party of Korea.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2018–27453 Filed 12–18–18; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Funding Availability Under Supportive Services for Veteran Families Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice of fund availability.

SUMMARY: The Department of Veterans Affairs (VA) is announcing the availability of funds for supportive services grants for new applicants and existing grantees under the Supportive Services for Veteran Families (SSVF) Program. This Notice of Fund Availability (NOFA) contains information concerning the SSVF Program, supportive services grant application process. Awards made for supportive services grants will fund operations beginning October 1, 2019.

DATES: Applications for supportive services grants under the SSVF Program must be received by the SSVF Program Office by 4:00 p.m. Eastern Time on February 22, 2019. In the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages, or other submission-related problems.

ADDRESSES: For a Copy of the Application Package: Copies of the application can be downloaded from the SSVF website at *www.va.gov/homeless/ssvf.asp.* Questions should be referred to the SSVF Program Office via email at *SSVF@va.gov.* For detailed SSVF Program information and requirements, see part 62 of Title 38, Code of Federal Regulations (38 CFR part 62).

Submission of Application Package: Applicants must submit applications electronically following instructions found at *www.va.gov/homeless/ssvf.asp.* Applications may not be mailed or sent by facsimile (FAX). Applications must be received in the SSVF Program Office by 4:00 p.m. Eastern Standard Time on the application deadline date. Applications must arrive as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. See Award Information section of this NOFA for maximum allowable grant amounts.

Technical Assistance: Information regarding how to obtain technical assistance with the preparation of a supportive services grant application is available on the SSVF Program website at: *www.va.gov/homeless/ssvf.asp.*

FOR FURTHER INFORMATION CONTACT: Mr. John Kuhn, National Director, Supportive Services for Veteran Families, by email at *SSVF@va.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: Supportive Services for Veteran Families Program.

Announcement Type: Initial.

Funding Opportunity Number: VA–SSVF–110918.

Catalog of Federal Domestic Assistance Number: 64.033, VA Supportive Services for Veteran Families Program.

Funding Opportunity Description

Purpose

The SSVF Program purpose is to provide supportive services grants to private non-profit organizations and consumer cooperatives, who will coordinate or provide supportive services to very low-income veteran families who: (i) Are residing in permanent housing and are at risk of becoming homeless; (ii) are homeless and scheduled to become residents of permanent housing within a specified time period; or (iii) after exiting permanent housing within a specified time period, are seeking other housing that is responsive to such very low-income veteran family's needs and preferences. SSVF prioritizes the delivery of rapid re-housing services to homeless veteran households.

Rapid re-housing is an intervention designed to help individuals and families quickly exit homelessness, return to housing in the community, and avoid homelessness again in the near term. The core components of a rapid re-housing program are housing identification, financial assistance with move-in and rental expenses, and rapid re-housing case management and services. These core components represent the minimum that a program must be providing to households to be considered a rapid re-housing program, but do not provide guidance for what constitutes an effective rapid re-housing program. Applicants should familiarize themselves with the Rapid Re-housing Performance Benchmarks and Program Standards found on at *www.va.gov/homeless/ssvf.asp.*

Funding Priorities

The principle goal for this NOFA is to provide support to those applicants who demonstrate the greatest capacity to end homelessness among veterans or, in communities that have already met US Interagency Council on Homelessness (USICH) Federal Criteria and Benchmarks, or, alternatively, Community Solutions' Functional Zero (the latter can be found at *https://cmtysolutions.org/sites/default/files/final_zero_2016_metrics.pdf*), a capacity to sustain these gains. Priority will be given to grantees who can demonstrate adoption of evidence-based practices in their application.

Under Priority 1, VA will provide funding to existing grantees with 3-year accreditation from the Commission on Accreditation of Rehabilitation Facilities (CARF) in Employment and Community Services: Rapid Rehousing and Homeless Prevention standards, a 4-year accreditation from the Council on Accreditation's (COA) accreditation in Housing Stabilization and Community Living Services standards, or a 3-year accreditation in The Joint Commission's (JC) Behavioral Health Care: Housing Support Services Standards. Priority 2 includes existing grantees seeking to renew their grants not included under Priority 1. Under Priority 3, VA will provide non-renewable grants for a 2-year period to eligible entities providing services to very low-income veteran families who are occupying permanent housing in the areas of one of the Continuums of Care (CoC) listed in the Award Information section of this Notice. VA has designed this 2-year effort to provide a surge of resources in communities with high need. Only existing grantees currently providing services in an identified target community are eligible to apply for additional funds in that target community they currently serve under Priority 3. Priority 4 is open to new applicants only, who are seeking to provide services in the areas of one of the CoCs listed in the Award Information section of this Notice. These locations have been selected based on the current unmet service needs and the levels of Veteran homelessness, and VA also seeks to ensure that supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands. Applications for Priority 3 and 4 awards must include a letter of support from the target CoC to be considered for funding. CoC letters of support must contain the information described in the Award Information section of this Notice.

Note: VA is considering adding an additional rental subsidy option for Priority 3 awards. Should VA announce this new rental subsidy option through the publication of rulemaking that would amend 38 Code of Federal Regulations (CFR) part 62, Priority 3 awardees, as well as any other SSVF grantee providing services in a Priority 3 target community, would have the Definitions:

Title 38 CFR part 62 contains definitions of terms used in the SSVF Program. In addition to the definitions and requirements described in 38 CFR part 62, this NOFA provides further clarification in this paragraph on the use of *Emergency Housing Assistance* (EHA). EHA may be provided by the SSVF grantee under 38 CFR 62.34(f) to offer transition in place when a permanent housing voucher, such as is offered through the Department of Housing and Urban Development (HUD) Section 8 program, is available from any source, but access to the permanent housing voucher is pending completion of the housing inspection and administrative processes necessary for leasing. In such circumstances, the EHA payment cannot exceed what would otherwise be paid when the voucher is utilized. EHA may also be used as part of a Rapid Resolution or diversion response that helps Veteran households avoid entry into homelessness through placements with family or friends.

Approach

Respondents to this NOFA should base their proposals and applications on the current requirements of part 62. Grantees will be expected to leverage supportive services grant funds to enhance the housing stability of very low-income veteran families who are occupying permanent housing. In doing so, grantees are required to establish relationships with local community resources. Therefore, grantees must work through coordinated partnerships built either through formal agreements or the informal working relationships commonly found among successful social service providers.

As part of the application, all applicants are strongly encouraged to provide letters of support from their respective VA Network Homeless Coordinator (or their designee). In addition, Priority 1 and 2 applicants are strongly encouraged to provide letters of support from the CoC where they plan to deliver services that reflect the applicant's engagement in the CoC's efforts to coordinate services. Priority 3 and 4 applicants are required to provide these letters from the local CoC. Failure to provide a letter of support from the CoC as described will limit the maximum award to 90 percent of the award made in the previous fiscal year for Priority 1 and 2 applicants (as described in the Award Information section of this Notice. In addition, any applicant proposing to serve an Indian Tribal area is strongly encouraged to provide a letter of support from the relevant Indian Tribal Government.

The CoC's letter of support should note if the applicant is providing assistance to CoC in building local capacity to build Coordinated Entry Systems (CES) and the value and form of that assistance, whether support is direct funding or staffing. CES requires that providers ''operating within the CoC's geographic area must also work together to ensure the CoC's coordinated entry process allows for coordinated screening, assessment and referrals.'' (HUD Notice: CPD–17–01). The CoC's letter of support should also describe the applicant's participation in the CoC's community planning efforts.

Pursuant to 38 CFR 62.36, all grantees must participate in the development, implementation, and ongoing operations of their local CoC's coordinated assessment system, to include a CoC plan. A CoC plan is a community plan to organize and deliver housing and services to meet the needs of people who are homeless as they move to stable housing and maximize self-sufficiency. The community plan includes action steps to end homelessness and prevent a return to homelessness (CoC locations and contact information can be found at *www.hudhre.nfo/index.cfm?do=viewCocMaps*).

As part of their application, the applying organization's Executive Director must certify on behalf of the agency that they will actively participate in CoC community planning efforts and operate the rapid re-housing component of their SSVF grant in a manner consistent with the Rapid Re-housing Performance Benchmarks and Program Standards found at *www.va.gov/homeless/ssvf.asp.*

The aim of the provision of supportive services is to assist very low-income veteran families residing in permanent housing to remain stably housed and to rapidly transition those not currently in permanent housing to stable housing. SSVF emphasizes the placement of homeless veteran families who are described in 38 CFR 62.11(b)–(c) to include (i) very low-income veteran families who lack a fixed, regular and adequate nighttime residence and are scheduled to become residents of permanent housing within 90 days, and (ii) very low-income veteran families who have exited permanent housing within the previous 90 days to seek other housing that is responsive to their needs and preferences. As a crisis intervention program, the SSVF Program is not intended to provide long-term support for participants, nor will it be able to address all of the financial and supportive services needs of participants that affect housing stability. Rather, when participants require long-term support, grantees should focus on connecting such participants to income supports, such as employment and mainstream Federal and community resources (*e.g.,* HUD–VA Supportive Housing Program, HUD Housing Choice Voucher Programs, McKinney-Vento Funded Supportive Housing Programs, Temporary Assistance for Needy

Families (TANF), and Social Security Income/Social Security Disability Insurance (SSI/SSDI), etc.) that can provide ongoing support as required.

Assistance in obtaining or retaining permanent housing is a fundamental goal of the SSVF Program. Grantees must provide case management services in accordance with 38 CFR 62.31. Such case management should include tenant counseling, mediation with landlords, and outreach to landlords.

Authority

Funding available under this NOFA is authorized by 38 United States Code (U.S.C.) 2044. VA implements the SSVF Program through regulations in 38 CFR part 62. Funds made available under this NOFA are subject to the requirements of these regulations.

Requirements for the Use of Supportive Services Grant Funds

Requirements

The applicant's request for funding must be consistent with the limitations and uses of supportive services grant funds set forth in 38 CFR part 62 and in this NOFA. In accordance with the regulations and this NOFA, the following requirements apply to supportive services grants awarded under this NOFA:

1. Grantees may use a maximum of 10 percent of supportive services grant funds for administrative costs identified in 38 CFR 62.70(e).

2. Priority 1 and 2 grantees must use a minimum of 60 percent of the temporary financial assistance portion of their supportive services grant funds to serve very low-income veteran families who qualify under 38 CFR 62.11(b). Priority 3 and 4 applicants are required to spend no less than 70 percent of all budgeted temporary financial assistance on participants occupying permanent housing as defined in 38 CFR 62.11(b). (NOTE: Grantees may request a waiver to decrease this minimum, as discussed in the Application Review Information section of this Notice.)

3. Priority 1, 2, and 4 grantees may use a maximum of 50 percent of supportive services grant funds to provide the supportive service of temporary financial assistance paid directly to a third party on behalf of a participant for child care, emergency housing assistance, transportation, rental assistance, utility-fee payment assistance, security deposits, utility deposits, moving costs, and general housing stability assistance (which includes emergency supplies), in accordance with 38 CFR 62.33 and 38 CFR 62.34. Priority 3 grantees must use a minimum of 60 percent of supportive services grant funds to provide the supportive service of temporary financial assistance, unless a waiver is granted by the SSVF program office.

Guidance for the Use of Supportive Services Grant Funds

Title 38 CFR 62.2 defines Rapid re-housing as assistance offered ''without preconditions''. This is consistent with VA policy to support a ''Housing First'' model in addressing and ending homelessness.

Grantees must develop plans that will ensure that veteran participants have the level of income and economic stability needed to remain in permanent housing after the conclusion of the SSVF intervention. Both employment and benefits assistance from VA and non-VA sources represent a significant underutilized source of income stability for homeless veterans. Income is not a pre-condition for housing. Case management should include income maximization strategies to ensure households have access to benefits, employment, and financial counseling. The complexity of program rules and the stigma some associate with entitlement programs contributes to their lack of use. For this reason, grantees are encouraged to consider strategies that can lead to prompt and successful access to employment and benefits that are essential to retaining housing.

1. Grantees are expected to offer the following supportive services: Counseling participants about housing; assisting participants in understanding leases; securing utilities; making moving arrangements; providing representative payee services concerning rent and utilities when needed; and mediation and outreach to property owners related to locating or retaining housing. Grantees may also assist participants by providing rental assistance, security or utility deposits, moving costs, emergency housing, or general housing stability assistance; or using other Federal resources, such as HUD's Emergency Solutions Grants Program (ESG), or supportive services grant funds subject to the limitations described in this Notice and 38 CFR 62.34.

2. As SSVF is a short-term crisis intervention, grantees must develop plans that will produce sufficient income to sustain veteran participants in permanent housing after the conclusion of the SSVF intervention. Grantees must ensure the availability of employment and vocational services either through the direct provision of these services or their availability through formal or informal service agreements. Agreements with Homeless Veteran Reintegration Programs funded by the U.S. Department of Labor are strongly encouraged. For participants unable to work due to disability, income must be established through available benefits programs.

3. Per 38 CFR 62.33, grantees must assist participants in obtaining public benefits. Grantees must screen all participants for eligibility for a broad range of entitlements such as TANF, Social Security, the Supplemental Nutrition Assistance Program, the Low-Income Home Energy Assistance Program, the Earned Income Tax Credit, and local General Assistance programs. A description of some of these benefits programs, including eligibility and how to access benefits, can be found at *www.benefits.gov.* Grantees are expected to access the Substance Abuse and Mental Health Services Administration's SSI/SSDI Outreach, Access, and Recovery (SOAR) program directly by training staff and providing the service or subcontracting services to an organization to provide SOAR services.

4. Grantees are encouraged to provide, or assist participants in obtaining, legal services relevant to issues that interfere with the participants' ability to obtain or retain permanent housing. (NOTE: Information regarding legal services provided may be protected from being released to the grantee or VA under attorney-client privilege, although the grantee must provide sufficient information to demonstrate the frequency and type of service delivered.) Support for legal services can include paying for court filing fees to assist a participant with issues that interfere with the participant's ability to obtain or retain permanent housing or supportive services, including issues that affect the participant's employability and financial security. Grantees (in addition to employees and members of grantees) may represent participants before VA with respect to a claim for VA benefits, but only if they are recognized for that purpose pursuant to 38 U.S.C. Chapter 59. Further, the individual providing such representation must be accredited pursuant to 38 U.S.C. Chapter 59.

5. Access to mental health and addiction services are required by SSVF; however, grantees cannot fund these services directly through the SSVF grant. Therefore, applicants must demonstrate, through either formal or informal agreements, their ability to promote rapid access to and engagement with mental health and addiction

services for the veteran and family members.

6. VA recognizes that extremely low-income veterans, with incomes below 30 percent of the area median income, face greater barriers to permanent housing placement. Grantees should consider how they can support these participants.

7. When serving participants who are residing in permanent housing, the defining question to ask is ''Would this individual or family be homeless but for this assistance?'' The grantee must use VA's homeless prevention screening tool with criteria that targets those most at-risk of homelessness. To qualify for SSVF services, a participant who is served under 38 CFR 62.11(a) (homeless prevention) must not have sufficient resources or support networks (*e.g.,* family, friends, faith-based or other social networks) immediately available to prevent them from becoming homeless. To further qualify for services under 38 CFR 62.11(a), the grantee must document that the participant meets that eligibility requirement. Documentation of one of the following conditions would meet this requirement:

(a) Has moved because of economic reasons two or more times during the 60 days immediately preceding the application for homelessness prevention assistance;

(b) Is living in the home of another because of economic hardship;

(c) Has been notified in writing that their right to occupy their current housing or living situation will be terminated within 21 days after the date of application for assistance;

(d) Lives in a hotel or motel, and the cost of the hotel or motel stay is not paid by charitable organizations or by Federal, State, or local government programs for low-income individuals;

(e) Is exiting a publicly funded institution or system of care (such as a health care facility, a mental health facility, or correctional institution) without a stable housing plan; or

(f) Otherwise lives in housing that has characteristics associated with instability and an increased risk of homelessness, as identified in the VA's homeless prevention screening tool.

8. SSVF grantees are required to participate in local planning efforts designed to end veteran homelessness. Grantees may use grant funds to support SSVF involvement in such community planning by sub-contracting with CoCs, when such funding is essential, to create or sustain the development of these data driven plans. Grantees may also deploy staff to participate in CoC sanctioned Coordinated Entry screening and assessment.

9. When other funds from community resources are not readily available to assist program participants, grantees may choose to utilize supportive services grants, to the extent described in this NOFA and in 38 CFR 62.33 and 62.34, to provide temporary financial assistance. Such assistance may, subject to the limitations in this NOFA and 38 CFR part 62, be paid directly to a third party on behalf of a participant for child care, transportation, family emergency housing assistance, rental assistance, utility-fee payment assistance, security or utility deposits, moving costs and general housing stability assistance as necessary.

10. SSVF expects grantees to offer Rapid Resolution (also known as diversion) services. These services engage veterans immediately before or after they become homeless and assist them to avoid continued homelessness. These efforts can reduce the trauma and expense associated with extended periods of homelessness, and the strain on the crisis response and affordable housing resources in the community. Through Rapid Resolution, the grantee and the Veteran explore safe, alternative housing options immediately before or quickly after they become homeless. Rapid Resolution can identify an immediate safe place to stay within the Veteran's network of family, friends, or other social networks. All Veterans requesting SSVF services should have a Rapid Resolution screening and if not appropriate for Rapid Resolution grantees should then assess the Veteran for other SSVF services. More information about Rapid Resolution can be found at *www.va.gov/homeless/ssvf.asp.*

Award Information

Overview

This NOFA announces the availability of funds for supportive services grants under the SSVF Program and pertains to proposals for renewal of existing supportive services grant programs.

Funding

The funding priorities for this NOFA are as follows:.

1. Priority 1. Under Priority 1, VA will provide funding to those existing grantees with 3-year CARF, 4-year COA accreditations, or 3-year JC accreditations. Proof of accreditation must be submitted with the application no later than the application due date. Grantees previously awarded a 3-year grant that is not scheduled to end by October 1, 2019, cannot apply under this NOFA but are required to submit a letter of intent (LOI) by the NOFA deadline indicating their intention of continuing SSVF services in FY 2019. Grantees submitting a LOI must include proof of continued accreditation, a letter of support from the CoC (see Award Information section in this Notice.) and a proposed budget for FY 2020.

2. Priority 2. Priority 2 includes all other existing grantees, not applying under Priority 1, seeking to renew their grants.

3. Priority 3. Priority 3 applications will be accepted only from existing grantees currently providing services in one of the communities targeted for additional funding under this Priority.

(a) Awards are for a 2-year non-recurring period.

(b) If multiple grantees have fundable scores, VA may elect to equally distribute funds amongst applicants regardless of the funding request in order to strengthen overall community capacity. This distribution of funds could occur among the top 2 or 3 scoring applicants.

(c) If underspent, awards are subject to being recouped as per the Other Information

(d) section of this Notice, with funding amounts annualized for the purposes of spending calculations (for example, a 2-year award of $6 million is treated as $3 million per year). As a new award in the first year of the award period, grants will not be subject to the Other Information section of this Notice until the end of the third quarter.

(e) List of CoCs for purposes of Priority 3 funding.

State	CoC for the following areas	CoC ID	Maximum (awards cover 2-year term)
CA	San Jose/Santa Clara	CA–500	$3 million.
CA	San Francisco	CA–501	$6 million.
CA	Oakland	CA–502	$6 million.
CA	Los Angeles	CA–600	$6 million.
CA	San Diego	CA–601	$6 million.

State	CoC for the following areas	CoC ID	Maximum (awards cover 2-year term)
DC	District of Columbia	DC–500	$3 million.
HI	Honolulu	HI–501	$3 million.
IL	Chicago	IL–510	$6 million.
NY	New York City	NY–600	$6 million.
WA	Seattle	WA–500	$6 million.

4. Priority 4. Priority 4 applications will be accepted from new applicants only, who are seeking to provide services in the areas of one of the following targeted CoCs:

(a) Grant requests do not need to serve target communities exclusively and may also include neighboring communities. Grant requests cannot exceed the amount listed as the ''Maximum Request'' for the target CoCs listed below.

(b) As a new award, in the first year of the award period, grants will not be subject to VII.C until the end of the third quarter.

State	CoC for the following areas	CoC ID	Maximum request
AK	Alaska BoS	AK–501	$500,000.
AL	Birmingham/Jefferson, St. Clair	AL–500	$500,000.
AR	Little Rock/Central Arkansas	AR–500	$500,000.
AZ	Phoenix, Mesa/Maricopa	AZ–502	$1 million.
CA	Sacramento City	CA–503	$1 million.
CA	San Diego	CA–601	$1 million.
CA	Santa Ana/Anaheim/Orange County	CA–602	$1 million.
CO	Metropolitan Denver	CO–503	$1 million.
CO	Colorado BoS	CO–500	$1 million.
IN	Indiana BoS	IN–502	$1 million.
KS	Kansas BoS	KS–507	$500,000.
LA	Lafayette/Acadiana	LA–500	$250,000.
LA	Louisiana BoS	LA–509	$250,000
MA	Boston	MA–500	$1 million.
MO	Kansas City	MO–604	$500,000.
MT	Montana Statewide	MT–500	$500,000.
NC	Charlotte/Mecklenberg	NC–505	$500,000.
NC	North Carolina BoS	NC–503	$500,000.
NY	Buffalo, Niagara Falls/Erie	NY–508	$250,000.
NV	Las Vegas/Clark	NV–500	$1 million.
OR	Portland, Gresham/Multnomah	OR–501	$1 million.
OR	Oregon BoS	OR–505	$1 million.
SD	South Dakota Statewide	SD–500	$500,000.
TX	Dallas City	TX–600	$500,000.
TX	Houston, Pasadena, Conroe/Harris	TX–700	$1 million.
TX	Texas BoS	TX–503	$1 million.
WA	Washington BoS	WA–501	$1 million.
WI	Wisconsin BoS	WI–500	$1 million.

All Priority 1 and 2 applicants must apply using the renewal application. To be eligible for renewal of a supportive services grant, the Priority 1 and 2 applicants' program concept must be substantially the same as the program concept of the grantees' current grant award. Renewal applications can request funding that is equal to or less than their current annualized award. Under Priority 3 and 4, applicants must apply using the application for new applicants. Applications will only be accepted from eligible entities proposing to serve the target communities served by one of the CoCs described in Section II.B.3. and II.B.4.

Allocation of Funds

Funding will be awarded under this NOFA to new applicants and existing grantees for a 1 to 3-year period for services beginning October 1, 2019. The following requirements apply to grants awarded under this NOFA:

1. In response to this NOFA, only existing grantees can apply as Priority 1 or 2 grantees.

2. Applications for Priority 3 will only be accepted from designated target communities and requests cannot exceed the amounts listed as a maximum award list in the chart in II.B.3.

3. Only existing grantees currently providing SSVF services in a target community listed in II.B.3. may apply for funding under Priority 3. These applicants can only apply for funding in the target community where they are providing services.

4. Applications for Priority 4 must include services for the designated target communities (the application may also include services for adjacent areas) and requests cannot exceed the amounts listed as the maximum award in the chart in II.B.4.

5. Eligible entities can submit no more than one application for new funding under Priority 4.

6. Each renewal grant request under Priority 1 or 2 cannot exceed the grantee's current annualized award.

7. Applicants must fill out separate applications for each grant funding request.

8. Applicants under Priority 1 or 2 may request an amount less than their current award (this will not be considered a substantial change to the program concept).

9. If a grantee failed to use all of its awarded funds in FY 2018 or had unspent funds returned to VA in FY 2018, VA may elect to limit renewal awards under Priority 1 or 2 to the amount of funds used in the previous fiscal year.

10. If, during the course of the grant year, VA determines that grantee spending is not meeting the minimum percentage milestones below, VA may elect to recoup projected unused funds and reprogram such funds to provide supportive services in areas with higher need. Should VA elect to recoup unspent funds, reductions in available grant funds would take place the first business day following the end of the quarter.

(a) By the end of the first quarter, December 31, 2019, of the grantee's supportive services annualized grant award period, if the grantee's cumulative requests for supportive services grant funds is fewer than 15 percent of the total supportive services grant award VA may recoup funds. During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 35 percent of the total supportive services grant award, or VA may recoup funds.

(b) By the end of the second quarter, March 31, 2020, of the grantee's supportive services annualized grant award period, if the grantee's cumulative requests for supportive services grant funds is fewer than 40 percent of total supportive services grant award the VA may recoup funds. During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 60 percent of the total supportive services grant award.

(c) By the end of the third quarter, June 30, 2020, of the grantee's supportive services annualized grant award period, if the grantee's cumulative requests for supportive services grant funds is fewer than 65 percent of total supportive services grant award, the VA may recoup funds. During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 80 percent of the total supportive services grant award, or the VA may recoup funds.

11. Applicants for Priority 1 or 2 awards who fail to provide a letter of support from at least one of the CoCs they plan to serve will be eligible for renewal funding at a level no greater than 90 percent of the amount of funds awarded to them in their prior grant award. Applicants are responsible for determining who in each CoC is authorized to provide such letters of support. This requirement applies to all Priority 1 and 2 applicants, including existing multi-year grantees that are only required to submit a LOI in response to this NOFA. Applicants for Priority 3 or 4 awards are required to provide a letter of support from the CoC identified in Section II.B.3 (for Priority 3) or Section II.B.4. (for Priority 4). Priority 3 and 4 applications that do not include a letter will not be considered for funding. In order to meet this requirement, all applicant letters, regardless of Priority, must include:

(a) A detailed description of the applicant's participation in the CoC's Coordinated Entry process or planning activities and overall community planning efforts (for instance, confirmation of applicant's active participation in planning coordinated entry, commitment to participating in coordinated entry, hours spent on CoC-sponsored committee or workgroup assignments and names of said committees or workgroups).

(b) The applicant's contribution to the CoC's coordinated entry process capacity building efforts, detailing the specific nature of this contribution (for instance, the hours of staff time and/or the amount of funding provided), if such SSVF capacity has been requested by the CoC or otherwise has shown to be of value to the CoC.

12. Should additional funding become available over the course of grant term from funds recouped under the Award Information section of this Notice, funds that are voluntarily returned by grantees, or funds that become available due to a grant termination, VA may elect to offer these funds to grantees in areas where demand has exceeded available SSVF resources. Additional funds will be provided first to the highest scoring grantee in the selected area who is in compliance with their grant agreement and has the capacity to utilize the additional funds.

13. Should sufficient funds be available, Priority 1 and 2 grantees may be eligible for an increase of up to 2 percent of their renewed total award. Any such increase will be applied uniformly to all renewed Priority 1 and 2 grants.

Supportive Services Grant Award Period

Priority 1 and 2 grant awards are generally made for a 1-year period, although selected grants may be eligible for a 3-year award (see the Award Administration section of this Notice). Priority 3 grants will have a 2-year, non-renewable term. Priority 4 grants are awarded for a 1-year period. Priority 1, 2, and 4 are eligible to be renewed in a subsequent NOFA subject to the availability of funding.

Eligibility Information

Eligible Applicants: Only eligible entities that are existing grantees with grants scheduled to end by September 30, 2019, can apply under Priority 1 or 2 in response to this NOFA. For Priority 3, any eligible entity that is an existing grantee may apply for new funding in one of the listed target communities described in the Award Information section of this Notice. For Priority 4, any eligible entity may apply for new funding in one of the listed target communities described in the Award Section of this Notice. In order to be eligible, an applicant must qualify as a private non-profit organization that meets the definition of ''eligible entity'' in the 38 CFR 62.2.

Cost Sharing or Matching: None.

Application and Submission Information

Obtaining an Application Package

Applications are located at *www.va.gov/homeless/ssvf.asp.* Any questions regarding this process should be referred to the SSVF Program Office via email at *SSVF@va.gov.* For detailed SSVF Program information and requirements, see 38 CFR part 62.

Content and Form of Application

Applicants must submit applications electronically following instructions found at *www.va.gov/homeless/ssvf*.asp. The full, downloadable content of the application can be found at *www.va.gov/homeless/ssvf*.asp. Priority 3 and 4 applicants must complete the application for new applicants. Priority 1 and 2 applicants use the renewal application. The renewal application includes questions that require a narrative response for the following.

1. Describe how your program's participants made progress in achieving stability during the grant award period. For example, describe specific initiatives you have taken to increase household income through employment or benefits, such as use of the Department of Labor's Homeless Veterans Reintegration Program or the SSI/SSDI Outreach, Access, and Recovery (SOAR) program. Additionally, describe how any proposed program modifications will impact participants housing stability.

2. Describe how your program targeted and reduced Literal homelessness among very low-income Veteran families occupying permanent housing (Category 2 and 3, described in 38 CFR 62.11). Please include any

initiatives you are taking to address shortfalls in the availability of affordable housing in the communities you serve.

3. Describe how you targeted and prevented literal homelessness among those very low-income Veteran families occupying permanent housing who were most at risk (Category 1, described in 38 CFR 62.11(b)(1)). Please describe in detail any Rapid Resolution/diversion services offered and how they are integrated into the screening process employed as part of Coordinated Entry.

4. Describe how you receive and respond to feedback from participants in your program (*e.g.* exit interviews, internal surveys, etc.). What is your average number of responses to the SSVF Participant Survey? Are you satisfied with your response rate and, if not, how will you work to increase it? Describe any changes you have made as a result of participant feedback.

5. Specify the average time between client intake and start of service delivery, average time to placement in permanent housing, and average length of stay (enrollment to exit). Describe any programmatic or organizational delays associated with onset of supportive services delivery. Describe the timeline for any proposed program modifications.

6. How have you coordinated SSVF services with other programs offered in the Continuum(s) of Care (CoC) you currently serve? Describe your direct involvement in each CoC's Coordinated Entry effort and community plan to end Veteran homelessness.

7. Please explain whether your program was implemented consistent with your approved budget in your previous year of operation (Oct 1 through Sept 30). Explain any major deviations or variances from original budget. (VA-approved program changes to the grant agreement do not need to be addressed.)

8. Please provide information on whether your program: (a) Required an extension in order to fully expend its grant award, (b) had unspent funds swept by the SSVF program office at the end of any quarter and/or (c) returned funds to U.S. Treasury at the end of the grant period. If you have returned funds, explain your plan to fully expend your current grant amount.

9. Describe how your program was implemented in accordance with VA's goals (as described in 38 CFR part 62 and this NOFA) for the SSVF Program. Address how you ensured staff were trained and supervised to deliver services to rapidly meet participants' individualized needs while protecting the program from waste, fraud, and abuse.

Submission Dates and Times

Applications for supportive services grants under the SSVF Program must be received by the SSVF Program Office by 4:00 p.m. Eastern Time on February 22, 2019. Awards made for all grants will fund operations beginning October 1, 2019. Applications must arrive as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. Additionally, in the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages, or other delivery-related problems.

Funding Restrictions

Funding will be awarded for supportive services grants under this NOFA depending on funding availability (currently funding is only authorized to be appropriated for the SSVF program through FY 2019). Applicants should fill out separate applications for each supportive services funding request. Funding for Priority 1 or 2 will be awarded under this NOFA to existing grantees for a 1 to 3-year period beginning on October 1, 2019. Funding for Priority 3 will be awarded for a 2-year period beginning on October 1, 2019. Funding for Priority 4 will be awarded for a 1-year period beginning on October 1, 2019.

Funding used for staff education and training cannot exceed 1 percent of the overall program grant award. This limitation does not include the cost to attend VA mandated training. All training costs must be directly related to the provision of services to homeless veterans and their families.

Expenses related to maintaining accreditation are allowable. Grantees are allowed to include expenses for seeking initial accreditation only once in a 5-year period. The expenses to renew full accreditation is allowed and is based on the schedule of the accrediting agency, for instance every 3 years for CARF and every 4 years for COA. Expenses related to the renewal of less than full accreditation are not allowed.

Other Submission Requirements

1. Existing grantees applying for renewal grants may apply only as renewal applicants using the application designed for renewal grants.

2. Existing grantees applying for new funding under Priority 3 must use the application designed for new grants.

3. At the discretion of VA, multiple grant proposals submitted by the same lead agency may be combined into a single grant award if the proposals provide services to contiguous areas.

4. Additional supportive services grant application requirements are specified in the application package. Submission of an incorrect or incomplete application package will result in the application being rejected during threshold review. The application packages must contain all required forms and certifications. Selections will be made based on criteria described in 38 CFR part 62 and this NOFA. Applicants and grantees will be notified of any additional information needed to confirm or clarify information provided in the application and the deadline by which to submit such information. Applicants must submit applications electronically. Applications may not be mailed or sent by facsimile (FAX).

Application Review Information

Criteria

1. VA will only score applicants that meet the threshold requirements described in 38 CFR 62.21.

2. VA will use the criteria described in 38 CFR 62.22 to score an application (Priority 3 and 4) for a supportive services grant and criteria in 38 CFR 62.24 to score grantees applying for renewal (Priority 1 and 2) of a supportive services grant.

Review and Selection Process

3. VA will review all supportive services grant applications in response to this NOFA according to the following steps:

a. Score all applications that meet the threshold requirements described in 38 CFR 62.21.

b. Rank those applications who score at least 75 cumulative points and receive at least one point under each of the categories identified for new applicants in 38 CFR 62.22 and renewal applicants in 38 CFR 62.24. The applications will be ranked in order from highest to lowest scores in accordance with 38 CFR 62.23 for new applicants and 38 CFR 62.25 for renewal applicants.

c. Utilize the ranked scores of applications as the primary basis for

selection. However, VA will also utilize the following considerations in 38 CFR 62.23(d) to select applicants for funding:

(i) Give preference to applications that provide or coordinate the provision of supportive services for very low-income veteran families transitioning from homelessness to permanent housing. Consistent with this preference, where other funds from community resources are not readily available for temporary financial assistance, Priority 1 and 2 applicants are required to spend no less than 60 percent of all budgeted temporary financial assistance on participants occupying permanent housing as defined in 38 CFR 62.11(b). Priority 3 and 4 applicants are required to spend no less than 70 percent of all budgeted temporary financial assistance on participants occupying permanent housing as defined in 38 CFR 62.11(b). Waivers to this spending requirement may be requested when grantees can demonstrate significant local progress towards eliminating homelessness in the target service area. Waiver requests must include data from authoritative sources such as USICH certification, that a community has ended homelessness as defined by Federal Benchmarks and Criteria or has reached Community Solution's Functional Zero. Waivers for the spending requirement may also be requested for services provided to rural Indian tribal areas and other rural areas where shelter capacity is insufficient to meet local need. Waiver requests must include an endorsement by the impacted CoC explicitly stating that a shift in resources from rapid re-housing to prevention will not result in an increase in homelessness.

(ii) To the extent practicable, ensure that supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands. This equitable distribution criteria will be used to ensure that SSVF resources are provided to those communities with the highest need as identified by VA's assessment of expected demand and available resources to meet that demand.

(ii) Subject to the considerations noted in paragraph B.3 above, VA will fund the highest-ranked applicants for which funding is available.

Award Administration Information

Award Notices

Although subject to change, the SSVF Program Office expects to announce grant recipients in the fourth quarter of FY 2019 with grant agreements being signed by October 1, 2019. Prior to executing a funding agreement, VA will contact the applicants, make known the amount of proposed funding and verify that the applicant would still like the funding. Once VA verifies that the applicant is still seeking funding, VA will execute an agreement and make payments to the grant recipient in accordance with 38 CFR part 62 and this NOFA.

Administrative and National Policy Requirements

Grantees are expected to offer the following supportive services: Housing counseling; assisting participants in understanding leases; securing utilities; making moving arrangements; providing representative payee services concerning rent and utilities when needed; and mediation and outreach to property owners related to locating or retaining housing. Grantees may also assist participants by providing rental assistance, security or utility deposits, moving costs or general housing stability assistance, using other Federal resources, such as ESG, or supportive services grant funds to the extent described in this NOFA and 38 CFR 62.34.

As SSVF grants cannot be used to fund treatment for mental health or substance use disorders, applicants must provide evidence that they can provide access to such services to all program participants through formal and informal agreements with community providers.

Reporting

VA places great emphasis on the responsibility and accountability of grantees. As described in 38 CFR 62.63 and 62.71, VA has procedures in place to monitor supportive services provided to participants and outcomes associated with the supportive services provided under the SSVF Program. Applicants should be aware of the following:

1. Upon execution of a supportive services grant agreement with VA, grantees will have a VA regional coordinator assigned by the SSVF Program Office who will provide oversight and monitor supportive services provided to participants.

2. Grantees will be required to enter data into a Homeless Management Information System (HMIS) Web-based software application. This data will consist of information on the participants served and types of supportive services provided by grantees. Grantees must treat the data for activities funded by the SSVF Program separate from that of activities funded by other programs. Grantees will be required to work with their HMIS Administrators to export client-level data for activities funded by the SSVF Program to VA on at least a monthly basis.

3. VA shall complete monitoring evaluations of each grantee at a rate of not less than once every two years. Monitoring will also include the submittal of quarterly and annual financial and performance reports by the grantee. The grantee will be expected to demonstrate adherence to the grantee's proposed program concept, as described in the grantee's application. All grantees are subject to audits conducted by the VA or its representative.

4. Grantees will be assessed based on their ability to meet critical performance measures. In addition to meeting program requirements defined by the regulations and applicable NOFA(s), grantees will be assessed on their ability to place participants into housing and the housing retention rates of participants served. Higher placement for homeless participants and higher housing retention rates for at-risk participants are expected for very-low income veteran families when compared to extremely low-income veteran families with incomes below 30 percent of the area median income.

5. Organizations receiving renewal awards and that have had ongoing SSVF program operation for at least 1 year (as measured from the start of initial SSVF services until February 22, 2019) may be eligible for a 3-year award. Grantees meeting outcome goals defined by VA and in substantial compliance with their grant agreements (defined by meeting targets and having no outstanding corrective action plans) and who, in addition, receive 3-year accreditation from CARF in Employment and Community Services: Rapid Rehousing and Homeless Prevention standards, a 4-year accreditation from COA accreditation in Housing Stabilization and Community Living Services standards, or a 3 year accreditation in The Joint Commission's Behavioral Health Care: Housing Support Services Standards are eligible for a 3-year grant renewal subject to funding availability. (NOTE: Multi-year awards are contingent on funding availability). If awarded a multiple year renewal, grantees may be eligible for funding increases as defined in NOFAs that correspond to years 2 and 3 of their renewal funding.

Other Information

VA Goals and Objectives for Funds Awarded Under This NOFA: In accordance with 38 CFR 62.24(c), VA will evaluate an applicant's compliance with VA goals and requirements for the

SSVF Program. VA goals and requirements include the provision of supportive services designed to enhance the housing stability and independent living skills of very low-income veteran families occupying permanent housing across geographic regions and program administration in accordance with all applicable laws, regulations, and guidelines. For purposes of this NOFA, VA goals and requirements also include the provision of supportive services designed to rapidly re-house or prevent homelessness among people in the following target populations who also meet all requirements for being part of a very low-income veteran family occupying permanent housing:

1. Veteran families earning less than 30 percent of area median income as most recently published by HUD for programs under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) (*http://www.huduser.org*).

2. Veterans with at least one dependent family member.

3. Veterans returning from Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn.

4. Veteran families located in a community, as defined by HUD's CoC, or a county not currently served by another SSVF grantee.

5. Veteran families located in a community, as defined by HUD's CoC, where current level of SSVF services is not sufficient to meet demand of Category 2 and 3 (currently homeless) veteran families.

6. Veteran families located in a rural area.

7. Veteran families located on Indian Tribal Property.

B. Payments of Supportive Services Grant Funds: Grantees will receive payments electronically through the U.S. Department of Health and Human Services Payment Management System. Grantees will have the ability to request payments as frequently as they choose subject to the following limitations:

1. During the first quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 35 percent of the total supportive services grant award without written approval by VA.

2. By the end of the second quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 60 percent of the total supportive services grant award without written approval by VA.

3. By the end of the third quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 80 percent of the total supportive services grant award without written approval by VA.

4. By the end of the fourth quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds may not exceed 100 percent of the total supportive services grant award.

Recouping Excess Funds

VA regularly reviews grantee expenditures to ensure that funds are being used in a manner consistent with program goals and regulations. It is expected that grantee expenditures will be consistent across quarters as significant variance, specifically lower than expected spending, may indicate either a lower demand for services or difficulty in managing funds. If during the grant period, VA determines that grantee spending is not meeting the minimum percentage milestones below, VA may elect to recoup projected unused funds and reprogram such funds to provide supportive services in areas with higher need. Reductions will be calculated based on the total amount of payment requests submitted through the U.S. Department of Health and Human Services Payment Management System by 5:00 p.m. eastern standard time on the last business day of the quarter. Should VA elect to recoup unspent funds, reductions in available grant funds would take place the second business day following the end of the quarter.

1. By the end of the first quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 15 percent of total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 35 percent of the total supportive services grant award.)

2. By the end of the second quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 40 percent of total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 60 percent of the total supportive services grant award.)

3. By the end of the third quarter of the grantee's supportive services annualized grant award period, the grantee's cumulative requests for supportive services grant funds is fewer than 65 percent of total supportive services grant award. (During this same period, the grantee's cumulative requests for supportive services grant funds may not exceed 80 percent of the total supportive services grant award).

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 L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on December 14, 2018, for publication.

Dated: December 14, 2018.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2018–27465 Filed 12–18–18; 8:45 am]

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Part II

Library of Congress

Copyright Royalty Board

37 CFR Part 382

Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and ''Preexisting'' Subscription Services (SDARS III); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 382

[Docket No. 16–CRB–0001 SR/PSSR (2018–2022)]

Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their final determination of the rates and terms for the digital transmission of sound recordings and the reproduction of ephemeral recordings by preexisting subscription services and preexisting satellite digital audio radio services for the period beginning January 1, 2018, and ending on December 31, 2027.

DATES:

Effective Date: December 19, 2018.

Applicability Date: The regulations apply to the license period beginning January 1, 2018, and ending December 31, 2027.

ADDRESSES: The final determination is posted in eCRB at *https://app.crb.gov/.* For access to the docket to read the final determination and submitted background documents, go to eCRB and search for docket number 16–CRB–0001 SR/PSSR (2018–2022).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Assistant, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The purpose of the Copyright Royalty Judges (Judges) in the present proceeding is to determine the royalty rates and terms applicable to Preexisting Subscription Services (PSS) and Satellite Digital Audio Radio Services (SDARS) for licenses established by the Copyright Act (Act) to utilize copyrighted sound recordings. *See* 17 U.S.C. 112, 114. The Act requires the Judges to determine applicable rates and terms every five years. *See* 17 U.S.C. 801(b)(1), 804(b)(3)(B).

In determining the PSS rates, the Judges considered proposals from both Music Choice and SoundExchange as guideposts rather than as benchmarks and determined a rate based upon the current statutory rate as adjusted to meet statutory requirements. In determining the SDARS rates, the Judges relied most heavily on the opportunity cost approach proffered by SoundExchange, but the Judges utilized opportunity cost survey data that they found more appropriate than the data relied on by SoundExchange.

After the Judges issued the Initial Determination in this proceeding on December 14, 2017, both Sirius XM Radio, Inc., (Sirius XM), the lone SDARS, and Music Choice filed timely motions for rehearing. SoundExchange filed responses opposing each rehearing motion, and Sirius XM and Music Choice filed replies. On April 17, 2018, the Judges ruled on the rehearing motions. *See* Order Granting In Part and Denying In Part . . . Motion[s] for Rehearing (Apr. 17, 2018). By this order, the Judges denied the Music Choice motion and asked for additional briefing on the primary issue Sirius XM raised, *viz.,* whether the Judges should reduce the royalty rate for SDARS set in the Initial Determination to a rate not lower than 14.7% of Gross Revenues. *Id.* at 9. The parties filed briefs and responses and the Judges took the issue under advisement.

On October 11, 2018, the President signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law 115–264, 132 Stat. 3676 (Oct. 11, 2018) (MMA). That law includes a provision amending section 804(b)(3)(B) of the Copyright Act (Act) to state that "with respect to pre-existing satellite digital audio radio services, the terms and rates set forth by the Copyright Royalty Judges on December 14, 2017, in their initial determination for the rate period ending on December 31, 2022, shall be in effect through December 31, 2027, without any change based on a rehearing under section 803(c)(2) . . . ." *Id.* sec. 103. As a consequence of this statutory provision, the Judges dismissed the pending rehearing as moot. *See* Order Dismissing Rehearing Proceeding (Oct. 11, 2018).

Based upon the totality of the record, and in accordance with the following reasoning and analysis, the Judges determine that the applicable rates and terms for the period beginning January 1, 2018,[1] shall be:

For PSS: 7.5% of Gross Revenues, as that term is defined for PSS.

For SDARS: 15.5% of Gross Revenues, as that term is defined for SDARS.

II. Background

A. Statutory Licenses

In 1995, Congress granted to sound recording copyright owners the exclusive right "to perform the copyrighted [sound recording] publicly by means of a digital audio transmission."[2] 17 U.S.C. 106(6). Concurrently, Congress limited that exclusive right by creating two statutory licenses that would enable certain users, including SDARS and PSS, to transmit digitally sound recordings without obtaining a voluntary license from each copyright owner. *See* 17 U.S.C. 112(e), 114(d). The section 112 license (ephemeral license) allows an entity that transmits a sound recording digitally to make ephemeral phonorecords of the sound recording to facilitate the transmission. Section 112(e) describes conditions under which an entity may license the ephemeral sound recording.[3] Section 114 describes limits that apply to the digital transmission license.[4]

B. The Standards for Determining Royalty Rates

Section 801(b)(1) of the Act provides that the Judges shall "make determinations and adjustments of reasonable terms and rates of royalty payments" for the statutory licenses set forth in, *inter alia,* section 114(f)(1) ("digital performance license").[5] The digital performance license requires that the Judges set rates and terms that are "reasonable." *Id.* In addition, section 801(b)(1) provides that these "reasonable" rates shall be calculated to achieve four specific objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with

[1] In the Judges' Initial Determination in this proceeding, they established rates for the period January 1, 2018 through December 31, 2022. Under the MMA, these rates shall remain in effect until December 31, 2027. *See* 17 U.S.C. 804(b)(3)(B) (as amended by the MMA). Note that all redactions in this publication were made by the Copyright Royalty Judges and not by the **Federal Register**.

[2] *See* Digital Performance Right in Sound Recording Act of 1995, Public Law 104–39, 109 Stat. 336 (1995).

[3] Section 112 provides that a sound recording transmitter may make no more than one ephemeral phonorecord, "unless the terms and conditions of the statutory license allow for more." 17 U.S.C. 112(e)(1).

[4] Specifically, section 114 excludes from the statutory license transmissions by interactive services. *See* 17 U.S.C. 114(d)(2)(A)(i).

[5] Sirius XM and SoundExchange agree in substance that the Judges should conform the SDARS regulations regarding ephemeral licenses to the language adopted by the Judges in *Web IV. See* SEPFF ¶ 2371; SXMPFF ¶ 492. The Judges approve this agreement and adopt it in the regulations for the forthcoming rate period. *See infra,* section III.

respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 801(b)(1).

In *SDARS 1,* the Judges detailed the historical treatment of these section 801(b)(1) standards. *See* Determination of Rates and Terms . . . 73 FR 4080, 4082–84 (Jan. 24, 2008) (*SDARS I*). There, the Judges noted that the section 801(b)(1) factors originated in the protracted legislative process that ultimately produced the Copyright Act of 1976. The *SDARS I* Judges examined the legislative history of the 1976 Act and noted that the motivation for adopting the four itemized 801(b)(1) factors arose from an exchange between two law professors, Professor Ernest Gellhorn, on behalf of certain copyright users, and Professor Louis H. Pollack, on behalf of certain copyright owners. The issue between the professors was the constitutionality of the Copyright Royalty Tribunal (CRT), a predecessor of the Copyright Royalty Board. As recounted in *SDARS I:* ''Professor Gellhorn had recommended that, in order to bolster the constitutionality of the Tribunal, the Congress should, *inter alia,* adopt statutory standards beyond the vague criterion of 'reasonableness.' '' *SDARS I,* 73 FR at 4082 (citing *Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1922 (1975).[6] After consideration of alternative potential statutory language, Congress adopted the four-part itemized factors included in section 801(b)(1) to supplement the ''reasonable'' rate requirement. *Id.*

There is additional legislative history regarding the itemized four factors in section 801(b)(1) that aids in understanding how those factors should be applied and informs economic analysis under these statutory provisions. This legislative history is highlighted by dueling positions taken in Congressional testimony in 1967 by the licensors, through the National Music Publishers Association (NMPA) and its economic witness, Robert R. Nathan, and by the licensees, the Recording Industry Association of America (RIAA), through their counsel, Thurman Arnold, Esq., a well-known advocate of strong antitrust enforcement. *See* Hearing on S. 597, Subcomm. on Patents, Trademarks and Copyrights of the S. Committee on the Judiciary, (Mar. 20–21, 1967) (Senate Hearing).

Mr. Nathan criticized any proposed legislation that would subject the songwriting industry to a statutory mechanical licensing scheme. *Id.* at 382. He did not agree that licenses in the music industry should be treated differently than how ''we generally function under competitive marketplace bargaining arrangements whereby most entities in our economy bargain for that which goes into the creation of goods and services and also bargain the price for which those goods and services are sold.'' *Id.* He further noted that the statutory mechanical royalty rate was in part a reaction to an early 20th century concern regarding a Supreme Court decision allowing a player-piano manufacturer to play songs through the use of perforated paper rolls fed into the new devices (player pianos), without a license and without a duty to pay royalties to the songwriters and publishers. *White-Smith Music Publishing Company* v. *Apollo Company,* 209 U.S. 1 (1908). As Mr. Nathan explained: ''[T]he Aeolian Co.[,] had gained control of some 80 percent of the musical compositions and Congress . . . fear[ed] the threat of monopoly in the mechanical reproduction of music.'' Senate Hearing at 382–83. The Copyright Act of 1909 superseded the effect of *White-Smith* by creating a statutory license and imposing a fixed statutory rate for mechanical reproduction of musical compositions.

In his 1967 testimony, Mr. Nathan advocated that Congress eliminate the compulsory license and the statutory rate, and he specifically urged Congress to resist replacing the fixed statutory fee with a regulatory standard to be implemented by a quasi-adjudicatory body. As to the latter point he explained to Congress: ''[O]ne might ask . . . whether the music publishing industry has any characteristics of a public utility? I submit . . . that there is nothing in the music publishing industry which gives [it] the characteristics or the elements of a public utility . . . .'' *Id.* at 383. Mr. Nathan noted what he felt was a key distinction: Unlike traditional public utilities such as ''railroad systems'' or ''streetcar lines,'' the songwriting and publishing industry is ''a creative and nonstandardized area,'' and ''[m]onopoly and public utility aspects are just not prevalent in this industry.'' *Id.*

The licensees' opposing position, expressed by Mr. Arnold on behalf of the RIAA, contained the seeds of the standard ultimately adopted in section 801(b)(1). As Mr. Arnold testified, the statute should include, *inter alia,* ''accepted standards of statutory ratemaking,'' including a rate ''that insures the party against whom it is imposed a reasonable return on . . . investment'' and ''that divides the rewards for the respective creative contributions of the record producers [the licensees] and the copyright owners . . . equitably between them.'' *Id.* at 469.

Mr. Nathan criticized this approach on two fronts. First, he argued that the ''personal service'' nature of the songwriting and publishing industry precluded application of a ''reasonable rate of return'' requirement for establishing the compulsory royalty rate. Second, with regard to the division of the ''rewards'' proposal, Mr. Nathan stated that ''I have never in all my experience encountered this novel concept of dividing rewards for creative contributions as a meaningful and relevant standard of ratemaking.'' *Id.* at 1093–94.[7]

Resolution of this 1967 dispute languished until 1976, when Professor Gellhorn successfully convinced Congress to adopt an itemized standard in the final statute. See F. Greenman & A. Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect,* 1 Cardozo Arts & Ent. L.J. 1, 53, 59 (1982). In so doing, Congress did not explicitly address the economic dispute between Mr. Arnold and Mr. Nathan regarding the relative merits of a market-based rate *versus* a rate established in some other manner.

Under the itemized section 801(b)(1) standard, the Judges have the discretion to choose a market rate, a market-based rate, or a rate unrelated to market evidence. *Music Choice* v. *Copyright Royalty Bd.,* 774 F.3d 1000, 1010 (D.C. Cir. 2014) (and citations therein). Any such rate would be legally appropriate provided it was not ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the [Judges]

[6] The *SDARS I* Judges also noted that, in like fashion, the Register of Copyrights concluded that it would be ''wise to establish, in the statute, certain criteria beyond 'reasonableness' that each Panel is to apply to its decision-making.'' *Id.* (citing *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law,* Chapter XV, at 31 (1975)).

[7] As the present record (and the record in *Phonorecords III*) demonstrates, subsequent to Mr. Nathan's 1967 testimony, the economic concept of ''dividing rewards for creative contributions as a meaningful and relevant standard of ratemaking'' has blossomed, with the application of Opportunity Cost/Efficient Component Pricing approaches, Nash Bargaining Solutions, and Shapley Value analyses.

have no basis in the record.'' *Id.* at 1007. Indeed, in *Music Choice,* the D.C. Circuit reaffirmed that ''the Copyright Act gives the Judges of the Copyright Royalty Board *broad discretion* to set rates and terms for compulsory licenses of the digital performance of sound recordings.'' *Id.* at 1016 (emphasis added).

C. Prior Proceedings

This proceeding is not the first in which the Judges or their predecessors have applied the section 801(b) factors to determine royalty rates.[8] In *SDARS I,* the Judges detailed the historical treatment of these factors by their predecessors, the Copyright Royalty Tribunal and the Librarian in his administration of the Copyright Arbitration Royalty Panel (CARP) system. *See* Determination of Rates and Terms . . ., 73 FR 4080, 4082–84 (Jan. 24, 2008) (*SDARS I*). In *SDARS I,* the Judges chose to ''begin with a consideration and analysis of the [market] benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the [section 801(b)] statutory objectives'' to reach a decision. *Id.* at 4084.

The precedent guiding the present panel of Judges signals an analysis in which the Judges may weigh the evidence presented to support the rate proposals, including marketplace benchmarks, apply the section 801(b) policy factors to assure the final rates are consonant with those factors and, if the evidence permits, also establish a zone of reasonableness within which the rate shall be set.[9]

D. The Present Proceeding

The Judges commenced the present proceeding with publication of notice seeking petitions to participate. *See* 81 FR 255 (Jan. 5, 2016). Seven entities filed petitions to participate.[10] The Judges dismissed the petitions of Music Reports, Inc. and David Powell. Muzak LLC withdrew its petition to participate. The parties participating in the hearing were George Johnson d/b/a GEO Music Group (GEO), Music Choice, Sirius XM Radio, Inc. (Sirius XM), and SoundExchange, Inc. (SoundExchange).

The Judges presided over an evidentiary hearing that commenced on April 12, 2017, and ended on May 18, 2017. Parties to the hearing presented oral closing argument on July 18. The parties called 35 witnesses,[11] including 15 experts.[12] Of the 856 exhibits marked for identification for the hearing (not including illustrative presentations by various witnesses) the Judges admitted 511 (including those admitted for limited purpose) into evidence during the hearing.[13] On June 14, the parties filed their respective Proposed Findings of Fact (PFF) and Proposed Conclusions of Law (PCL). Parties filed Reply PFF and PCL on June 29.

III. The Section 112 Ephemeral License

The ephemeral license rates that the Judges are to determine in this proceeding shall ''most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 112(e)(4). All parties to the present proceeding agree that the value of the section 112 ephemeral license is linked to the value of the section 114 performance license.[14] Music Choice asked that the Judges include the section 112 rate in the overall rate. Sirius and SoundExchange asked the Judges to determine that the value of the licenses be allocated 5% to the ephemeral license and 95% to the performance license, consistent with the current regulations applicable to SDARS, webcasters, and new subscription (CABSAT) services. *See, e.g.,* Sirius XM . . . Proposed Findings . . . and Conclusions at 234 (SXM PFFCL); Proposed Findings . . . and Conclusions of SoundExchange . . . at 938 (SX PFFCL); *see* 37 CFR 382.3(c), 382.12(b) (2016).

The parties' positions and the Judges' decisions concerning the ephemeral license regulations are detailed in section XI.C of this Determination; the regulatory language adopted by the Judges is attached as Appendix A.

IV. PSS Performance License

A. Background

The Act defines a PSS as ''a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998 . . . .'' 17 U.S.C. 114(j)(11). When Congress enacted that definition, there were three PSS entities in existence. *See* H.R. Rep. No. 105–796, at 81, 85, 89 (Oct. 8, 1998). Only two remain, and Music Choice was the only PSS that participated in this proceeding.[15] SoundExchange represented Copyright Owners in the PSS portion of the proceeding. George Johnson, an individual licensor, also proposed a PSS rate.

Music Choice operates a residential audio service that consists of 50 channels of audio programming delivered to subscribers' televisions. Written Direct Testimony of David J. Del Beccaro, Trial Ex. 55, at 4 (Del Beccaro WDT). Music Choice's services are delivered to customers by cable operators and other multichannel video programming distributors (MVPDs) as part of customers' digital basic cable service. *Id.*

In addition to its cable TV-based service, Music Choice makes its 50 cable channels, plus an additional 25 channels of audio programming, available to authenticated television subscribers through its website and a

[8] The Copyright Royalty Tribunal (CRT) applied the 801(b) factors in a section 116 (Jukebox) rate adjustment and a section 115 (Phonorecords) rate adjustment. The Librarian of Congress, as administrator of a Copyright Arbitration Royalty Panel (CARP) issued a determination for the section 114 satellite radio license (SDARS I). In 2017, the Judges presided over a contested Phonorecords rate hearing, the determination of which will issue after the present determination and will involve application of the 801(b) policy factors to the Phonorecords license.

[9] The U.S. Court of Appeals for the D.C. Circuit has also concluded that the Judges may apply the ''[section 801(b)] . . . objectives [to] determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, [and] the [Judges are] free to choose among those rates, and courts are without authority to set aside the particular rate chosen . . . if it lies within a ''zone of reasonableness.'' *See Recording Indus. Ass'n of America* v. *Copyright Royalty Tribunal,* 662 F.2d 1, 9 (D.C. Cir. 1981) (footnotes omitted). Thus, the Judges may establish such a zone of reasonableness, but are not required to do so.

[10] Original petitioners included George Johnson d/b/a GEO Music Group; Music Choice; Music Reports, Inc.; Muzak LLC; Sirius XM Radio, Inc.; SoundExchange, Inc. (SoundExchange); and David Powell. SoundExchange appeared on behalf of itself and its members, the American Association of Independent Music; the American Federation of Musicians of the United States and Canada; the Recording Industry Association of America; the Screen Actors Guild and the American Federation of Television and Radio Artists; Sony Music Entertainment; Universal Music Group; and Warner Music Group.

[11] In addition to live witnesses, participants also designated prior testimony of witnesses in prior proceedings. *See* 37 CFR 351.4(b)(2).

[12] GEO Music Group (GEO) presented the testimony of George Johnson. Mr. Johnson asked to be qualified as an expert in the music sound recording business. There being no objection, the Judges acknowledged his experience as a songwriter, singer, and independent record producer for approximately 30 years and qualified him for purposes of the present proceeding as an expert in the music business.

[13] Immediately prior to and during the hearing in this proceeding, participants filed motions seeking to limit or exclude opposing parties' evidence. The Judges' conclusions on those motions are issued by separate order or orders. References to evidence in this Determination are to evidence admitted to the record.

[14] *See* Music Choice Written Direct Statement at 6; Introductory Memorandum to the Written Statement of Sirius Radio Inc. at 1; Proposed Rates and Terms of SoundExchange, Inc. and Copyright Owner and Artist Participants at 5.

[15] The other remaining PSS entity, Muzak LLC, filed a Petition to Participate, but withdrew it before the deadline for filing Written Direct Statements.

mobile app. *Id.* Music Choice describes these internet transmissions as ''an ancillary part of its residential music business . . . .'' Written Rebuttal Testimony of David J. Del Beccaro, Trial Ex. 57, at 25 (Del Beccaro WRT).

1. PSS Rates From SDARS II

The parties in the prior proceeding (*SDARS II*) reached agreement on the rates and terms of the section 112 license prior to the hearing. *See* 78 FR at 23054–56.[16] Therefore, the Judges' focus in that proceeding was limited to determining the appropriate rates and terms for the section 114 license. The Judges began with a consideration and analysis of the market benchmarks and testimony submitted by the parties and then measured the rate or rates yielded by that process against the Section 801(b) statutory objectives to reach a decision. 78 FR at 23055. The Judges repeat that approach in the current proceeding.

In *SDARS II,* Music Choice advocated adoption of the annual royalties it pays to performing rights societies (PROs) (*i.e.,* ASCAP, BMI, and SESAC) for the right to perform musical works to subscribers of its residential audio service as a precedential benchmark. Indeed, Music Choice asserted that the Judges were *required* to rely on that musical works rate. The Judges rejected that contention but analyzed whether the rates that Music Choice paid the PROs were a useful benchmark. 78 FR at 23056. Music Choice contended that two pieces of evidence corroborated use of the musical works rates as a benchmark: (1) Decisions from Canada and the United Kingdom concluding that royalty rates for sound recordings and musical compositions have equivalent value [17] and (2) results of an economic model called the Asymmetric Nash Bargaining Framework (Nash Framework) [18] offered by Music Choice's expert, Professor Gregory Crawford.[19] Based on his analysis, Professor Crawford concluded the PRO rates were an appropriate benchmark for the sound recording license at issue.

The Judges disagreed and found that the musical works benchmark lacked comparability to the hypothetical PSS market. *Id.* at 23058. The Judges found that the musical works market involved different sellers (PROs versus record companies) selling different rights (musical works performance rights versus sound recording performance rights) than those at issue in this proceeding.[20]

With regard to the Nash Framework, the Judges noted:

> The Nash Framework is a theoretical concept whose goal is to evaluate how the surplus from a hypothetical transaction might be divided between negotiating parties. Even assuming that the Nash Framework has predictive value in some real-world contexts, Music Choice provided no data to support the theoretical approximations in the market for any intellectual property rights, much less those that the Judges are charged with evaluating. Therefore, the Judges find that the Nash Framework is not useful corroborating evidence.

78 FR at 23058.[21]

For its part, SoundExchange offered certain marketplace agreements executed by interactive music streaming services as a benchmark. The Judges also rejected this proposed benchmark on comparability grounds. 78 FR at 23058.[22]

The Judges concluded that the evidence presented by Music Choice framed the lower end of a range of reasonable rates and that presented by SoundExchange framed the upper end. 78 FR at 23059. Having rejected the parties' respective proffered benchmarks (and proposed corroborating evidence) for any purpose other than to frame a range of potential rates, the Judges were left with a consideration of the then-prevailing royalty rate of 7.5% of gross revenues, which fell within that range. The Judges started with the then-prevailing rate and applied the Section 801(b) factors. Consideration of the section 801(b) factors persuaded the Judges that they should adopt that rate, but adjust it up to 8.5% based on Music Choice's planned expansion of its service from 46 channels to up to 300. The Judges concluded that the planned expansion would result in a substantial increase in the number of plays of recorded music without any corresponding increase in compensation. 78 FR at 23059–60. Nevertheless, the Judges acknowledged that the upward adjustment of the benchmark rate was based on projected usage that was likely to occur during the rate period. The Judges noted that ''[s]hould Music Choice alter its anticipated usage under the statutory license in the future, such evidence can be taken into account in a future rate proceeding. . . .'' *Id.* at 23061.

2. Standard for PSS Royalty Rates

When the Judges determine a section 114 rate for PSS, they generally begin with an appropriate rate (or range of rates) and adjust it, as appropriate, in accordance with the section 801(b)(1) statutory factors. By contrast, the section 112 ephemeral license requires the Judges, among other things, to ''establish rates that most clearly represent the fees that would have been negotiated between a willing buyer and a willing seller.'' 17 U.S.C. 112(e)(4).[23]

[16] In the *SDARS II* proceeding, SoundExchange and Music Choice submitted a joint stipulation with respect to the Section 112(e) ephemeral license, and the Judges adopted the proposal based on the stipulation. 78 FR at 23055–56. The provision addressing the Section 112(e) license appears in current CRB Rule 382.3(c). It states that ''[t]he royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.''

[17] The Judges dismissed Music Choice's reliance on foreign jurisdictions because of a lack of proof of comparability between foreign markets and U.S. markets. Further, Music Choice failed to convince the Judges that the governing laws were sufficiently similar to U.S. law to offer even analogous reasoning. *See* 78 FR at 23058.

[18] The Nash Framework, as presented in the instant proceeding, is discussed in greater detail *infra,* section IV.C.1.a.

[19] Professor Crawford's Nash Framework from *SDARS II* (as well as the Judges' reasons for rejecting it) is described at length in the determination and need not be repeated here. *See SDARS II,* 78 FR at 23056–57, 23058. As discussed below, in the current proceeding Music Choice does not premise its Nash-based model (or any other model) on an asserted equivalency between the value of sound recordings and musical works, in light of the Judges' rejection of that argument on the record presented in *SDARS II.* Nonetheless, Professor Crawford's Nash Framework in the instant proceeding is strikingly similar to his Nash Framework in *SDARS II.*

[20] The Judges acknowledged that musical works performance rights and sound recording performance rights are likely perfect complements, but concluded that, based on the record, such complementarity had not been shown to inform the decision regarding relative value of the rights.

[21] The Judge who dissented from the majority decision offered what the majority characterized as a ''more spirited rejection of the probative value of the Nash Framework as proffered in this context.'' The majority concurred with this assessment but concluded that ''as a threshold matter, [the] Nash Framework, without real-world data to support its predictive capacity, is unworthy of further consideration. 78 FR at 23058, n.17.

[22] The markets that the proffered agreements covered were subscription interactive webcasting, ringtones/ringbacks, and digital downloads. The Judges concluded that these markets involve the licensing of products and rights separate and apart from the right to publicly perform sound recordings in the context of the PSS proceeding. The Judges noted that the buyers are different from the target PSS market. Thus, the key characteristic of a good benchmark—comparability—was not present. 78 FR at 23058. The Judges noted that the bundling of Music Choice's services with multiple channels of video and other non-music programming significantly dim the possibility of market comparators. The Judges concluded that ''in the absence of some rational, reasoned adjustment to make the music agreements data more comparable to the PSS market, the Judges find its probative value in this proceeding of only marginal value.'' *Id.*

[23] Section 112(e)(4) also directs the Judges to base their decision on such factors as (1) whether use of the service may substitute for or promote the sale of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue and (2) the relative roles of the copyright owner and the transmitting organization in the

Continued

The ephemeral license also requires a minimum fee for each type of service offered by a transmitting organization.[24]

Consistent with this process, in determining the appropriate rate for the PSS market for the upcoming rate period, the Judges must first identify a starting point for applying the Section 801(b) policy factors. A marketplace benchmark, if available, can be a useful starting point for applying the Section 801(b) factors. *See SDARS II,* 78 FR at 23056. A key component of a marketplace benchmark is that the market it purports to represent is comparable to the hypothetical target market in the proceeding. *See SDARS I,* 73 FR at 4088 (''comparability' is a key issue in gauging the relevance of any proffered benchmarks.''). In determining whether a benchmark market is comparable, the Judges consider such factors as whether it has the same buyers and sellers as the target market and whether they are negotiating for the same rights. 78 FR at 23058. ''Although the applicable Section 114 statutory standard provides a broader scope for analyzing relevant 'benchmark' rates than the 'willing buyer/willing seller standard' . . . , nevertheless potential benchmarks are confined to a zone of reasonableness that excludes clearly noncomparable marketplace situations.'' 73 FR at 4088.

In the hypothetical PSS market the buyers are the PSS services, and the sellers are the copyright owners of the sound recordings that are being transmitted (which most often means record companies). The buyers and sellers are negotiating for the same bundle of rights as those granted to a PSS under section 114(f)(1)(A) of the Copyright Act to make digital subscription transmissions of the copyrighted works.

When the parties (or the Judges) identify variances in the comparability of the hypothetical target market and the proffered benchmark market, the Judges will consider reasoned adjustments that might more closely align the two markets.[25] Even when a proffered benchmark is not comparable to the target market, however, the Judges may use the rates derived from the proffered benchmark as a reference point (or guidepost) to help frame a zone of reasonableness within which to set an appropriate rate for the upcoming rate period (as they did in *SDARS II*).[26]

B. The Parties' Rate Proposals

1. Music Choice's Proposal

Since 1998, the PSS have paid a fee based on a percentage of *gross revenues,* as that term is defined by regulation.[27] *See SDARS II,* 78 FR 23054, 23056; 63 FR 25394, 25413 (May 8, 1998). Music Choice has proposed continuing that rate structure but seeks at least a 34% reduction in the current rate of 8.5% of gross revenues, to a rate no higher than 5.6% of gross revenues. MC PFF ¶ 30.

2. SoundExchange's Proposal

SoundExchange requests that the Judges change the PSS rate structure. Rather than the percentage-of-revenue formula, SoundExchange proposes that PSS pay a per-subscriber fee that would begin at $0.0190 in 2018, the first year of the new rate period, and rise to $0.0214 in 2022, the last year of the rate period. Amended Proposed Rates and Terms of SoundExchange, Inc. and Copyright Owner and Artist Participants at 7. Although SoundExchange does not offer a percent-of-revenue alternative to its proposed per-subscriber rates, it acknowledges that converting its proposed rates to a percentage-of-revenue rate would plausibly yield a rate of [REDACTED] % for 2018, the first year of the upcoming rate period. SX PFFCL ¶ 1949; *see* Written Rebuttal Testimony of Gregory Crawford, Trial Ex. 59, ¶ 113 (Crawford WRT).[28] The evidence in the record supports that this conversion estimate is correct; thus the lowest rate that SoundExchange proposes ([REDACTED] %) exceeds the highest rate that Music Choice proposes (5.6%) by [REDACTED] %; it exceeds the current rate by [REDACTED] %, assuming no increase in subscribers.[29]

SoundExchange also proposed a separate rate for internet transmissions by a PSS, leading to a dispute between the parties over whether a PSS's internet transmissions are included in the PSS license and subject to the PSS rate standard. The Judges referred the question of categorization of Music Choice's streaming service to the Register of Copyrights (Register) for a legal opinion. Analysis of the Register's opinion follows in Section IV.D.2.

3. GEO's Rate Proposal

George Johnson, d/b/a GEO Music Group (GEO) proposed that PSS pay a per-subscriber rate of $0.10 in 2018 rising to $0.20 in 2022. Johnson WDT at 14. He also proposed a percentage-of-revenue rate of 45% of gross revenues. It is unclear whether he proposed that PSS pay both components or that they pay them as a greater-of or lesser-of structure. Mr. Johnson did not proffer a benchmark or any other evidence to support his rate proposals for PSS. He merely stated that ''[t]hese are estimates from public data and actual royalty statements. If the Sirius XM and Music Choice would provide number of listeners per station and on a per-play basis, that would help GEO to better establish a more reasonable rate.'' *Id.* The Judges find that there is no evidence in the record to support the PSS rates that Mr. Johnson proposed and therefore decline to adopt them.[30]

C. Rates for Music Choice's Cable Radio Service

1. Analysis of the Parties' Proffered Benchmarks

a. Music Choice's Proffered Nash Model

Music Choice, through its expert, Professor Crawford, contended that in the absence of an appropriate marketplace benchmark, the best way to

copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk. 17 U.S.C. 112(e)(4).

[24] The ephemeral license for both PSS and SDARS is addressed in section XI.C.

[25] When the Judges are faced with proposed benchmarks that are not comparable and cannot be made so with reasoned adjustments, the Judges reject the proffered benchmarks. *See, e.g., SDARS II,* 78 FR at 23058; *SDARS I,* 73 FR at 4089–90.

[26] *See supra,* section IV.A.1.

[27] Music Choice also does not propose an alternative per-subscriber rate should the Judges adopt such a rate structure rather than a percent-of-revenue structure. Neither party has proposed to combine both rate structures (*e.g.,* in a greater-of structure). Given that neither party has advocated a hybrid rate structure nor provided sufficient evidence to support such a rate structure in the current proceeding, the Judges weigh the arguments and evidence in the record to determine the applicable rate structure from the two structures that the parties proposed.

[28] Music Choice's expert, Professor Gregory Crawford, estimates that Music Choice would pay [REDACTED] % of its unadjusted residential service revenue in sound recording performance royalties in 2018 under the CABSAT rates, the basis for SoundExchange's rate proposal, compared to the 8.5% it currently pays. Crawford WRT at ¶ 113, Table 6. This estimate appears consistent with the effective rate that Stingray, a Music Choice competitor, paid in 2015 under the CABSAT rates. SX PFFCL ¶ 1949; Trial Ex. 1017 at SoundX 000145808.

[29] Assuming that the number of subscribers that carried Music Choice's service remained flat over the upcoming rate period, the annual 3% increases SoundExchange proposes would bring the rates to [REDACTED] % for 2019, [REDACTED] % for 2020, [REDACTED] % for 2021, and [REDACTED] % for 2022, or [REDACTED] % over the current rate. This estimate is consistent with SoundExchange's estimate that a CABSAT service pays almost [REDACTED] times as much on a per-subscriber basis as a PSS. SX PFFCL ¶ 1940 and evidence cited therein. *See id.* ¶¶ 1934–35 (estimating that Music Choice's PSS statutory royalty payment amounts to [REDACTED] cents per listener per year whereas for a CABSAT service, the annual per-subscriber royalty for 2017 is 22.2 cents).

[30] Mr. Johnson also proposed requiring the PSS to install a ''buy button'' on their services to promote sales of music downloads. 5/3/17 Tr. 2232, 2238 (Johnson). Such proposal is beyond the scope of the Section 114 and 112 licenses and therefore beyond the Judges' authority in the current proceeding.

estimate the royalties that would arise in a hypothetical effectively competitive market for the PSS sound recording rights is to use an economic model. Professor Crawford chose as that model one based upon the Nash Bargaining Solution, developed by Nobel-prize-winning economist John Nash. Crawford WDT ¶¶ 62, 64. Professor Crawford offered a variation of the Nash Framework that the Judges rejected in *SDARS II* as a means of corroborating the proffered musical works benchmark. Crawford WDT ¶ 65.[31]

In his Nash Framework proposal, Professor Crawford modeled a single record label as the ''upstream'' firm in the negotiation of sound recording performance rights to be licensed to a single PSS, the ''downstream'' firm in the negotiation. *Id.* ¶ 67. The Nash Framework is based on the assumption that the record label and PSS provider each have a certain degree of market power. *Id.* ¶ 71. Professor Crawford asserted that this assumption is applicable with respect to Music Choice given its current product offerings and established relationships with MVPDs. *Id.* ¶ 73. According to Professor Crawford, Music Choice has negotiated long-term contracts with the MVPDs and possesses a unique bundle of technology that would be costly and time consuming for other firms to duplicate. *Id.* ¶ 73. Professor Crawford concluded that because both PSS providers and record labels have some market power, a non-cooperative bargaining model such as the Nash Framework is an appropriate framework for analyzing market outcomes for the PSS sound recording performance rights in the absence of a compulsory license. *Id.* ¶ 75.

In the Nash Framework three fundamental factors determine how two firms would ''split a pie'' in a hypothetical negotiation. These ''Nash Factors'' are: (1) The Joint Agreement Profits; (2) each firm's Threat Point; and (3) each firm's bargaining power. *Id.* ¶ 81.[32] To determine the royalty that would arise in the hypothetical market for sound recording performance rights for the PSS over the 2018–2022 rate period, Professor Crawford quantified the Nash Factors based on Music Choice's costs and revenues of its residential audio service as a standalone business. *Id.* ¶ 110.

i. Joint Agreement Profits

Because Music Choice keeps its books on a consolidated basis, Professor Crawford analyzed Music Choice's costs and revenues to determine how they would have been allocated if Music Choice operated its residential audio service as a standalone business. *Id.* ¶¶ 122–149; 4/24/17 Tr. 733–38 (Crawford); 5/18/17 Tr. 4549–52 (Del Beccaro).[33] This process was conducted not in the ordinary course of business but to isolate Music Choice's residential audio business for use in the Nash Framework and in response to the Judges' observation in *SDARS II* that the residential audio service is the applicable Music Choice business line in analyzing the section 114 license. Crawford WDT ¶ 110. Professor Crawford also asserted that isolating the residential audio service is necessary to ensure that Music Choice does not subsidize this business line with profits from other business lines, which Professor Crawford believes would be inconsistent with economic policy and the statutory objectives of the PSS license as he understands them to be. *Id.* ¶ 176; 4/24/17 Tr. 787 (Crawford).

It would not be fruitful to detail the multistep process Professor Crawford conducted to disaggregate costs and revenues to derive inputs for the Nash Framework analysis. Nonetheless, it is worth noting that many of the steps required judgment calls on Professor Crawford's part that undoubtedly affected the inputs he later plugged into the Nash Framework.[34] The Judges do not suggest that Professor Crawford's adjustments were erroneous or inappropriate under the circumstances but only mention them to highlight the level of discretion and subjectivity that Professor Crawford employed in developing the inputs that he fed into the Nash Framework. Given the extreme complexity of the process that Professor Crawford developed, it would be impracticable if not impossible for the Judges to ''back out'' one or more of the adjustments Professor Crawford made in developing the model if the Judges found they were unwarranted. The discretion that Professor Crawford exhibited in disaggregating Music Choice's costs and revenues pales, however, in comparison to that he exercised in choosing other Nash Factors, such as bargaining power and Threat Point. The great degree of discretion in quantifying the inputs in the Nash Framework as proposed by Professor Crawford underscores the inherent weakness in the Crawford model. The Judges concerns about the model are more applicable in the current proceeding than they were in *SDARS II* because Music Choice seeks to elevate the model to benchmark status rather than as information to corroborate a proffered rate as was the case in *SDARS II.*

Professor Crawford used the disaggregated costs and revenues to *begin* the Nash Framework calculations. The first step in that process is to create the first Nash Factor—Joint Agreement Profits—the joint economic profits to be shared between a record label and PSS provider in the PSS market if an agreement is reached. It is the total economic profits that the PSS provider earns before payment of a sound recording performance royalty. Crawford WDT ¶ 92.

Based on his analysis of Music Choice's financial information as discussed above, Professor Crawford estimated the Joint Agreement Profits in the hypothetical market for PSS sound

[31] Music Choice acknowledged that the Judges rejected its proposed musical works benchmark as a marketplace benchmark in *SDARS II.* Rather than proffer a marketplace benchmark from another market, however, Music Choice proffered Professor Crawford's Nash Framework, not to corroborate the musical works benchmark rejected in *SDARS II,* but as a stand-alone benchmark.

[32] Joint Agreement Profits are the combined profits to both the upstream and downstream firms in the market under study from reaching an agreement. For the PSS this means the revenue the PSS earns for the PSS less all non-PSS royalty costs that they incur. Crawford WDT ¶ 81. The Threat Point for each firm is the profit it would receive when no agreement is reached. *Id.* The difference between the Joint Agreement Profits and the sum of the firms' Threat Points is called the ''Incremental Profits'' which are the profits the firms could earn by reaching an agreement above and beyond the profits they could earn in the absence of an agreement. *Id.* The profits each firm receives in a bargain equals its Threat Point plus its Bargaining Power times the Incremental Profits. *Id.* ¶ 82. Dr. Crawford communicated this formula in mathematical terms as Royalty = Threat Point + Bargaining Power * Incremental Surplus. *Id.* at n.69.

[33] Music Choice has three business lines: A residential audio service, a residential video service, and a commercial audio service. Some of Music Choice's subscription fee revenue bundles residential audio and video services. Many of Music Choice's costs are used in the production of both the residential audio and video business lines. Crawford WDT ¶ 110. According to Professor Crawford, the residential audio service remains the most important in terms of revenues and company strategy. Professor Crawford asserted that if the residential audio service were to cease, Music Choice would cease providing any services and would close altogether. Crawford WDT ¶ 129.

[34] For example, Dr. Crawford chose to exclude certain legal costs that Music Choice incurred or expected to incur related to the *PSS III* proceeding in 2016 and 2017 because those costs relate to litigating the 2018–2022 rate proceeding. Instead he substituted costs that Music Choice purportedly incurred during the *PSS II* rate period (2013–2017). He also chose to average certain patent litigation costs over an eight-year period that Music Choice incurred during 2016–2017 because, based on his discussions with Music Choice executives, Music Choice historically has incurred such patent costs every eight years. Crawford WDT ¶ 148. Of course, as a practical matter, no individual company can know with any reasonable degree of certainty when, in the future, it may be sued for patent infringement or sue another that allegedly violates one of its patents.

recording performance rights would range from [REDACTED] in 2018 to [REDACTED] in 2022. Crawford WDT ¶¶ 113, 171.

ii. Threat Points

Professor Crawford then calculated each party's Threat Point, the second factor in the Nash Framework. A Threat Point is a theoretical construct representing the profit that would accrue to a record label and a PSS provider if they are unable to reach an agreement. Each firm in a hypothetical negotiation will have a Threat Point. Crawford WDT ¶ 67. Under the model, threat points can be positive, negative, or zero. *Id.* at 26 n.71. For a record label, a negative threat point could occur where the record label could earn additional profit in a non-PSS market (*e.g.,* music downloads) if it reaches an agreement with a PSS in the PSS market. If the record label fails to reach the agreement with the PSS provider, it loses all prospective profits it would have earned in the PSS market and the profits it could have earned in the non-PSS market. *Id.* ¶ 85.

The profit each firm earns in a bargain equals its threat point plus its bargaining power (discussed below) times incremental profits. *Id.* ¶ 82. Incremental profits are the difference between the joint agreement profits and the sum of the firms' threat points. *Id.* ¶ 81. Professor Crawford determined that Music Choice's threat point would be zero because, in the absence of an agreement between Music Choice and a theoretical record label, Music Choice would not be able to offer a viable residential audio service and therefore would have economic profits of zero. *Id.* ¶ 173. Professor Crawford asserted that assigning a zero threat point to Music Choice is conservative because it is based on an assumption that Music Choice could not offer a viable service in the absence of an agreement with a *single* label.[35] If Music Choice could offer such a service in the absence of the catalog of any record label, then Music Choice's threat point would be higher than zero, which would suggest that Music Choice should pay a lower royalty rate under the model. *Id.* at 49 n.149.

Outside of the threat point discussion, however, Professor Crawford asserted that Music Choice's residential audio service remains the most important in terms of revenues and company strategy. Indeed, Professor Crawford asserted that if the residential audio service were to cease, Music Choice would cease providing any services and would close altogether. *Id.* ¶ 129. Placed in the context of the threat point discussion, this concession strongly suggests that Music Choice deserves a negative threat point under Professor Crawford's model, the extent of which would be measured by the amount of profits Music Choice would lose if it closed its non-PSS business lines. SoundExchange's expert pointed out this inconsistency in Professor Crawford's presentation. 5/3/17 Tr. 2461, 2343 (Wazzan) (''Dr. Crawford concedes that Music Choice would go out of business altogether without the residential music business. So they would lose their commercial and video revenue streams. And if you look at the financials, we know that Music Choice is forecasting significant profits in its non-PSS lines of business.'').

Music Choice's responses to this disconnect between Professor Crawford's threat point assessment and his statements about the primacy of Music Choice's residential audio business are unavailing. For example, Music Choice contended that the *SDARS II* decision is precedent for treatment of the threat point analysis that Professor Crawford employed. Music Choice Reply to SE PFF 2044 at 817–18. The passage from *SDARS II* that Music Choice referred to pertained to an analysis of Factor B in Section 801(b)(1), regarding the setting of a rate that provides a fair return (for the service) and a fair income (for the copyright owners) under existing market conditions. The Judges were concerned in that context that Music Choice was making claims of unprofitability of its business as a whole to support a downward adjustment in the rates under the Section 801(b) factors. The Judges pointed out that the subject of the section 114 license was Music Choice's residential audio business rather than its entire business, which included non-PSS lines. 78 FR at 23059. By that point in the determination, the Judges had already discounted the use of the Crawford model and the proffered musical works benchmark the results of which the model purportedly corroborated. The Judges did not opine on how Professor Crawford should have calculated the threat point for his own model because the Judges dismissed the usefulness of the model. 78 FR at 23058 (''without real world data to support its predictive capacity [Professor Crawford's application of the Nash Framework] is unworthy of further consideration.'').

Therefore, the Judges agree with SoundExchange's criticism that Professor Crawford incorrectly assigned a threat point of zero to Music Choice when, under Professor Crawford's own testimony, Music Choice would lose profits from non-PSS business lines if Music Choice could not reach an agreement with one or more record labels. Based on that fact alone, the results of Professor Crawford's model in the current proceeding are suspect, but the flaws in Professor Crawford's presentation do not end there.

With respect to the threat point for a hypothetical record label, Professor Crawford asserted that it would be zero in the PSS market. As for the label's threat point in the non-PSS market (*e.g.,* sales of CDs and downloads), Professor Crawford asserted that the analysis was more ''nuanced.'' Crawford WDT ¶¶ 94–95, 174–175. Due to an alleged promotional effect that the PSS has on the label in the non-PSS market, Professor Crawford concluded that the record label's threat point could be negative. Professor Crawford has no way of estimating the purported promotional effect of Music Choice's services in the non-PSS market so he assigned a zero threat point to the hypothetical record label. *Id.* ¶¶ 175–176. We concur with Professor Crawford's decision not to attempt to assign any promotional value to Music Choice's service in the non-PSS market. The evidence he cited to support such an effect is either dated (*i.e.,* from a 1998 CARP decision) or anecdotal (*i.e.,* record labels provide Music Choice with ''promotional copies'' of new singles or albums). *Id.* ¶¶ 97–104. The Judges do not doubt that record labels seek exposure for the artists they promote, and digital platforms like Music Choice may provide meaningful exposure to the artists that appear on its PSS service. The Judges find no evidence in the record in this proceeding that they can use to quantify what impact, if any, promotional activities on Music Choice's platform would have on artists (and the labels that sign them) in non-PSS markets.

The Judges are less sanguine, however, about Professor Crawford's assignment of a zero threat point to the

[35] Rather than postulate the hypothetical PSS market as a negotiation between a single PSS and a single record label Professor Crawford could have constructed the model as a negotiation between a single PSS and a group of record labels. Under this scenario, the PSS might reach agreements with some labels but not others. The failure of an agreement with certain labels (*i.e.,* smaller labels) might not preclude the PSS from offering a service whereas the failure of the PSS to reach an agreement with any of the larger labels might preclude the PSS from offering any type of service (*i.e.,* PSS service or non-PSS service). Under this scenario, the assignment to the PSS of a negative threat point might be more appropriate than assigning a zero threat point because if Music Choice failed to reach an agreement with one major label then it might be precluded from offering any service.

first portion of a record label's threat point (*i.e.,* that dealing with the PSS market). It is not at all clear that a record label's failure to reach an agreement with Music Choice would mean a loss of all record company profits in the PSS market if that market includes all providers of residential audio services. There is evidence in the record that at least one Music Choice competitor, Stingray Music, provides a service that is comparable to the residential audio service that Music Choice provides, but pays a much higher royalty rate than Music Choice pays.[36] Although that competitor, which is a recent entrant to the U.S. market, has not sought a royalty rate closer to that which Music Choice pays, it certainly could in the future, perhaps using the lower rate paid by Music Choice as a comparable to support its own rate reduction. In other words, the lower rate that Music Choice pays as a PSS could put downward pressure on the rates that competing services pay to record labels.

By contrast, if Music Choice and the theoretical record label were unable to reach an agreement, the rate that Music Choice pays could no longer be used by providers of comparable services to justify lower royalty rates. Under that scenario, a record label could actually benefit from the loss of Music Choice to the extent that the rate it pays could be shown to be below a market rate, which would result in a positive threat point for the record label.[37] As with the asserted promotional effect, however, such an effect is impossible to estimate with any accuracy. The Judges do not conclude from this discussion that zero is the correct threat point for the hypothetical record label but rather confirm the lack of usefulness of the Crawford model because critical components of the model, at least as presented by Dr. Crawford in the current proceeding, allow a broad level of discretion and subjectivity, which undermines the credibility of the results.

iii. Relative Bargaining Power

Professor Crawford's assignment of the parties' respective bargaining powers (the last element of the Nash Framework) was also based on faulty reasoning. Under the Nash Framework, each firm's bargaining power is a number between 0 and 1, which measures the strength of that firm in the negotiation. Crawford WDT ¶ 81. The sum of the two parties' bargaining powers equals 1. *Id.* Professor Crawford related each firm's bargaining power to each party's patience in a negotiation. The party with greater patience also has greater bargaining power. Professor Crawford contended that that comparison is consistent with the nature of bargaining between Music Choice and the copyright owners. According to Professor Crawford,

> [b]oth record labels and Music Choice have a history of successful negotiations, so there is nothing *a priori* to suggest that in the hypothetical marketplace, one would be more or less patient than the other. Furthermore, estimating Bargaining Parameters of firms in marketplace settings is a challenging undertaking at the frontier of economic research. . . . I will therefore assume that a range of Bargaining Powers is possible. As I think it unreasonable to believe that either a record label or a PSS provider could extract *all* the profits from a bargain, I choose a range of bargaining powers for each party between 0.2 and 0.8.

Crawford WDT ¶ 105. The Judges interpret Professor Crawford's statement regarding relative bargaining power as saying he has no way to quantify what the relative bargaining powers are between Music Choice and the record labels. Ultimately, the Judges believe that this is an accurate statement that further undermines the usefulness of the Nash Framework in the proceeding. That being said, what evidence there is in the record regarding the relative bargaining power of Music Choice and the record labels suggests that the record labels have much greater bargaining power than Music Choice (or a similarly situated PSS in the hypothetical market).

Mr. Del Beccaro, Music Choice's President and CEO testified about a history of ''inequality in bargaining power'' between Music Choice and the record labels that forced Music Choice to accept rates that were higher than it would have otherwise. *See, e.g.,* Del Beccaro WDT at 10 (''Music Choice had no choice but to accept a rate increase to 7 percent for 2002 to 2003 and 7.5 percent for 2004 through 2007''); *id.* at 11 (''[d]espite repeated efforts by Music Choice to engage in settlement negotiations, when the royalty rate came up for adjustment for the next rate period, SoundExchange did not negotiate a settlement until directed to by the Judges during the direct trial opening statements of the SDARS I proceeding in June 2007''); *id.* at 12 (''[In *SDARS III*] Music Choice reached out to SoundExchange yet again, in January 2016, to attempt settlement solely to avoid the costs of litigation. SoundExchange once again failed to negotiate, and did not even respond to Music Choice's offer until July.'').

Professor Crawford contended that ''there is no direct evidence on the relative bargaining power of either a record label or Music Choice in a hypothetical market for sound recording performance rights for PSSs.'' Crawford WDT ¶ 177. But he needed look no further than Mr. Del Beccaro's statements about Music Choice's efforts to negotiate settlements with SoundExchange. These statements strongly suggest that Music Choice has very little if any bargaining power in its negotiations with the labels. The greater the bargaining power by the record labels, the higher the rates that Music Choice would be required to pay. Crawford WDT at 73, Ex. B.3. Therefore, the Judges find no support in the record to suggest that Music Choice or a similarly situated PSS would enjoy anything but minimal bargaining power in negotiations with the labels, particularly any of the major labels. As a result, even under the fundamentally flawed Crawford model, nothing but the highest projected rate of 5.6% would even be considered to fall within a zone of reasonableness. Given the inherent subjectivity of the model, however, the Judges continue to conclude that it provides no useful information regarding the royalty rates that a PSS should pay, other than perhaps to eliminate from a potential zone of reasonableness all rates at or below 5.6%. Therefore, the Judges reject, for the second time in two consecutive PSS

[36] Stingray Music is a Canadian digital pay television audio service owned and operated by Stingray Digital. It has about 50 music channels that are available to television service subscribers of several cable and IPTV providers in the U.S. Like Music Choice, Stingray also has a business service and streams to individuals who subscribe to television services that provide Stingray Music. Wazzan WDT ¶ 62. The PSS and services such as Stingray, which SoundExchange refers to as CABSAT (cable/satellite) services compete for the same MVPD wholesale buyers. Stingray bought Music Choice's European affiliate, which it operates as Music Choice International. In the U.S., Music Choice and Stingray are direct competitors. *Id.* ¶ 62(g), (h).

[37] *See* Wazzan WRT ¶ 57 (''there is considerable reason to believe that the existence of Music Choice imposes significant opportunity costs on record companies in today's market [in that] record labels receive substantially higher revenues from interactive and non-interactive music services than from the PSS''). SoundExchange's expert, Dr. Wazzan, attempted to correct this error and others in Professor Crawford's model and derived a range of rates that are several times greater than those Professor Crawford's estimated. Wazzan WRT ¶ 48. SX PFFCL ¶ 2046 (comparing Crawford's range of 1.4% to 5.6% to Wazzan's ''Corrected'' range of 9.0% to 36%). If the Judges were to rely to some extent on the Crawford model, the evidence in the record does not support a rate outside of this wide range of 1.4% to 36% of gross revenues. After reviewing each party's evidence regarding the Crawford model, however, the Judges do not have a high level of confidence regarding where within that broad range a reasonable rate might lie. Nevertheless, the many flaws in Professor Crawford's model suggest that the lower end of the range of rates that the Crawford model yields is likely outside the zone of reasonableness.

proceedings, the usefulness of Professor Crawford's presentation of the Nash Framework as a model for determining reasonable royalty rates for the PSS.

b. SoundExchange's Proffered CABSAT Rate

i. The CABSAT Benchmark

SoundExchange asserted that there is no applicable marketplace benchmark suitable for the PSS market, even with a comparability adjustment. *See* Wazzan CWDT ¶ 12. According to SoundExchange ''nobody has identified any agreements relating exclusively to a PSS, or even relating in material part to a PSS.'' *Id.* ¶¶ 45, 47.[38] SoundExchange observed that even if such agreements existed, one would expect the rates under those agreements to be influenced by the statutory license. *Id.* ¶ 44.

Rather, SoundExchange proffered as its benchmark a royalty rate developed in a settlement under section 114 of the Act and applicable to certain ''new subscription services'' that offer digital music transmissions to cable or satellite television subscribers.[39] SoundExchange referred to these new subscription services' rates as ''CABSAT'' rates. The Judges adopted the ''CABSAT'' rates in a separate proceeding under a statutory provision that prescribes a rate-setting standard different from the one at issue in the present proceeding. *See* Written Direct Testimony of Paul Wazzan, Trial Ex. 27, ¶ 11 (Wazzan WDT).

SoundExchange asserted that the CABSAT rates are set in a ''hybrid'' market in which negotiations occur in a marketplace setting but, in the case of an impasse, either party can appeal to a judicial or regulatory body for a rate determination. SoundExchange contended this ''hybrid'' environment makes CABSAT rates an appropriate benchmark if the parties have similar stakes in the benchmark and target markets. *See* Crawford WDT ¶ 50; Wazzan CWRT ¶ 20. SoundExchange concluded that while no party has identified a suitable marketplace benchmark for the PSS that is not constrained by regulation, the statutory CABSAT rates are ''a market-like rate.'' *See* Crawford WDT ¶ 58.

SoundExchange argued that the two services that use the statutory PSS license (*i.e.,* Music Choice and Muzak's Dish CD service) ''are in all important respects functionally equivalent to the three services ''that use the statutory CABSAT license.'' *See* SX PFFCL at xxiv. SoundExchange asserted that both services are cable radio services that are delivered to consumers through MVPDs; both provide a similar number of channels and similar genres of music; both would negotiate in the hypothetical market for the same rights from the same entities; and PSSs would meet every element of the regulatory definition of a CABSAT service. SoundExchange argued that PSSs and CABSAT services compete head-to-head for carriage on MVPDs. In short, according to SoundExchange, the only material difference between the two types of services is the date on which they commenced operation. *See, e.g.,* Wazzan CWDT ¶¶ 59, 60, 66; Crawford WDT ¶ 50; 5/3/17 Tr. at 2305–06 (Wazzan); 4/24/17 Tr. at 714 (Crawford); Written Direct Testimony of Jonathan Bender, Trial Ex. 29, at 29 (Bender WDT). For that reason and ''because setting relatively lower rates for the PSS would distort the market in their favor'' SoundExchange asserted: ''the CABSAT rates present an appropriate benchmark in the absence of any clearly-appropriate unregulated marketplace benchmark.'' *Id.*

According to SoundExchange, Music Choice considers Stingray, one of the CABSAT services, to be its primary competitor. 5/18/17 Tr. 4641–42 (Del Beccaro). SoundExchange acknowledged that the CABSAT rates, which are statutory rates set in the context of a CRB rate proceeding, are not unregulated marketplace rates. Nevertheless, SoundExchange asserted that the CABSAT rates represent the ''best available benchmark for the PSS rates.'' SX PFFCL at xlv. SoundExchange acknowledged that the statutory rate standard for CABSATs is a willing buyer/willing seller standard. Nonetheless, SoundExchange contended that no adjustment would be required to the CABSAT rates under the Section 801(b) factors before applying them to the PSS services. *See* Wazzan CWDT ¶ 18. The extant CABSAT rates only apply for three of the five years of the current PSS rate period (2018–2020), therefore SoundExchange proposed that the Judges apply a 3% per year rate increase (the size of the CABSAT rate increases in 2018–2020) to the 2020 CABSAT rate to derive the rates for 2021 and 2022, the last two years of the upcoming PSS rate period. *See* Bender WDT at 29–31.

Under SoundExchange's proposal, the rate for PSSs' residential audio services would be a monthly per-subscriber rate of $0.0190 for 2018, $0.0196 for 2019, $0.0202 for 2020, $0.0208 for 2021, and $0.0214 for 2020. SX Amended Rate Proposal at 7, 10. These rates would cover the PSSs' royalty obligations under the section 114 and 112(e) licenses. *Id.*

For PSSs' webcasting activities,[40] SoundExchange proposed that the PSS pay the same rates that apply to commercial webcasters providing a subscription service under 37 CFR 380.10. Through 2020, that rate would be a per-performance rate of $0.0022, adjusted for inflation. For PSSs that are unable to measure performances, the rate would be based on the average number of recordings on the service played per hour multiplied by the Aggregate Tuning Hours. SX Amended Rate Proposal at 8.

In advocating for the CABSAT benchmark, SoundExchange also stressed the importance of changing the current rate structure from a percent-of-revenue to a per-subscriber structure, because CABSAT rates are calculated per-subscriber. SX PFFCL ¶ 1949. SoundExchange acknowledged that one could convert the proffered CABSAT-based rates to a percentage rate. SoundExchange estimated that in 2015, Stingray paid an effective percentage royalty rate of ''just under [REDACTED] %'' of its revenues. SX PFFCL ¶ 1949. This converted CABSAT rate compares to Professor Crawford's estimate that Music Choice would pay between [REDACTED] % and [REDACTED] % of its unadjusted residential audio service revenue under SoundExchange's rate proposal. *See* Crawford WRT ¶ 113. Given this perceived equivalence, SoundExchange perceived no reason to adopt a percent-of-revenue rate structure for PSS in the current proceeding. *Id.*

SoundExchange contended that a per-subscriber rate structure is preferable because Music Choice is paid under such a structure by its MVPD customers. *Id.* ¶ 1950. SoundExchange also argued that a per-subscriber rate is easier to apply and more transparent than a percentage-of-revenue rate. *See* Orszag AWDT ¶ 27; Crawford WDT ¶¶ 147–

[38] SoundExchange acknowledged that the record includes evidence of two Muzak agreements that address Muzak's PSS service, but SoundExchange asserted that these agreements are concerned primarily with Muzak's business establishment service. Trial Exs. 401, 402. In any case, SoundExchange asserted that there are a number of reasons why these agreements would not make suitable benchmarks. *See* Wazzan CWDT ¶ 45.

[39] *See* 37 CFR part 383. Three services currently offer residential audio services through cable and satellite television providers and pay royalties under part 383 regulations as New Subscription Services: Stingray, Sirius XM, and Muzak's legacy DMX.

[40] This proposed rate would apply to ''all licensed transmissions and related ephemeral recordings through an internet streaming service qualifying as a PSS (or any similar service capable of tracking the individual sound recordings received by any particular consumer).'' SX Amended Rate Proposal at 8.

148; Bender WRT at 13.[41] Of particular concern to SoundExchange was the perception that a revenue-based structure gives Music Choice the flexibility to reduce the amount of royalties it pays by charging its affiliated owners discounted prices. According to SoundExchange, Music Choice is partially owned by cable companies, including Comcast, Time Warner Cable, and Cox, and charges lower prices to its MVPD owners than it charges to other MVPDs. *See* Wazzan CWDT ¶ 90. SoundExchange argued that ''the Judges should be suspicious of commercial arrangements between Music Choice and its MVPD partners.'' *Id.* ¶ 1979.

SoundExchange disputed Music Choice's attestations that its MVPD partner affiliate fees are a function of the relative size of affiliated MVPDs *vis-à-vis* non-affiliates. *See* Del Beccaro WDT at 22–23; *but see* Wazzan WDT ¶ 91. SoundExchange contended that evidence in the record shows that all affiliates received discounted rates from Music Choice, regardless of the number of subscribers they had at the time. SX PFFCL ¶ 1990; Trial Ex. 410, Music Choice Partner Affiliation Agreement, Sch. B at MC0012247–48; 5/3/17 Tr. 2333 (Wazzan). SoundExchange contended that this purported affiliate discount, which remains in effect, represents a [REDACTED] % discount to fees that non-affiliated MVPDs are required to pay. 5/3/17 Tr. 2333–37 (Wazzan). SoundExchange represented that Music Choice's non-partners with the largest number of subscribers are expected to pay $[REDACTED] or $[REDACTED] per subscriber per month in 2018, while the partners are expected to pay $[REDACTED] per subscriber per month, about one third as much. *See* Wazzan CWRT, App. C. at 43–44.

ii. Music Choice's Opposition to the CABSAT Benchmark and Per-Subscriber Rate Structure

Music Choice opposed SoundExchange's proffered CABSAT benchmark and proposed per-subscriber rate structure. As a preliminary matter, Music Choice contended that SoundExchange's identification of the necessary components of a comparable market for benchmarking purposes omits two key requirements, namely that the benchmark represent a workably competitive market and that the buyers and sellers in both the target market and the benchmark market have similar stakes. *See* Crawford WDT ¶ 50; 5/24/17 Tr. at 695–96 (Crawford). Music Choice contended that the proffered CABSAT benchmark fails on both accounts because the CABSAT rates and terms were set by a settlement between SoundExchange and Sirius XM. Crawford WDT ¶¶ 55–56. According to Music Choice, the settlement did not reflect any sort of competitive marketplace. *Id.*

Music Choice asserted that Sirius XM is not an active participant in the CABSAT market, providing its CABSAT service to only one affiliate (DISH Network). Music Choice contended that Sirius XM's CABSAT service is merely a promotional vehicle to drive subscriptions to its primary business, the satellite radio service. *See* Crawford WRT ¶ 43. In support of this argument, Music Choice noted that Sirius XM's CABSAT service generates only [REDACTED] % of Sirius XM's revenues. Given that the CABSAT service generates such a miniscule percentage of Sirius XM's revenues, Music Choice argued that Sirius XM had no real incentive to vigorously negotiate the CABSAT settlement let alone incur the costs of a rate proceeding.[42] *Id.* ¶¶ 55–56. By contrast, Music Choice has a far different stake because the PSS service is its primary business. Crawford WDT ¶ 129 (Music Choice's residential audio service remains its most important business in terms of revenues and company strategy).

In Music Choice's estimation, the proffered CABSAT benchmark lacks a key indicator of comparability—similar stakes—which Music Choice asserted must be present when using a benchmark from a hybrid market (*i.e.,* a market in which negotiations occur in a marketplace setting but, in the case of an impasse, either party can appeal to a judicial or regulatory body for a rate determination). *See* Crawford WRT ¶¶ 55–56. Music Choice also argued that the ''sellers'' in the proffered CABSAT market and the hypothetical PSS market are not comparable because in the CABSAT market SoundExchange represents the entire record industry as opposed to individual record companies which purportedly would reflect the sellers in the hypothetical PSS market. *Id.*

Music Choice also argued that the proffered CABSAT benchmark is flawed because the underlying CABSAT market is neither competitive nor stable. *See* Del Beccaro WRT at 5–6. According to Music Choice, ''[t]here has never been a CABSAT licensee that has proven able to operate a long-term profitable business from its CABSAT operations, nor have the majority of participants in the CABSAT market actively or successfully sought new affiliates or competed in the marketplace.'' *Id.* Music Choice asserted that Stingray is the ''only active CABSAT.'' *Id.*[43] According to Music Choice, after six years in the CABSAT market Stingray has captured only 6% of the MVPD market and, until recently, all of its affiliates were small cable operators that pay high rates, which have sustained Stingray. *See* Del Beccaro WRT at 10. Music Choice projected that if it left the market, Stingray could not replace it because Stingray would have to reach agreements with larger MVPDs at lower rates while still paying the high per-subscriber CABSAT rates. *Id.* Over time under this market dynamic Music Choice contended Stingray would be forced to exit the CABSAT market. *Id.*

Music Choice also faulted SoundExchange for glossing over the legislative history of the PSS license and the Section 801(b) policy standard, which, Music Choice contended, reflects Congressional intent to ''protect the unique business expectancies of the PSS, even against later market entrants, which is inapplicable to other statutory licensees and must inform any interpretation or application of the 801(b)(1) policy standard to the PSS.'' MC Reply to SX PFFCL at 66. Music Choice noted that ''Congress 'grandfathered' the three PSS, Music Choice, DMX and Muzak, which were already in operation at the time Congress passed the Digital Millennium Copyright Act (DMCA)[44] allowing the PSS to continue operating under the 801(b)(1) policy-based rate standard rather than be subjected to the new [willing buyer/willing seller] marketplace standard.'' *Id.* at 65. Thus, Music Choice concluded, ''the mere fact that non-comparable services pay different rates provides no useful data for setting the PSS rates.'' *Id.* at 66.

Music Choice agreed with SoundExchange (and Dr. Wazzan) that

[41] SoundExchange acknowledged that although allocation disputes can arise under a percent-of-revenue structure, ''such disputes have not materialized between SoundExchange and Music Choice in recent memory.'' SXPFFCL at ¶ 1952.

[42] Music Choice argued that the ''bargaining and market dynamics that led to the settlement from which the current CABSAT rates and terms are derived also make clear that those rates are not market rates, or even market-like . . .'' MC Reply to SoundExchange's PFFCL at 68. According to Music Choice, Sirius XM had no rational business incentive to litigate the last CABSAT proceeding, so it had little choice but to settle. *Id.* at 69–70 (and evidence cited therein).

[43] According to Music Choice, the only companies ever to enter the CABSAT market are MTV, DMX, Sirius XM, and Stingray. Music Choice represented that MTV and DMX have since exited the CABSAT market. According to Music Choice, Sirius XM has only one affiliate, which it purportedly uses as a promotion tool, and is not competing for new business. MC Reply to SX PFFCL at 71–72 (and evidence cited therein).

[44] Public Law 105–304, 112 Stat. 2860 (Oct. 28, 1998).

there are no types of licensed music services comparable to the PSS. *Id.* at 67. Music Choice disagreed, however, that the current PSS rate is below market. In fact, it contended that the current PSS rate is an above-market rate, given that it is the result of settlements that Music Choice had little choice but to accept to avoid litigation costs. *Id.* (MC Reply to SX PFFCL ¶ 1789).

Music Choice contended that, despite SoundExchange's claims to the contrary, the reason Music Choice has not sought direct licenses is not because it would not get a better rate than the statutory rate but because the cost of direct license negotiations would be too high. *Id.* Music Choice also noted that since the current statutory rate does not exclude revenues from direct licenses for PSS, Music Choice would still have to pay a share of revenues attributed to the sound recordings from the direct licenses in addition to the royalties required by those direct licenses. *Id.* at 67–68. According to Music Choice, direct licensing would only make sense if it could directly license 100% of its music. *Id.* at 68 (Reply to SX PFFCL ¶ 1789).

Music Choice acknowledged that PSS providers and CABSAT services both sell cable radio to MVPDs but contended that material differences in quality, programming, on-screen displays and other features set the PSS (or at least Music Choice's) service apart from that of the CABSATs. *Id.* at 77. Music Choice contended that its screen displays provide significantly more promotional impact than those of any CABSAT service. *Id.* at 78–79.[45]

Music Choice also opposed the per-subscriber rate structure that SoundExchange proposed. Music Choice contended that the proposal is based on the false premise that Music Choice provides unfairly advantageous discounts to cable providers with which Music Choice is affiliated. MC PFF ¶ 279; Wazzan WDT at 37–38; 5/3/17 Tr. 2330 (Wazzan). Music Choice represented that a supermajority interest in Music Choice is owned by non-cable companies, including some affiliated with record companies, which would be harmed if Music Choice gave below-market rates to its cable affiliates. Therefore, according to Music Choice, doing so would make no economic sense. MC PFF ¶¶ 283, 285–288; Del Beccaro WRT at 16, 19–20.

Music Choice asserted that any preferential pricing it offers is the result of the size of the cable company, although factors such as long-term commitment to the Music Choice service may also play a role. Del Beccaro WRT at 16–17. Indeed, Music Choice represented that at times its cable affiliates have made concessions on price just to help Music Choice survive. MC PFF ¶ 299; 5/18/17 Tr. 4593–94 (Del Beccaro); 4/24/17 Tr. 804–05 (Crawford).

iii. Judges' Analysis of SoundExchange's Proffered CABSAT Benchmark and Proposed Per-Subscriber Rate Structure

In determining whether a proffered marketplace benchmark is comparable to the hypothetical target market the Judges have looked at the comparability of the buyers, sellers, and rights over which the parties negotiated.[46] When the two markets were comparable (*i.e.,* the buyers, sellers, and rights are the same), the Judges have found that the rate that the buyers and sellers have negotiated in the market can provide useful guidance in determining the rate for the target market.[47] In the present proceeding, SoundExchange conceded that ''[t]he CABSAT benchmark is not a marketplace benchmark. It is instead a regulated rate.'' SX PFFCL ¶ 1847 (and evidence cited therein). The prevailing CABSAT rates were agreed to by SoundExchange and Sirius XM, the only remaining participants, in a CRB rate-setting proceeding. *See, e.g.,* Crawford WRT ¶ 33.[48]

As a threshold matter, the Judges note that in setting a statutory rate for PSS they are not required to approximate a market rate.[49] Rather, the Judges' mandate is to set a reasonable rate consistent with the Section 801(b) factors.[50] In enacting the DMCA, Congress carved-out the PSS from application of the willing buyer/willing seller standard intended to approximate a market rate.[51] The intent of the carve-out was to acknowledge the pioneering status of the PSS, which invested in a new type of digital audio service (*i.e.,* transmission of noninteractive audio to the television) in reliance on the existing 801(b) rate standard and to protect their prior investments.[52] The PSS took the risks and received the benefits, one of which was a statutory exception from the rate-setting provisions in the DMCA that were designed to ''move the industry to market rates.'' [53] SoundExchange now argues, however, that the Judges should adopt the proffered CABSAT rate benchmark as a market-like rate. The Judges decline.

Notwithstanding the similarities in PSS and CABSAT service offerings that SoundExchange noted, the Judges do not find the proffered CABSAT rate benchmark is a useful starting point from which to apply the Section 801(b) factors.

First, it is not at all clear to the Judges that the proffered CABSAT benchmark market and the hypothetical PSS market offer the same rights. As discussed below in reference to the Register's Memorandum Opinion regarding the scope of the PSS market, the rights that the PSS can exercise while maintaining the grandfathered rate-setting methodology are limited to PSS entities' existing service offerings and expanded service offerings, as the Register defines those terms. Services that a PSS entity provides outside the scope of the grandfathered categories constitute different service offerings, *i.e.,* rights outside those offered in the hypothetical PSS market. Although the types of activities that PSS and CABSAT entities perform may overlap in certain respects, for purposes of determining comparability of the hypothetical market to the target market, the relevant service bundle is limited to those activities that the hypothetical PSS entity may provide consistent with the grandfathered rate methodology.

PSS entities, such as Music Choice, and CABSAT entities may (and do, subject to an appropriate royalty rate) provide services outside the scope of the PSS license (*e.g.,* internet-based and mobile application-based services that are consumed outside the home).[54]

[45] Music Choice cited the fact that it bundles its residential PSS with its video offerings as ''critical and relevant, because those bundled offerings provide a value proposition that is appealing to MVPD providers and allows [Music Choice] to compete effectively against the Stingray and Sirius XM's CABSAT services.'' MC Reply to SXPFFCL at 85.

[46] *See, e.g., SDARS I,* 73 FR 4080, 4088 (Jan. 24, 2008).

[47] *See id.* (''comparability' is a key issue in gauging the relevance of any proffered benchmarks . . . potential benchmarks are confined to a zone of reasonableness that excludes clearly noncomparable marketplace situations'').

[48] The rates that the participants agreed to and the Judges adopted based on that agreement were monthly per subscriber payments of: 2016: $0.0179; 2017: $0.0185; 2018: $0.0190; 2019: $0.0196; and 2020: $0.0202. 80 FR at 36928 (37 CFR 383.3(a)(1)).

[49] *Music Choice* v. *CRB,* 774 F.3d. 1000, 1012 (''nothing in the statute requires the Judges to rely on market rates or agreements when setting Section 114 rates'').

[50] 78 FR at 23055; *Music Choice* v. *CRB,* 774 F.3d at 1013 (''The Copyright Act does not 'clearly require[ ] the use of 'market rates'. [I]nstead, 'reasonable rates' are those that are calculated with reference to the four statutory criteria.'').

[51] *SoundExchange* v. *Muzak,* 854 F.3d 713, 714–15 (D.C. Cir. 2017).

[52] *See Id.* at 719.

[53] *Id.*

[54] Dr. Wazzan referenced some of the differences he perceived between the services that PSS and CABSAT entities provide. Wazzan WDT ¶¶ 67–72. For example, he noted that Music Choice provides

These different services, however, are not included within the bundle of rights that PSS entities would negotiate for in the hypothetical market. Although it is theoretically possible to adjust the proffered CABSAT benchmark to accommodate for the difference in the bundle of rights that the CABSAT and PSS services negotiate for, SoundExchange acknowledged no such difference and, consequently, offered no adjustment in the current proceeding to account for the difference. The Judges can find no persuasive evidence in the record that would allow the Judges to develop such an adjustment *sua sponte.*[55]

SoundExchange attempted to conflate what the PSS services and CABSAT services do (as represented by SoundExchange) with what they have the right to do either in the hypothetical PSS market or in the CABSAT market. SX PFFCL ¶ 1794 (''the same rights are conveyed, because both create audio music channels incorporating the licensed sound recordings and sell them to MVPDs, who in turn resell those channels to consumers as part of subscription bundles.''); *see* 5/3/17 Tr. at 2305–06 (Wazzan); *see also* SX PFFCL ¶¶ 1797–1799 (''CABSAT Services And PSS Are Functionally Equivalent Cable Radio Services And So Implicate the Same Rights''). Similarities in service offerings do not necessarily equate to comparability of rights that each of the service types is authorized to exercise.

SoundExchange's attempted direct compare-and-contrast of the various activities in which the two types of entities engage also ignores the fundamental, statutory difference between PSS and CABSAT: Legislative intent that PSS and non-PSS be treated differently with respect to the way in which their respective royalty rates are determined. By SoundExchange's own admission, the CABSAT rates were based on a settlement agreement negotiated in the context of a proceeding in which the applicable rate standard was a willing buyer/willing seller standard. In adopting the DMCA, Congress expressly carved-out the PSS from that standard. The Judges conclude that applying the CABSAT rate benchmark as proffered by SoundExchange in the current proceeding would effectively subject the PSS to the willing buyer/willing seller standard, which, in the Judges' view, would be inconsistent with Congress's intent in adopting the PSS rate-setting methodology in the DMCA.

The proffered CABSAT benchmark also raises concerns because of the enormous difference between the current PSS statutory rate of 8.5% of gross revenues and the rates proposed under the CABSAT benchmark (converting to approximately [REDACTED] % of revenue in the first year). In *SDARS II,* the Judges characterized a difference between the prevailing statutory rate of 8% and a proposed rate as high as 32.5% (for SDARS services) as a ''yawning gap'' that raised concerns about the reasonableness of the proffered benchmark that yielded such rates. *See* 78 FR at 23066. The Judges have the same concerns about the rates derived from the proffered CABSAT benchmark and find that the wide gap strongly suggests that the buyers in the CABSAT market lack comparability with those in the theoretical PSS market. This difference in comparability of buyers is supported by SoundExchange's own admission that Sirius XM, which negotiated the CABSAT rates with SoundExchange, ''is first and foremost the provider of an SDARS'' that ''also provides a CABSAT service.'' SX PFFCL ¶ 1838. The PSS in the theoretical market are buyers negotiating for rights to operate their core business and therefore will have a greater stake in negotiating the most favorable rate. On the other hand, a buyer negotiating for rights for a non-core service might be more willing to settle for an acceptable rate rather than the best possible rate. Significant differences in the stakes of the respective buyers between the PSS and the CABSAT services suggest a lack of comparability between the two for benchmarking purposes.

The Judges conclude that the CABSAT benchmark as proposed in the current proceeding is not sufficiently comparable to the hypothetical PSS target market and that the CABSAT rates are outside of the zone of reasonableness for determining PSS rates for the upcoming rate period. The only useful information that the proffered CABSAT benchmark provides is to identify a rate ceiling that any reasonable PSS rates must remain below. In other words, a reasonable PSS rate for the upcoming rate period must be lower than the lowest rate proposed by SoundExchange based on the CABSAT benchmark (*i.e.,* $0.0190 per subscriber or [REDACTED] % of gross revenues).

By rejecting the proffered CABSAT benchmark, the Judges also reject one of SoundExchange's arguments in support of abandoning the current percent-of-revenue rate structure in favor of a per-subscriber rate structure. *See* SX PFFCL ¶ 1949. The Judges find SoundExchange's other reasons in support of a per-subscriber rate structure equally unpersuasive. Even reviewing the evidence SoundExchange presents in a light most favorable to SoundExchange, the Judges do not find that Music Choice's arrangements with its affiliated MVPD customers support a change in the rate structure to a per-subscriber structure. In this regard, the Judges accept as credible the evidence that Music Choice presented that historically it has charged and currently charges similarly situated non-partner

''internet simulcasts of its channels to subscribers of the MVPDs that distribute Music Choice'' but took no position on whether such streaming is part of its PSS. *Id.* ¶¶ 67–68. He continued that ''the CABSAT rates in Part 383 are quite clearly limited to a service 'transmitted to residential subscribers of a television service' through an MVPD using 'a technology that is incapable of tracking the individual sound recordings received by any particular consumer.'' *Id.* ¶ 70. According to Dr. Wazzan, ''internet streaming is something else, because streams are typically transmitted to devices other than televisions, over the public internet.'' *Id.* Dr. Wazzan noted that Sirius XM and Stingray both provide internet streaming services but do so under a different rate structure than that applicable to the CABSAT service. *Id.* ¶ 72. In finding that the rights conveyed to the CABSAT services are not comparable, for benchmarking purposes, to those for which a theoretical PSS would negotiate, the Judges do not take a position on whether the rights conveyed to the theoretical PSS entities are broader or narrower than those conveyed to the CABSAT services. They could be broader in some senses and narrower in others, but the evidence in the record shows that there are meaningful differences. All differences could affect the value of the underlying license and therefore are relevant in assessing the comparability of the proffered benchmark market and the target market. Ultimately, a detailed analysis might support a finding that, on balance, the differences are a wash, which would support a finding that, notwithstanding the differences in the rights granted, no comparability adjustment was necessary. Based on the record in the current proceeding, however, the Judges are not in a position to make such an assessment and therefore are left with a record that shows a lack of comparability of rights with no adjustment to sufficiently align the markets.

[55] Although the Register's Memorandum Opinion was issued after the record was closed in the current proceeding, the D.C. Circuit's *Muzak* decision, which highlighted the limitations in the rights that a PSS could exercise consistent with the grandfathered rate methodology, was issued during the proceeding. As a party to the case, SoundExchange advocated for the restrictions on the PSS license that the D.C. Circuit found. SoundExchange certainly could reasonably anticipate the impact that the *Muzak* decision would have on the rights that other PSS entities could exercise consistent with the grandfathered rate-setting methodology. Indeed, one of SoundExchange's witnesses referenced the decision and the limitations it placed on the rights that a PSS entity could exercise consistent with the grandfathering provision. SX PFFCL ¶ 1807; 5/10/17 Tr. 3205 (Bender); *see* SX PFFCL ¶ 1807 (''[d]uring the hearing in this case, the Court of Appeals for the D.C. Circuit held that Muzak's PSS status is limited to its historic DishCD service.'') Therefore, SoundExchange had notice that the rights that a hypothetical PSS entity could exercise consistent with the grandfathering provision were limited to providing the types of services (*i.e.,* existing and expanded service offerings) that the Register set forth in her Memorandum Opinion addressing the scope of the PSS license.

affiliates rates that are the same as or lower than those charged to its partners. MC Reply to SX PFFCL at 188 (Reply to SX PFFCL ¶ 1960) (and evidence cited therein); *see, e.g.,* 5/18/17 Tr. 4582, 4593–94 (Del Beccaro); Del Beccaro WRT at 18.

If SoundExchange and Music Choice were to agree to a per-subscriber rate structure, that structure would not, on its face, be inconsistent with the Copyright Act. Without a persuasive argument, supported by the evidentiary record, however, the Judges are reluctant to change the existing rate structure, which has thus far seemingly operated effectively. The arguments and record in the current proceeding do not support such a change. Therefore, the Judges reject SoundExchange's request to change the rate structure to a per-subscriber structure.

After reviewing and dismissing both proffered benchmarks, the Judges are left with the broad parameters of a zone of reasonableness that must be higher than 5.6% of gross revenues [56] and lower than [REDACTED] % of gross revenues (or $0.0190 per subscriber). The current rate of 8.5% of gross revenues falls within that range, albeit toward the lower end. In *SDARS II,* the Judges could endorse no proffered benchmark as an appropriate starting point for application of the Section 801(b)(1) factors. *See* 78 FR at 23059. Therefore, the Judges looked to the prevailing statutory rate to begin the analysis of the Section 801(b)(1) factors. *Id.*

Notwithstanding that no party advocated using the statutory rate as the starting point of the Section 801(b)(1) analysis and that the rate was negotiated in the shadow of the statutory license, the Judges found in *SDARS II* that the current rate was neither too high, too low, nor otherwise inappropriate. *Id.* The Judges reach the same conclusion in the current proceeding. As was the case in *SDARS II,* neither party has proposed using the current statutory rate as the starting point for applying the Section 801(b)(1) factors. SX PFFCL ¶ 1889; 4/25/17 Tr. 848 (Crawford). Music Choice contended that the current rate is too high and SoundExchange contended that it is too low. The parties do not contend that the previous PSS proceeding was ''necessarily'' wrongly decided, only that the Judges now must look elsewhere to find a reasonable rate. *See* 5/3/17 Tr. 2305 (Wazzan).[57]

Both parties' disdain for the current statutory rate appears to stem primarily from the fact that in the first proceeding to set a rate for the PSS, which occurred about twenty years ago, the CARP looked to the musical works royalty rate to help determine what the rate should be for the PSS. *See, e.g.,* SX PFFCL ¶¶ 1894–1900. Since then, the parties have either agreed to a royalty rate or, as occurred in *SDARS II,* the Judges selected a rate after fully reviewing the evidence in the record. The Judges and their predecessors each chose a rate that they viewed as reasonable and supported by the evidence before them at the time. The fact that once upon a time one decision-maker relied on a type of evidence that the Judges do not find persuasive in the current proceeding on the current record is irrelevant in the current proceeding. Unlike Music Choice and SoundExchange, the Judges are not convinced that the specter of the musical works rate on the prevailing PSS rate is so great as to preclude the Judges from using the current PSS rate as the starting point for applying the Section 801(b)(1) factors.

The Judges must continue to have the flexibility to rely on the best evidence they have available on the record before them in selecting reasonable rates and terms for the upcoming rate period. At this time, in this proceeding, on this record, the best available evidence is the prevailing statutory rate, which falls within the broad parameters of the zone of reasonableness indicated by the evidence that the parties presented. Therefore, the Judges look to the prevailing statutory rate of 8.5% as the starting point for the Section 801(b) analysis.

2. Application of the 801(b)(1) Factors

The digital performance license requires that the rates (but not the terms) be determined to achieve the statutory objectives detailed above. *See* 17 U.S.C. 801(b)(1). SoundExchange asserted that if the Judges use the prevailing statutory rate as the starting point of the section 801(b) factor analysis then they should adjust the rates upward to provide copyright owners a fair return (Factor 2), to reflect their greater contributions to the product made available to the public (Factor 3), and to avoid further disruption of the industries involved (Factor 4). SX PFFCL ¶ 2112.

Music Choice contended that the Judges should not have adjusted the prevailing statutory rate upward in *SDARS II* to account for Music Choice's projected increase in usage of sound recordings. Music Choice argued that the PSS license is not a general ''usage'' license (in that making more channels available does not necessarily lead to a greater number of performances), and that listeners can only listen to one channel at a time, regardless of how many channels are available for them to choose from. Del Beccaro WDT at 16.[58] The Judges find this claim somewhat peculiar. Music Choice appears to assume that all members of a household are transfixed to the same television set as they might have been at the dawn of the television age. Modern viewing habits, however, are far different. Televisions and other comparable electronic devices abound in modern households. It is not unreasonable to assume that each individual in a modern household could have access to his or her own viewing or listening device, any one of which might be capable of viewing or listening to the Music Choice service.

In *SDARS II,* the Judges found evidence of Music Choice's then current intention to increase the number of Music Channels offered from 46 to 300. 78 FR at 23059. Music Choice does not dispute that intention. Del Beccaro WDT at 15. A greater variety of channels could reasonably be expected to attract its own audience.[59] The Judges may rely on a party's present intentions as to future actions. Of course, present intentions of future actions do not ensure that the latter will come to fruition. In this instance, the Judges' finding was based on the evidence in the record before them. Music Choice represented in the current proceeding that in actuality, the expansion of its service was far more limited than it had anticipated in the last rate period. Del

[56] *See supra,* section IV.C.1.a.

[57] As discussed below, Music Choice did fault the Judges' decision to make an upward adjustment to the prevailing statutory rate to account for Music Choice's anticipated increase in the number of channels it offered.

[58] Music Choice contended that had there been any increase in revenues due to the increase in the number of channels that Music Choice offered, that SoundExchange would have reaped the benefits through increased royalties under as a percentage of revenues. In *SDARS II,* the Judges found no evidence to support a projected increase in revenues. 78 FR at 23060 (''Music Choice provided no evidence, however, to suggest that the planned expansion in usage would result in increased revenues to which the statutory royalty rate is to be applied''.) Indeed, Music Choice represented that even though it added 25 channels to its app and internet platforms during the current rate period, its listenership remained flat while its revenues actually decreased. Del Beccaro WDT at 16, 18.

[59] Mr. Del Beccaro suggested that the Judges should follow the principle that PSS royalties should only be payable based on actual performances, which occur when a song is actually received by a listener as is the case with respect to webcasters. He quickly cautioned, however, that Music Choice is not able to track the actual number of performances to enable such a per-performance rate. Del Beccaro WDT at 16–17 and n.2.

Beccaro WDT at 18. Consequently, Music Choice contended that it has been overpaying for the past rate period because the rate should have been kept at 7.5% of gross revenues. Del Beccaro WDT at 18. Indeed, Music Choice argued that this alleged ''overpayment justifies a rate reduction in the next rate period'' below the previous period's 7.5% rate. Crawford WDT ¶ 214.

While Music Choice chose not to expand its channel offerings as it had anticipated, it had the right to do so consistent with the statutory license, and the rate that the Judges adopted reflected Music Choice's stated intention regarding that projected expansion. A licensee has no *general* statutory or regulatory right to a rebate in a subsequent proceeding. Nevertheless, the Judges *specifically* noted in *SDARS II* that if Music Choice's projected increase in channels did not materialize the Judges could take that fact into account in a future proceeding. 78 FR at 23061. In *SDARS II,* the Judges found the increase from 7.5% to 8.5% was consistent with the second section 801(b) factor (fair return to copyright owners).[60] In this proceeding, the Judges examine again whether the basis for that increase continues to exist in the present market.

a. Factor A: Maximize Creative Works to the Public

Music Choice contends that the PSS services are favored under this factor because the PSS (and Music Choice in particular) generate original content (such as on-screen displays and curated channels) in providing the PSS service. MC PFF ¶ 334–335. Music Choice contends that this original creative content has great promotional impact on the sound recordings they play on the service, which is illustrated by the fact that record labels lobby to get their sound recordings played on the service. *Id.* ¶¶ 352–362. The Judges do not doubt that Music Choice expends resources promoting the artists that appear on the service and that such exposure can be promotional to the artists and their record labels. These efforts are already incorporated into the current statutory rate and therefore no downward adjustment is justified to the extent Music Choice promotes artists.

Music Choice contended that the current rate is actually hindering it in providing the types of promotional services that help artists and labels. Del Beccaro WDT at 17–18. By Music Choice's own admission, however, much of the decline is due as much to Music Choice's declining revenues as to the royalty rate it pays. Written Direct Testimony of Damon Williams, Trial Ex. 56, at 32–33 (Williams WDT). Indeed, since the royalty is currently based on a percent of revenue, a decrease in revenues would actually result in a decrease in the royalties Music Choice pays. Nevertheless, Music Choice provided no quantification of the promotional effects, if any, its service has on the artists it promotes. Moreover, it provided no persuasive evidence to connect the current statutory rate with any decrease in such artist services. Given the record before them, the Judges do not find that the evidence supports a decrease from the current rate based on this section 801(b) factor.

SoundExchange limited its discussion regarding this factor to arguments in support of adoption of the CABSAT rate and arguments against lowering the current PSS rate. The Judges do not adopt the CABSAT rates and find no persuasive evidence in the record to support a lower rate based on the first section 801(b) factor.

b. Factor B: Afford Fair Return and Fair Income

The second section 801(b) factor requires the Judges to assess whether the rate (or rates) they have chosen to begin the section 801(b) analysis affords the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions. 17 U.S.C. 801(b)(1)(B).

As discussed above, in *SDARS II* the Judges found that an increase from the then-prevailing statutory rate was warranted because Music Choice anticipated greatly expanding the number of channels of music it would offer without any anticipated increase in revenues that would adequately compensate copyright owners for this increase. 78 FR at 23060. In actuality, Music Choice's expansion was far more modest than it had anticipated. Del Beccaro WDT at 18; 5/18/17 Tr. 4521 (Del Beccaro); Del Beccaro WDT at 4 (Music Choice currently provides 50 television-accessible music channels). Given that the basis for the Judges' increase in the royalty rate after the *SDARS II* hearing was a projected expansion of music channels that did not materialize, the Judges find that, all things being equal, a downward adjustment to the PSS rate from 8.5% back to 7.5% is most supported by the evidence and by *SDARS II. See* 17 U.S.C. 803(a)(1) (''The . . . Judges shall act in accordance with . . . prior determinations . . . of . . . the Judges . . . .'').

According to Music Choice, the current rate has not provided the service a fair income under existing economic conditions. MC PFF ¶ 395. Music Choice asserted that, due to changes in Music Choice's downstream MVPD market, it anticipates losing money on its residential audio business over the next two years under the current rate. *Id.* ¶¶ 395–396. Music Choice's main contention was that a hyper-competitive market for its services is making it more difficult for it to remain profitable and provide the same level of services to copyright owners under current market conditions. Nevertheless, all of the conditions that Music Choice cited to support a downward adjustment are already incorporated into the current statutory rate. Music Choice provided no evidence that any new threat is on the horizon that might warrant a downward adjustment from the current statutory rate going forward. Moreover, as SoundExchange correctly noted, no copyright user, not even a PSS, is guaranteed any level of profitability.

Music Choice argued that a decrease from the current rate would not have a material effect on the copyright owners and artists. MC PFF ¶ 409. SoundExchange contended that the PSS pay lower royalty rates than any other music service and that these rates have a negative effect on copyright owners and artists who receive these low rates. *See* 5/18/17 Tr. at 4621–23 (Del Beccaro) (PSS pay lower rates than other music services); Harrison WDT ¶ 29 (record companies would not agree to current PSS rates). SoundExchange contended that the PSS rate is so far below a market rate that it would be ''foolish'' for any record company to attempt to directly license their sound recordings at rates near the current rate. SX PFFCL ¶ 2131 (and evidence cited therein). SoundExchange also asserted that a higher rate for PSS would not be unfair because Music Choice could continue to operate; it would only make less money doing so, and the Copyright Act does not guarantee a copyright user a certain minimum level of profits. *Id.* ¶ 2134.

The Judges do not mean to discount the fact that the market for providing content to cable and satellite providers is competitive and perhaps likely to grow more competitive in the future. Nevertheless, nothing in section 114 of the Copyright Act would authorize the Judges to shield PSS services from market forces and the Judges see no reason to do so in the absence of such a mandate. Music Choice's argument that a rate reduction would not materially affect the return that record labels receive for the sound recordings

[60] 78 FR at 23059.

they put into the marketplace is also misplaced. The relevant market for determining whether an adjustment is warranted is the market for PSS services, not the sound recordings market as a whole. As a percentage of total royalties, the amount copyright owners receive from the PSS services may be low. Nevertheless, all revenue sources are important for those that have earned them, and the rate charged for the use of sound recordings by the PSS must ensure that the copyright owners receive a fair return. Therefore, no additional downward adjustment is warranted.

SoundExchange claimed that the PSS pay the lowest royalty rates of any type of music service. Even if true, those comparative rates are already reflected in the current statutory rate. Section 114 is clear that the PSS that qualify for the grandfathered rate methodology are *sui generis.* At the time the grandfathered provision was adopted the number of qualifying services was very limited and has become more limited over time. Only two companies qualify for the grandfathered rate methodology and only for portions of their respective businesses. Therefore, consistent with the section 114 grandfathering provision, the correct question to ask is not whether the current statutory rate (or whatever rate the Judges choose to begin analysis of the section 801(b) factors) offers copyright owners a fair income vis-à-vis the rate they would earn from non-PSS music services but whether the current statutory rate offers copyright owners an unfairly low return that warrants an upward adjustment to ensure that copyright owners receive a fair return in the upcoming rate period. Admittedly, it is a difficult standard to meet, but SoundExchange has not provided sufficient persuasive evidence to support such an upward adjustment.[61]

After reviewing the evidence provided by both parties, the Judges conclude that (outside of a 1 percentage point reduction due to the anticipated expansion of the number of music channels that did not materialize) neither party has provided sufficient evidence to support a change from the current rate based on the second Section 801(b) factor.

c. Factor C: Reflect Relative Roles

The third section 801(b) factor requires the Judges to assess whether the rate they have chosen to begin the section 801(b) analysis reflects the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication. 17 U.S.C. 801(b)(1)(C).

Music Choice contended that with respect to this factor it has made a much stronger evidentiary showing than SoundExchange and therefore a lower rate should be warranted. MC PFF ¶ 426. For example, Music Choice noted that it makes significant creative contributions in terms of original programming, curation, and promotional content that increases subscribers' engagement with the music and increases the promotional impact of the Music Choice service. Williams WDT at 56; 5/18/17 Tr. at 4693 (Williams). Music Choice noted that it expends substantial resources on improving its service offerings but that declining revenues over the past rate period have forced Music Choice to cut staff that are used to provide these services. Williams WDT at 7. Music Choice discounted the record labels' contributions in this regard, arguing that they apply only to the sound recordings and not specifically to the PSS service. *See* MC PFF ¶ 447. Music Choice also noted that historically it has had to invent the technology necessary to get high-quality digital music programming to subscribers, but that the current rate has limited its ability to continue investing in improving its technology. *Id.* ¶¶ 450–52.

Music Choice asserted that the risks it faces are increasing relative to those faced by the record companies. Music Choice also contended that it (and other PSSs) has fewer opportunities for profitability. Del Beccaro WDT at 20. Music Choice noted that its residential business has still not become profitable on a standalone basis. *Id.* at 19–20. Music Choice pointed to consolidation among MVPDs and shrinking margins in the cable industry combined with competitive pressures that have led to a rapid deterioration of Music Choice's subscriber fees. *Id.* at 21. Music Choice represented that this changing MVPD market has fundamentally changed the financial outlook for Music Choice's residential audio service. *Id.* at 24–25.

Music Choice disputed SoundExchange's assertions that the Music Choice service is substitutional. *See* 5/16/17 Tr. 4076–77 (Harrison); 5/15/17 Tr. 3882 (Walker). Finally, Music Choice argued that it contributed more to the opening of new markets for creative expression and new media for its communication than the record companies. For all of these reasons Music Choice believes that this factor warrants a downward adjustment. MC PFF ¶¶ 500–501.

Not surprisingly, SoundExchange argued that no downward adjustment is warranted under this factor. SoundExchange believes that ''Music Choice's wholesale distribution model seems to be relatively inexpensive to operate.'' *See* Wazzan CWDT ¶ 80. By comparison, record companies spend far more on artists, repertoire, and marketing. *Id.* SoundExchange countered Music Choice's argument that the record companies' expenditures are not PSS-centered, arguing that without the record companies' expenditures the PSS would have no sound recordings to use for their services. *Id.* ¶ 80. SoundExchange further disputed Music Choice's contentions that past expenditures by investors in Music Choice warrant a rate reduction. According to SoundExchange, these capital costs were invested long ago and the investors have made no investments in the last eighteen years. *See* SX PFFCL ¶ 2141; *but see* Del Beccaro WDT at 20. SoundExchange contended that these investors have realized returns on their investments and that those investments have helped fuel Music Choice's non-statutory video service line of business. *See* SX PFFCL ¶ 2141; *but see* 5/18/17 Tr. at 4630–31 (Del Beccaro).

With the exception of Music Choice's assertion that market conditions have deteriorated recently, neither party made a persuasive argument that a further change in the current statutory rate is warranted, in either direction. Virtually all of the evidence that the parties present reflects conditions that have occurred under the current statutory rate. Therefore, all of the relative contributions of SoundExchange and Music Choice are already incorporated into that rate and no adjustment is warranted. The small rate reduction from the current statutory rate that the Judges found warranted under the second section 801(b) factor does not change the Judges' assessment.

As for the negative change in market conditions, Music Choice only noted a decline in the resources it spends and the staff it intends to employ to improve the service. If anything, a decrease in the resources it spends on the service, if quantifiable, would militate against a rate reduction. At this time, it is unclear

[61] Having determined that a downward adjustment is justified by the second section 801(b) factor, the Judges have reassessed the first section 801(b) factor and determined that no further adjustment is warranted notwithstanding the rate decrease supported by the second factor. The Judges review the evidence with respect to the third and fourth factors with the assumption that a rate reduction is already supported based on the second factor. 78 FR 31842, 31843 (May 28, 2013).

how market conditions will affect Music Choice's business in the upcoming rate period. Conceivably, persuasive evidence of dramatically deteriorating conditions in the market for PSS service might militate against an upward rate adjustment if such adjustment could be deemed disruptive but any such adjustment would be warranted under the fourth section 801(b) factor rather than the third. At this point, on the current record, the Judges find no persuasive evidence to support an adjustment from the current statutory rate in either direction under the third factor.

d. Factor D: Minimize Disruptive Impact

The fourth and final section 801(b) factor requires the Judges to assess whether the rate (or rates) they have chosen to begin the Section 801(b) analysis minimizes any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. 801(b)(1)(D). A royalty rate may be considered disruptive ''if it directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for [the parties affected by the rate] adequately to adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.'' *SDARS I,* 73 FR 4080, 4097 (Jan. 24, 2008).

Music Choice argued that the current statutory rate has had a disruptive effect on the PSS market. As support for this premise, Music Choice noted the previously discussed deterioration of Music Choice's financial condition, which it contended is due, in part, to the fact that the rate was increased in *SDARS II.* MC PFF ¶ 503. Music Choice did not argue that profits from Music Choice's other business lines should be considered in determining the possible disruptive effect of the PSS rate. *Id.* ¶ 506.

SoundExchange contended that if Music Choice and other PSSs cannot continue to operate then the market will adjust by allowing other competitors to take their place. *See* Wazzan CWRT ¶¶ 83, 86. From SoundExchange's perspective, Music Choice's quest for a lower rate is motivated by increased competition from Stingray. According to SoundExchange, Music Choice seeks a lower rate that would serve as a subsidy that would allow Music Choice to maintain its unfair advantage and its market share over non-PSS competitors. *See* 5/18/17 Tr. at 4532–37 (Del Beccaro). SoundExchange asserted that such a subsidy ''fosters Music Choice's inefficient operation and risks disrupting the market for residential audio services.'' Wazzan CWDT ¶ 84. From SoundExchange's perspective, the PSS rates are already artificially low and merely serve to insulate Music Choice from market forces at the record companies' expense. *See* Wazzan CWRT ¶81, n. 112; 4/25/17 Tr. at 933–34 (Crawford). SoundExchange argued that the current statutory rate is disruptive because it provides Music Choice a significant barrier to entry in the market for non-PSS (CABSAT) services. 5/3/17 Tr. at 2318 (Wazzan); SX PFFCL ¶ 2147. SoundExchange did not accept that a higher rate (even one as high as SoundExchange proposes) would be disruptive to the PSS market. Rather it contended that an upward adjustment would introduce a needed element of competition. *See* 4/25/17 Tr. at 902–03 (Crawford); Wazzan CWRT at 76, 83.

The Judges find that neither party provided persuasive evidence to warrant any further adjustment of the current statutory rate (other than that warranted by the second 801(b) factor) in either direction. Music Choice argued that the ''significant deterioration of its financial condition'' is due in part to the current statutory rate but the only evidence it cited deals with the effects of market competition. *See* Del Beccaro WDT at 21. The competitive pressures that Music Choice faces were not caused by the current statutory rate. While the rate increase that the Judges approved in *SDARS II* may have negatively affected Music Choice's margins, the Judges addressed any potential disruptive effect of that increase by phasing it in over the first two years of the rate period. The grandfathered rate calculation methodology was not intended to shield Music Choice from all negative impacts arising from competitive pressures. The reversal of that increase that the Judges find warranted under the second section 801(b) factor only makes Music Choice's arguments on this point less compelling.

The reality of the marketplace contradicts SoundExchange's contention that the current rate is disruptive. As SoundExchange pointed out, Music Choice faces stiff competition in the market. SX PFFCL ¶ 1879. The modest decrease in the statutory rate that the Judges find warranted under the section 801(b)(1)(B) factor does not change the Judges' assessment on this point.

On balance, the Judges find that neither party has provided persuasive evidence to support a finding that, under current market conditions, an adjustment to the current statutory rate (other than that discussed with respect to the second section 801(b) factor), is warranted under the fourth Section 801(b) factor. Therefore, the Judges determine that the appropriate rate for PSS services in the upcoming rate period shall be 7.5%. This rate shall apply to the gross revenues that the PSS services earn for all ''existing service offerings'' in addition to all ''expanded service offerings'' as those terms are defined and used at pages 15–16 of the Register of Copyright's (Register's) *Memorandum Opinion On Novel Material Questions of Law* (Memorandum Opinion) (Nov. 20, 2017). Based on the limited evidence in the record, the Judges find no justification for applying a different rate methodology to these two types of services at this time.

The Judges accept as credible Music Choice's evidence that additional channels that might conceivably fall within the expanded service category currently constitute a marginal portion of Music Choice's PSS service in terms of music usage. *See* Del Beccaro WDT at 16. While those types of services may increase over time, at this point the Judges do not find that the service offerings that fall within this category are sufficiently distinct from the existing service offerings to justify the creation of a separate rate methodology. Nevertheless, the Judges acknowledge SoundExchange's assertion that PSS services that might fall within the expanded service category have recently increased and may warrant a different rate methodology in the future. *See* Del Beccaro WRT at 25; 5/18/17 Tr. 4658–59, 4661 (Del Beccaro).

D. Music Choice's Internet Streaming Service

For the first time, in the present proceeding, SoundExchange proposed a separate rate for PSS that stream their services over the internet. For all licensed transmissions and related ephemeral recordings through an internet streaming service qualifying as a PSS (or any similar service capable of tracking the individual sound recordings received by any particular consumer), SoundExchange requested that the per-performance royalty fee for a commercial webcaster set forth in 37 CFR 380.10 apply.[62] Music Choice

[62] If a PSS does not have the technological capability to track individual performances, SoundExchange proposes that the PSS estimate its performances by multiplying its Aggregate Tuning Hours by the average number of recordings played per hour across its service. SX Amended Proposed Rates and Terms at 8.

contended that its streaming activity is already included within the PSS statutory license and the royalty rate that PSSs pay already includes this service. *See* Del Beccaro WRT at 27. As a result, Music Choice contended that no additional royalty payment should apply for internet streaming of the PSS service. *Id.*

1. Referral to the Register of Copyrights

The Judges concluded that the threshold issue of whether the streaming activities of a PSS were included within the scope of the PSS license was a novel material question of copyright law that the Judges must refer to the Register of Copyrights (Register). 17 U.S.C. 802(f)(1)(B). Hence, the Judges referred the issue to the Register, asking:

> (1) Are a preexisting subscription service's transmissions of multiple, unique channels of music that are accessible through that entity's website and through a mobile application ''subscription transmissions by preexisting subscription services'' for which the Judges are required to determine rates and terms of royalty payments under Section 114(f)(1)(A) of the Copyright Act?
>
> (2) If yes, what conditions, if any, must the PSS meet with regard to streaming channels to qualify for a license under Section 114(f)(1)(A)? For example, must the streamed stations be identical to counterpart stations made available through cable television? Is there a limitation on the number of channels that the PSS may stream? Is there a limitation on the number or type of customers that may access the website or the mobile application?

Order Referring Novel Material Question of Substantive Law and Setting Briefing Schedule at 3–4 (Oct. 5, 2017).

2. Register's Conclusions

The Register concluded that

> transmissions by a PSS entity that are accessible to a cable or satellite television subscriber through that entity's website and through a mobile application can be ''subscription transmissions by preexisting subscription services'' for which the CRJs must determine rates and terms of royalty payments under section 114(f)(1)(A), but only if such transmissions are sufficiently similar to the transmissions made to those subscribers via the entity's preexisting residential cable or satellite music service.

Memorandum Opinion at 12.

As a preliminary matter, ''the preexisting services must be limited to the three named entities in the [DMCA] Conference Report, *i.e.,* DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and [DiSHCD] (operated by Muzak).'' *Id.* at 14, internal footnotes omitted. Moreover, the Register noted that ''not every subscription transmission made by a PSS entity is subject to section 114(f)(1).'' *Id.* at 13. The Register observed that the DMCA's amendments to section 114 of the Copyright Act were designed to move the industry to market rates. *Id.* at 23. Nevertheless, the Register noted that ''Congress intended for PSS entities to be able to expand their service offerings to some limited extent and still have those service offerings be considered PSS offerings.'' *Id.* at 14.

According to the Register, the ultimate question is ''whether a particular program offering by a PSS entity qualifies as a PSS offering within the meaning of section 114(j)(11), and is therefore subject to the grandfathered rate standard under section 114(f)(1).'' *Id.* at 15.

The Register distinguished among three different types of service offerings:

> (1) A service offering identified by Congress as being a PSS offering as of July 31, 1998, that is still offered today *in the same transmission medium* identified by Congress in 1998. (The Register refers to this type of offering as an ''*existing service offering*''). According to the Register, an existing service offering would be entitled to *both* a rate established under the grandfathered rate standard under section 114(f)(1) and the grandfathered license requirements in section 114(d)(2)(B). *Id.*
>
> (2) A service offering identified by Congress as being a PSS offering as of July 31, 1998, that is still offered today, but *in a different transmission medium* than the one identified by Congress in 1998, *where only transmissions similar to the existing service offering are provided.* (The Register refers to this type of offering as an ''*expanded service offering*''). According to the Register, an expanded service offering would be entitled to a rate established under the grandfathered rate standard in section 114(f)(1), but would not be able to take advantage of the grandfathered license requirements in section 114(d)(2)(B). A PSS that offered this type of service would be required to comply with the more detailed license requirements in section 114(d)(2)(C). Memorandum Opinion at 15–16.
>
> (3) A service offering that is not an existing service offering or an expanded service offering. (The Register refers to this type of offering as a ''*different service offering*''). A ''different service offering'' is insufficiently similar to an ''existing service offering'' to be considered an ''expanded service offering'' and would not be entitled to either a rate established under the grandfathered rate standard under section 114(f)(1) or the grandfathered license requirements in section 114(d)(2)(B). Instead, the royalty rate for a different service offering would be set under the willing buyer/willing seller standard in section 114(f)(2). A PSS marketing a different service offering would be required to comply with the license requirements in section 114(d)(2)(C).[63]

Memorandum Opinion at 16.

The Register noted that ''an existing service offering can grow and expand significantly within the same transmission medium while remaining a PSS offering.'' *Id* at 19. Consistent with this understanding, the Register noted that

> [t]he user interface can be updated, certain functionality can be changed, the number of subscribers can grow, and channels can be added, subtracted, or otherwise changed. The only restriction is that the existing service offering as it is today must be fundamentally the same type of offering that it was on July 31, 1998—*i.e.,* it must be a non-interactive, residential, cable or satellite digital audio transmission subscription service.

Id. at 19–20 (internal footnotes omitted).

With respect to the second category of offerings (*i.e.,* expanded service offerings) ''a [PSS] does not lose its designation as such in the event the service decides to utilize a new transmission medium, *provided that the subscription transmissions are similar.*'' *Id.* at 20 n.72.[64]

In assessing whether a service offering is an expanded service offering and thus qualifies as a PSS offering, the Judges must compare the service offering in question to the existing service offering as it exists at the time of the comparison (rather than as it existed on July 31, 1998). *Id.* at 21. To aid the Judges in this comparison, the Register offers a non-exhaustive list of factors:

> (1) Whether the service offering has a similar effect on displacing or promoting sales of phonorecords.
>
> (2) Whether the quantity and nature of the use of sound recordings by the service offering is similar.
>
> (3) Whether the service offering provides similar content to similar user groups.
>
> (4) Whether the service offering is consumed in a similar manner, provides a similar user experience, and has similar form, feel, and functionality.
>
> (5) Whether and to what degree the service offering relates to the pre-July 31, 1998 investments Congress sought to protect.
>
> (6) Whether and to what degree the service offering takes advantage of the capabilities of the medium through which it is transmitted (*i.e.,* whether and the extent to which differences between the service offerings are due to limitations in the existing service

[63] The Register's categorizations of service types presumes that a service offering is eligible for the section 114 license. The categorization is meant to delineate whether the rate for a license-eligible service is determined pursuant to section 114(f)(1) or section 114(f)(2). If a PSS entity began offering an interactive service, for example, that service offering would not fall into one of the categories and would not be eligible for the statutory license. Memorandum Opinion at 16–17.

[64] For a service offering to qualify as an expanded service offering, the PSS entity must continue to operate its existing service offering. According to the Register, ''[a] service offering that is not an existing service offering can only be subject to the grandfathering provision if it provides transmissions similar to their existing service.'' Memorandum Opinion at 20, internal quotes omitted.

offering's transmission medium that are not present in the other service offering's transmission medium).
Id. at 21–22.[65]

A ''different service offering'' (the third category the Register identified) can never qualify as a PSS offering because it would not be one of the specifically identified pre-July 31, 1998 business operations (*i.e.,* the three PSS offerings) Congress sought to protect when it enacted the DMCA. This is true regardless of whether the service offering is developed internally or acquired. *Id.* at 22. When a PSS entity expands its operations and provides additional transmissions to subscribers to a different service, this is an entirely new investment and is not a PSS offering. *Id.* at 23.

The Register offered guidance regarding applications of the above categorization of service offerings. First,

in accordance with the principles of narrow construction afforded to grandfathering provisions, the Register finds that, as a matter of law, it is irrelevant whether or not Music Choice or another PSS entity, to some limited degree, was making transmissions via a different medium than those specified in the legislative history on July 31, 1998, such as the internet. If such a service was in fact doing so, it would not be as part of an existing service offering—any such transmissions today would be considered either an expanded service offering or a different service offering. . . .
Id. at 19.

The Judges must determine a royalty rate for the former type of service (*i.e.,* expanded service offering) in the current proceeding. The latter type of service (*i.e.,* different service offering) is outside the scope of the current proceeding; a royalty rate for any different service offering by a PSS (if any) must be determined by reference to existing rate regulations covering that type of service offering, in a separate, future proceeding under the willing buyer/willing seller standard, or through voluntary negotiations.

The Register observed that

the mere fact that a service offering is transmitted to cable or satellite television subscribers over the internet does not automatically disqualify the service offering from being an expanded service offering subject to the grandfathered rate standard, so long as the service offering, as a factual matter . . . is sufficiently similar to the PSS entity's existing cable or satellite service offering.
Id. at 25.

In assessing whether an internet-based service offering is sufficiently similar to a PSS entity's existing cable or satellite service offering, the Judges should consider ''the degree to which making the existing service offering accessible outside the home of the subscriber constitutes a fundamental change to the offering.'' *Id.*

According to the Register:

At least in the cable television market, there appears to be a distinction drawn between accessing content within the home and accessing that same content outside of it. To be clear, this distinction is one based on the *location* where the PSS offering is consumed, not the type of device on which the service is accessed. If the service offering is available through an internet-connected smartphone or tablet, but is designed so that the service offering will only work when accessed within the confines of the subscriber's residence, then it would be within the home and more similar to the PSS entity's existing cable or satellite service offering.
Id. at 26 (internal footnote omitted).

With respect to the impact that the number and type of channels offered by a service has in determining its categorization for rate-setting purposes, the Register identified examples of factors the Judges could consider, such as how many additional or fewer channels there are, how many channels offer different programming, and how different that programming is from that offered by the existing service offering. *Id.* The Register also notes that the Judges should consider the reasons why any such differences exist. If the service offering has more channels because of some benefit the internet provides (*e.g.,* greater bandwidth or different contractual arrangements with cable operators), then the PSS entity could be taking advantage of the capabilities of the internet as a transmission medium, which could tend to disqualify that service offering from the grandfathered royalty calculation method. *Id.* at 26–27. A similar analysis could be conducted with respect to the number and type of customers. *Id.* at 27.[66]

The Register noted that if a service offering qualifies for the grandfathered rate-setting methodology, the Judges still have the authority under section 114(f)(1)(A) to distinguish among the different types of digital audio transmission services in operation. If material differences between an existing service offering and an expanded service offering exist, the Judges may set separate rates based on those difference, using the section 801(b)(1) standard. *Id.* at 27–28.

3. Application of Register's Conclusions to Current Proceeding

Music Choice provides 50 channels of audio music programming delivered to subscribers' televisions (the Cable Radio Service). It also makes these 50 channels, plus an additional 25 internet-only channels, available to authenticated television subscribers through its website and a mobile app (the internet Service). Del Beccaro WDT at 4.[67]

The Register has determined, as a matter of law, that Music Choice's internet Service[68] is not an ''existing service offering.'' Memorandum Opinion at 19. Consequently, the internet Service is either an ''expanded service offering'' (*i.e.,* qualifying for grandfathered royalty determination under the Section 801(b) factors but subject to the expanded license requirements under section 114(d)(2)(C)) or a ''different service offering'' outside the scope of the PSS license.

By reference to the Register's six-factor list of criteria to differentiate an expanded service offering from a different service offering, the Judges find that an internet-based service that allows subscribers to access music outside their residences is a ''different service offering'' and is not eligible for grandfathered PSS rate structures or license requirements applicable to PSS. The regulations in Appendix A, therefore, exclude internet-based transmissions to the extent they are available outside a subscriber's residence.

[65] Even if a service offering is found to be an expanded service offering (rather than an existing service offering) qualifying for the section 114(f)(1) grandfathering provision for purposes of rate calculation, it would still not be eligible for the section 114(d)(2)(B) grandfathering provision (regarding license requirements) because it uses a different transmission medium than the existing service offering. Such an offering would be subject to the license requirements in section 114(d)(2)(C). Memorandum Opinion at 22.

[66] Differences in a service offering that directly and solely result from the imposition of the section 114(d)(2)(C) requirements that do not apply to the existing service offering (which is subject to section 114(d)(2)(B)) should not alone disqualify the service from the grandfathered royalty calculation methodology necessitated by the change in medium, nor should minor differences in the user interface or in the visual presentation. Memorandum Opinion at 27.

[67] *See also* Wazzan CWDT at ¶ 62(e) (''Music Choice provides 75 audio channels through various MVPDs, . . . and streaming to subscribers of the cable services that carry its channels, through a family of apps and a web portal.'') (internal footnotes omitted).

[68] Neither party asked the Judges to determine whether Music Choice's Cable Radio Service, as it exists today, constitutes an ''existing service offering'' or and ''expanded service offering'' by a PSS. As the Judges have already determined that the PSS rate covers both types of offerings, the question is moot and the Judges need not address it.

V. SDARS Performance License—Rate Structure

A. Rate Structure Arguments

1. Maintaining the Current Rate Structure

Sirius XM emphasized that the Judges have utilized a percent-of-revenue rate structure for ten years, and that absent any new and sufficient factual bases to deviate from that history, the Judges should continue to adopt this rate structure. SXMRPFF ¶ 384 (and record citations therein). Moreover, it noted that SoundExchange itself proposed a percent-of-revenue rate structure, not a ''greater-of'' structure, as recently as in the *SDARS II* proceeding. SXMPFF ¶ 253 (and record citations therein).

SoundExchange did not take issue with the historical *bona fides* of the current rate structure. However, SoundExchange noted that it urged the Judges to adopt what it describes as a simpler percent-of-revenue approach in *SDARS II,* but the Judges refused, opting instead for a more complicated structure that led to substantial disputes. SERPFF ¶ 253.

The Judges are not convinced by Sirius XM's argument that the rate structure should be maintained merely because it has been in place over the past two rate periods. The Judges are charged with setting rates and terms *de novo* for each period. If there are sufficient valid reasons why the rate structure should be changed, then the Judges will adopt those changes. Accordingly, the Judges consider the issues to determine whether to change the existing rate structure.

2. Factors Relating to a Change in Structure

a. Lack of Expert Support

SoundExchange advocated a deviation from the percent-of-revenue rate structure that has existed throughout the *SDARS I* and *SDARS II* rate periods. SoundExchange asked the Judges to establish a ''greater of'' structure, by which the royalty rate is calculated ''on a calendar year basis,'' but payable monthly, as the greater-of a specified percentage of revenue or a specified per subscriber dollar value. *See Amended Proposed Rates and Terms of SoundExchange, Inc. and Copyright Owner and Artist Participants* App. A at 14–15. (Jun. 14, 2017).

Sirius XM noted that no economist appearing in this proceeding endorsed the use of a greater-of formula. SXM RPFF ¶ 383. Moreover, Sirius XM pointed out that Mr. Orszag, an economic witness appearing for SoundExchange, expressly testified that he advocated *either* a percent-of-revenue rate structure *or* a per subscriber structure, and that he did not testify in support of a structure incorporating those two approaches in a single greater-of approach. SXM PFF ¶ 251. In response, SoundExchange did not identify any testimony that explicitly or adequately endorsed the use of a greater-of formula from an economic point of view.

The Judges are troubled by the lack of a cogent explanation from the licensors' economic witnesses as to the merits, on balance, of a greater-of rate formula. The absence of such evidence could be overcome by explanations derived from other evidence or testimony. Not having that further evidence, the Judges find it significant that no economist has sufficiently explained the benefits of this greater-of approach.

b. Impact on the Parties' Risks and Rewards

SoundExchange maintained that its proposed greater-of approach is warranted because it allows record companies to share in the growth of Sirius XM's revenue, while offering protection to the record companies on the downside if revenues are too low. SEPFF ¶ 252 (and record citations therein). Sirius XM argued, in essence, that this approach smacks of a heads I win, tails you lose approach, whereby record companies share the upside of Sirius XM's success, but have protection in the form of a default to the per subscriber rate if the upside does not materialize. SXM PFF ¶ 252.

c. Benchmarks Include a Greater-Of Rate Structure

SoundExchange emphasized that many interactive license agreements utilize the greater-of approach that SoundExchange advocates here, demonstrating the market's adoption of this approach. SEPFF ¶¶ 164–165 (and record citations therein). However, Sirius XM noted that these interactive agreements were all negotiated in a market characterized by the lack of effective competition, and that the lack of competition would affect the structure as well as the level of rates. SXMPFF ¶ 385 (and record citations therein).

The Judges find Sirius XM's effective competition point well-taken in this context. Given that SoundExchange's expert economic witnesses acknowledged the need for rates that reflect an effectively competitive market, it is no surprise that none of their economists touted the greater-of structure as a reflection of effective competition. The Judges find that the greater-of rate structure, advantageous to licensors through the shifting risks, may well represent an example of what licensors can and would obtain when they exploit their ''must have'' status for a special competitive advantage. The Judges do not find it persuasive that interactive streaming services and record companies adopt the greater-of structure in their negotiated licenses.

d. Impact on Royalty Disputes

SoundExchange argued at length that a greater-of rate structure that contains a per-subscriber prong will eliminate disputes regarding the definition of revenue under the percent-of-revenue approach. SEPFF ¶¶ 1646–1650 (and record citations therein). However, Sirius XM convincingly countered that a greater-of formula will not eliminate the issues of revenue definition and identification, because the issue of which prong creates the ''greater'' royalty will itself be dependent on the definition, identification, and calculation of the revenue-based royalty prong. SXM PFF ¶ 386.

The Judges agree with Sirius XM. If SoundExchange had proposed a per-subscriber rate only, then the issues surrounding the percent-of-revenue rate would be eliminated. But SoundExchange did not proposed a pure per-subscriber rate; nor did Sirius XM. Thus, the problems regarding the revenue-based royalty would continue to be present (albeit perhaps less often than under a pure revenue-based rate).

e. The Greater-Of Rate Structure and Trial Subscriptions

SoundExchange argued that its greater-of proposal helps to obviate the dispute between the parties regarding the length of free trials offered to potential subscribers by new owners of automobiles. SoundExchange noted that interactive services are generally required to pay royalties for any free trial that exceeds [REDACTED]. Orszag AWDT ¶ 85.[69] By contrast, Sirius XM typically offers free trials to new and used car purchasers that last three to twelve months.[70] *Id.* ¶ 81. SoundExchange argued that ''there is no

[69] The benchmark interactive services agreements address free trials longer than [REDACTED] by imposing a [REDACTED] royalty. *See* Orszag AWDT ¶ 89.

[70] Some *paid* promotions (where the automobile Original Equipment Manufacturer pays a reduced subscription fee to Sirius XM during the free (to the consumer) trial period) may last longer than [REDACTED] months. *See* Trial Ex. 322 at 14, 15 ([REDACTED]-month free trial for purchasers of certain high-end luxury cars ([REDACTED])). Under a percentage revenue rate structure Sirius XM pays a royalty on this discounted subscription revenue. *See* Orszag AWDT ¶ 82.

sound economic basis for the present disparate treatment, under which Sirius XM is permitted to offer the repertoires of rights owners for durations greater than one month without the payment of royalties,'' *id.* at ¶ 85, and proposed to eliminate that disparate treatment by classifying trial users as ''subscribers'' for royalty purposes, and setting a per-subscriber rate that varies depending on how long the user has been in the free trial period.[71] Thus, it would be irrelevant to the licensors if the free trial generated no revenue or lower revenue from automobile Original Equipment Manufacturers (OEMs) during the period offered free to the listener. SEPFF ¶¶ 1657–1665.

Sirius XM argued that trials, both paid and unpaid, provide value to licensors to the extent they entice new subscribers whose subscription revenue is then shared by the licensors. Sirius XM described the trials as a ''joint effort'' by Sirius XM and the record companies to attract more Sirius XM subscribers and produce future subscription revenues that inure to their mutual benefit. Corrected Written Rebuttal Testimony of Carl Shapiro, Trial Ex. 9, at 55 (Shapiro CWRT). Sirius XM further argued that it is in the best position to determine the most beneficial length of the trial period, and that requiring Sirius XM to pay per-subscriber royalties without recompense from the trial users would act as a disincentive to Sirius XM to utilize what it otherwise understood to be the optimal trial period. SXMRPFF ¶ 388.[72]

The Judges agree with Sirius XM. Under a percent-of-revenue royalty structure, Sirius XM and the record companies are aligned in their interest to minimize the time period for unpaid trials and trials paid by OEMs at less than the full subscription rate. Moreover, because Sirius XM is in the business of recruiting and interacting with potential subscribers, it would be less efficient for the licensors (or the Judges) to second-guess Sirius XM's downstream (retail) business model as it relates to the optimal period of trial use. Although it would appear from a cursory analysis that artists and record companies suffer from the use of their recordings without recompense (or sufficient recompense) during trial periods, the fuller view, given Sirius XM's aligned economic incentive to maximize revenues, demonstrates that the length and terms of trial periods are likely consonant with the interests of the licensors. This record evinces no evidence to the contrary.[73]

B. Conclusion Regarding the Rate Structure

For the foregoing reasons, the Judges adopt a percent-of-revenue rate structure in this proceeding for the 2018–2022 rate period.

VI. SDARS Performance License: SoundExchange Proposal

SoundExchange proposed a royalty fee that is the *greater-of* a per-subscriber rate and a percent-of-revenue rate. With regard to the percent-of-revenue prong, SoundExchange requested a rate equal to 23% of Sirius XM's ''Gross Revenues,'' as that quoted term shall be defined in the forthcoming regulations. *See* SoundExchange's Proposed Rates and Terms, at 2–3.[74] The per-subscriber rate proposed by SoundExchange is set forth in the table below:

Year	Free trial subscribers (months two and three)	All other subscribers
2018	$1.45	$2.48
2019	1.49	2.55
2020	1.54	2.63
2021	1.58	2.71
2022	1.63	2.79

For affirmative economic support of its rate proposal, SoundExchange relied principally on the expert opinions of two economic witnesses, Mr. Jonathan Orszag and Professor Robert Willig. Mr. Orszag used a ''ratio equivalency'' analysis, which he applied through two separate approaches. Professor Willig considered several economic models: (1) An ''Opportunity Cost'' analysis;[75] (2) a ''Ramsey Pricing'' analysis;[76] and (3) a ''Nash Bargaining Solution'' approach.[77] Professor Willig also discussed a fourth model—the Efficient Component Pricing Rule (ECPR), which he noted in his oral testimony as analytically analogous to his ''Opportunity Cost'' analysis, and yielded the same rate.[78]

A. Professor Willig's Opportunity Cost Model

1. ''Walk-Away'' Opportunity Cost

SoundExchange called Professor Robert Willig in support of its proposed rates. Professor Willig approached the rate determination using an opportunity cost model. As Professor Willig testified, opportunity costs are incurred when ''sales through one distribution channel reduce (*i.e.,* substitute for, or ''cannibalize'') sales through other distribution channels (thereby reducing compensation earned by content creators from those other channels . . .).'' Written Rebuttal Testimony of Robert Willig, Trial Ex. 46, ¶ 20 (Willig WRT); *see also* Written Direct Testimony of Carl Shapiro, Trial Ex. 8, at 19 (Shapiro WDT) (sellers incur opportunity cost when sales in one market diminish sales in other markets). Based upon his interpretation of survey evidence, Professor Willig established a walk-away opportunity cost of $2.55 per subscriber, which he equates to [REDACTED]% of Sirius XM's relevant revenue.

SoundExchange asserted that the appropriate opportunity cost for rate-setting purposes is the ''walk-away'' opportunity cost. SE PFF ¶¶ 486–95. Professor Willig defined a record label's walk-away opportunity cost as ''compensation that it would earn from other sources of distribution,'' if a label were ''to literally walk away from a distributor.'' 5/2/17 Tr. 2014–15 (Willig). Professor Willig referred to the opportunity cost as ''creator compensation cannibalization,''[79] and observed that ''the need to cover opportunity cost is part of what assures efficiency in the ultimate choice of the

[71] SoundExchange's amended rate proposal would charge no royalties for subscribers who are in the first month of their free trial. During the second and third months of a free trial, SoundExchange proposes a per-subscriber royalty rate that represents a discount of approximately 42% off SoundExchange's proposed full per-subscriber rate. The full per-subscriber rate would apply to all free trials after three months. *See* Amended Proposed Rates and Terms of SoundExchange, Inc. and Copyright Owner and Artist Participants, at 3 (Jun. 14, 2017).

[72] Sirius XM also argued that the record companies have a higher benefit/cost ratio from trial subscriptions than Sirius XM, and would thus agree in an unregulated market to waive royalties ''for as long as Sirius XM would choose to run unpaid trials.'' Shapiro CWRT at 55–56. SoundExchange rejected this argument because Professor Shapiro assumed, in computing his benefit/cost ratio, that no record company is a ''must have'' for Sirius XM. SEPFF ¶ 1619; *see* 4/24/17 Tr. 562 (Shapiro). As a result of this assumption, Professor Shapiro's benefit/cost calculation relied on a much lower record company opportunity cost than that adopted by the Judges. *See infra,* section VI.B.3. The Judges do not rely on this Sirius XM argument, therefore, in rejecting SoundExchange's proposal with regard to trial subscriptions.

[73] For example, there is no credible evidence that Sirius XM is interested in growing market share irrespective of revenue growth, in order to compete *for* the market (rather than merely *in* the market). This is unsurprising, because Sirius XM has already captured the satellite radio market. *See infra,* text following note 116.

[74] The definition of ''Gross Revenues'' for the forthcoming rate period is discussed *infra,* section XI.A.2.

[75] *See infra,* sections VI.A–VI.C.

[76] *See infra,* section VI.G.

[77] *See infra,* section VI.F.

[78] *See infra,* section 0.

[79] Sirius XM's rebuttal economic expert, Professor Farrell, concurred with the substance of this definition, agreeing that walk-away opportunity cost ''is the *profit* that a label would realize elsewhere'' if it did not license to Sirius XM. 4/24/17 Tr. 607 (Farrell).

balance of . . . varieties of modes of distribution.'' 5/2/17 Tr. 2019–20 (Willig). In an unregulated market, a supplier (record label or copyright owner) will not sell (license) to a service unless the supplier is compensated at or above its walk-away opportunity cost. *See id.* at 2019. In this regulated market, however, the creators do not have the option to walk away; the licenses are compulsory. *Id.* at 2015. Professor Willig thus perceived the role of the Judges to ''redress that imbalance created by the statutory license.'' [80] *Id.* at 2017.

As a matter of economic principle, Sirius XM did not dispute the use of an opportunity cost approach as appropriate in identifying a market-based SDARS royalty rate. *See* SX RPFF ¶ 109. However, Sirius XM disagreed with Professor Willig's use of ''walk-away opportunity cost,'' as he defined that phrase. *Id.*

The Judges summarize the parties' opportunity cost dispute as: Whether, in a hypothetical market with freely negotiated rates, opportunity cost should (1) *include* the value of each Major's ''must-have'' status which gives each Major the theoretical ability to put Sirius XM out of business by refusing to grant it a license at a royalty less than opportunity cost; or (2) *exclude* this value—a complementary oligopoly power—by which each Major hypothetically could put Sirius XM out of business.[81]

Professor Willig asserted that the walk-away opportunity cost for a ''must-have'' label is effectively the same as the label's *pro rata* share of the industry-wide opportunity cost.[82] *See* 5/2/17 Tr. 2137 (Willig); [83] *see also* SEPFF 502 at ¶ 502. Professor Willig's opportunity cost calculation thus measures what a must-have *single* record label would earn elsewhere, and proposes it as an industry-wide measure, even if that single record label is the *only* label that declines to license. On this theoretical point, Professor Farrell, one of Sirius XM's economic experts was in basic agreement. *See, e.g.,* 4/24/17 Tr. 665–66 (Farrell) (for label to recover pro rata walk-away opportunity cost, industry-wide royalty rate would have to be at least equal to industry-wide opportunity cost).

Further, Professor Willig opined that individual labels would bargain with an understanding that a royalty unacceptable to that label is likely also unacceptable to other labels. As a result, a label inclined to reject a proposed royalty will expect that other labels will do the same, with the result that each label's opportunity cost will equate to an industry-wide opportunity cost. *See* 5/2/17 Tr. at 2030 (Willig).

2. Sirius XM's Criticism of Willig's Use of ''Walk-Away'' Opportunity Cost

Sirius XM disputed the notion that opportunity costs should be defined and calculated on an *industry-wide* basis; rather, it asserted that the appropriate calculation must be undertaken in a ''label specific'' manner. Sirius XM asserted an essential and disqualifying premise: The opportunity cost Professor Willig calculated is the opportunity cost of ''either a single monopoly record label or a fully effective cartel.'' [84] Farrell WRT ¶ 27; *see also id.* ¶ 31. As Professor Shapiro noted:

> Most fundamentally, Professor Willig is *asking the wrong question.* Rather than attempting to calculate the opportunity cost to an individual label of having its sound recordings performed on Sirius XM, Professor Willig calculates the opportunity cost to the entire recorded music industry, as if a single entity (or a fully functioning cartel) controls the rights to all sound recordings.

Shapiro CWRT at 34. Moreover, Sirius XM claimed Professor Willig acknowledged that his opportunity cost calculation was identical to the opportunity cost that would apply ''if there were a single monopoly seller of sound recordings. . . .'' 5/2/17 Tr. at 2140 (Willig); *see also* Farrell WRT ¶¶ 67–71 (Willig's calculation is ''extreme'' and leads to inflated opportunity costs).

According to Sirius XM, Professor Willig's opportunity cost approach ignores the goal of determining a statutory rate reflective of an effectively competitive marketplace (as tempered by the enumerated section 801(b)(1) factors). *See* 4/20/17 Tr. 418 (Shapiro) (''he is measuring the wrong thing by looking at the monopoly opportunity cost.''). Thus, Professors Shapiro and Farrell both opined that a rate based on this industry-wide opportunity cost would be inconsistent with the economic concept of ''workable competition.'' [85] *See* Shapiro CWRT at 37; Farrell WRT ¶¶ 27–29.

Sirius XM candidly admitted that its criticism of Professor Willig's walk-away opportunity cost analysis is premised on the *assumption* that a single label ''does not have the 'must-have' monopoly power to effectively shut-down Sirius XM's music offering . . . .'' SXM PFFCL ¶ 367 (and record citations therein). Having made this assumption, Sirius XM's witnesses explained what they characterize as a fairly simple intuition grounded on their economic modeling in the record: ''[A] change in Sirius XM's music mix (*i.e.,* something less dramatic than losing access to *all* music) is likely to result in only some relatively modest loss in subscribers, if any—*not,* as Professor Willig models, *every* Sirius XM subscriber seeking music elsewhere. *See* Farrell WRT ¶ 67.[86]

Sirius XM lodged another fundamental objection to Professor Willig's opportunity cost approach. As Sirius XM noted, Professor Willig's $2.55 opportunity cost calculation was

[80] Opportunity costs are more than a theoretical concept. For example, UMG recognizes that on-demand subscription services may substitute for sales of digital downloads. *See* Written Direct Testimony of Aaron Harrison, Trial Ex. 32, at ¶ 17 (Harrison WDT). Accordingly, when UMG licenses fully interactive streaming services, it [REDACTED]. Because the *direct* marginal costs of distributing additional sound recordings to Sirius XM are ''zero or nearly zero,'' the principal marginal cost to a record company of licensing to a service is its opportunity cost. Shapiro WDT at 19; *see also* SEPFF ¶ 460 (not disputing Professor Shapiro's point that physical marginal cost is zero and that the only marginal cost at issue is marginal opportunity cost).

[81] Professor Willig calculated walk-away opportunity cost on the tautological assumption that, because each Major is a ''must have,'' its refusal to provide a license to Sirius XM would cause Sirius XM to go out of business. As discussed elsewhere in this Determination, Professors Shapiro and Farrell proposed the use of a different form of opportunity cost, one that does not assume that the loss of any one Major would cause Sirius XM's demise.

[82] The evidence in this proceeding strongly demonstrates the ''must have'' status of each Major. *See* SE PFF ¶¶ 517–525 (and record citations therein). Indeed, Sirius XM implicitly acknowledged the ''must have'' status of a Major, citing a steering adjustment as a method by which to mitigate the ''must have'' status and complementary oligopoly power of a Major to allow for an effectively competitive market.

[83] Professor Willig did not cite any authority that has previously used the phrase ''walk-away opportunity cost.'' Sirius XM's economic experts asserted that Professor Willig's ''walk-away opportunity cost'' is actually the ''monopoly'' or ''cartel'' opportunity cost. For the sole purpose of referring to and discussing Professor Willig's approach, the Judges will use his ''walk-away'' terminology; that usage does not suggest an equivalence with, or distinction from, monopoly or cartel opportunity cost.

[84] Professor Farrell testified that if a particular label's decision to license is based on ''the profit impact on the industry as a whole, that's what we would normally describe as monopoly or cartel behavior.'' 4/24/17 Tr. 614 (Farrell).

[85] ''Effective'' competition, as used in this Determination is synonymous with the term ''workable competition'' that is more commonly used by economists.

[86] Professor Farrell's argument ''demonstrated mathematically that if Sirius XM's failure to obtain a license from a record label led to the loss of some, but not all, subscribers, then the walk-away opportunity cost for that label would be significantly less than that label's pro-rated share of the monopoly opportunity cost calculated by Professor Willig, the difference between the two depending on the fraction of Sirius XM subscribers who would cancel their subscriptions in response to the failure of Sirius XM to secure a license from the individual label.'' Farrell WRT ¶¶ 68, 71.

derived by applying the royalties alternative services pay to record companies. In *Web IV,* the Judges found these rates to be inflated by the complementary oligopoly power of the Majors. Sirius XM criticized ''importing'' that ''supracompetitive'' rate into this statutory setting in the absence of any adjustment or allowance for effective competition. The royalty with the most disproportionate impact in this regard is the $[REDACTED]/month royalty charged to subscription interactive services.[87] *See* Written Direct Testimony of Robert Willig, Trial Ex. 28, ¶ 41 & Table 2 (Willig WDT). Professor Farrell argued that Professor Willig's calculations are significantly infected by the noncompetitive market for licenses to interactive services. *See* 4/24/17 Tr. 636, 640 (Farrell). Professor Farrell cautioned against putting ''heavy weight on a rate that has been found to be supracompetitive and driven by complementary oligopoly . . . .'' 4/24/17 Tr. at 641 (Farrell). Even Professor Willig agreed that a lack of steering in the interactive market could inflate the opportunity cost calculation for Sirius XM. 5/2/17 Tr. at 2037–38 (Willig).

Further, Sirius XM chastised Professor Willig for a claimed inconsistency. Professor Willig acknowledged on the one hand that *benchmarks* from other distribution channels, such as the interactive services benchmark, must be free of the effects of complementary oligopoly. Nonetheless, he applied the rates from these same distribution channels without a downward adjustment to offset the upward impact of the complementary oligopoly effect when computing opportunity cost. *See* 5/2/17 Tr. 2152–54 (Willig).

Sirius XM also criticized Professor Willig for his second alternative justification for using the industry-wide opportunity cost; that is what Sirius XM labeled his ''unilateral alignment'' approach. *See* SXM PFFCOL ¶¶ 379–382. Sirius XM characterized this as the ''conscious parallelism'' of like-minded oligopolists, *viz.,* a form of anticompetitive ''tacit collusion which, even though not a violation of any antitrust laws, would nonetheless lead to results that would be inconsistent with the necessity that rates be consistent with the principles of effective (workable) competition.'' *Id.* ¶ 381 (and record citations therein).

[87] Based upon Professor Dhar's survey, interactive services' diversion ratio of 31% comprises 70% of Professor Willig's $2.55 opportunity cost. The Judges examine the survey data *infra,* section VI.B.

3. The Judges' Use of the Opportunity Cost Model To Set the SDARS Royalty Rate

The Judges find that Professor Willig's industry-wide walk-away opportunity cost approach is an appropriate tool, on the present record, to apply as an interim step in crafting the statutory rate. On the one hand, there is no dispute between the parties that the Majors would use this industry-wide opportunity cost calculation to set royalty rates in an unrestricted market. On the other hand, the Judges find there is no *bona fide* dispute but that these rates would partially reflect the complementary oligopoly effect of Majors.

Standing alone, the complementary oligopoly effect within the walk-away opportunity cost model would inflate the rate above the ''reasonable rate'' the Judges must determine. However, the Judges may mitigate the industry-wide walk-away opportunity cost that incorporates complementary oligopoly effects, as they do in their ''fork in the road'' approach later in this Determination. Thus, even if one could construe Professor Willig's ''walkaway'' approach, standing alone, as inconsistent with the concept of effective competition, that inconsistency can be—and is—mitigated because the because the Judges have considered and accounted for such ''must have''/complementary inefficiencies by also accepting Professor Willig's practical and reasonable ''fork in the road'' approach, discussed below.

The Judges find unhelpful SoundExchange's alternative justification for the use of walk-away opportunity costs in the marketplace. This alternative point simply noted that the major record labels, who are oligopolists, would engage in some form of what is known as ''conscious parallelism'' when negotiating royalties. *See* 5/2/17 Tr. 2027 (Willig) (''decision-making is unilateral, but parallel, across the record [l]abels''); *see also* SE PFF ¶ 526. This exposition explains why oligopolists would move in concert without engaging in explicit collusion, but begs the question whether that concerted price movement would incorporate walk-away opportunity cost *ab initio.* It is Professor Willig's *first* point—that each Major's knowledge of its ''must have'' status imbues it with *individual* market power to walk-away—that is sufficient to demonstrate the market logic of the industry's collective exploitation of walk-away opportunity cost. *See* 5/2/17 Tr. 2031–34 (Willig).

The Judges also find unhelpful Sirius XM's argument that Professor Willig's opportunity cost approach is the equivalent of a benchmarking approach. To be sure, the point is correct, but its advancement as a criticism is wrong. When properly weighted, the opportunity cost approach is tantamount to a useful benchmark, because the weightings are quite analogous to (and more precise than) the ''adjustments'' the Judges consistently make to proposed benchmarks. To the extent the opportunity cost is infected by complementary oligopoly inefficiencies that increased the rates from which that opportunity cost is derived, the Judges look to the entire record to ascertain whether and how to account for that factor, as they have by applying Professor Willig's ''fork in the road'' approach.

B. Application of the Opportunity Cost Approach

To apply the walk-away opportunity cost approach in the satellite radio market, Professor Willig utilized the survey conducted by Professor Ravi Dhar (Dhar Survey) to calculate his $2.55 per subscriber per month opportunity cost of licensing sound recordings to Sirius XM. Willig WDT ¶ 41. Professor Willig's analysis is built upon two principal elements: Diversion ratios and creator compensation data.

Professor Willig derived the first element (his ''diversion ratios''), from substitution data which indicate the other sources and modes of distribution of recorded music to which Sirius XM subscribers would gravitate if Sirius XM were no longer available at acceptable prices. 5/2/17 Tr. 2057–58 (Willig). More particularly, the Dhar Survey examined how Sirius XM subscribers would react to a higher price for a subscription to Sirius XM. 5/2/17 Tr. 2057–58 (Willig). The Dhar Survey first asked respondents if they would discontinue their Sirius XM service at various higher prices. Willig WDT ¶ 40. Those respondents who answered these ''pricing questions'' by stating they would cancel their Sirius XM subscriptions were then asked certain ''switching questions.'' The respondents were asked how they would listen to music, and specifically which of the alternative distribution channels presented in the survey question they would select. Willig WDT ¶ 40 (summarizing relevant aspects of Dhar Survey); Corrected Written Direct Testimony of Ravi Dhar, Trial Ex. 22, ¶¶ 58–60 & App. D at 69–70 (Dhar CWDT).

With the foregoing information in hand, Professor Willig needed to assign monetary values to the diversion ratios.

This second element, for which Professor Willig coined the phrase ''creator compensation data,'' is the amount of compensation that would flow to sound recording licensors from the distribution platforms to which Sirius XM subscribers would migrate. 5/02/17 Tr. 2058–59 (Willig).[88]

To link the diversion ratio and creator compensation data for each alternative distribution mode to which Sirius XM subscribers would migrate, Professor Willig multiplied the diversion ratio by the creator compensation data (per subscriber). The product according to Professor Willig equals the opportunity cost associated with consumers listening to Sirius XM as opposed to each alternative distribution mode. 5/2/17 Tr. 2059–60 (Willig).

Professor Willig then added each of the positive weighted levels of monthly creator compensation for each alternative distribution mode. Willig WDT ¶ 41. According to Professor Willig, this summation represents the total opportunity cost of licensing Sirius XM across all alternative modes of distribution. He summarized his calculations in the following table.

OPPORTUNITY COST BASED ON DHAR SURVEY RESPONSES—SUMMARY OF RESULTS

Distribution across alternative modes	Alt. mode mix (%)	Unit creator comp $/Sub-Mo.	Wghtd creator comp $/Sub-Mo.
Paid Interactive	31	[REDACTED]	[REDACTED]
Paid Noninteractive	15	[REDACTED]	[REDACTED]
Purchase CDs/downloads	10	[REDACTED]	[REDACTED]
Ad-supported Noninteractive	4	[REDACTED]	[REDACTED]
Ad-supported Interactive	3	[REDACTED]	[REDACTED]
Music video	2	[REDACTED]	[REDACTED]
Cable/satellite music channels	2	0.00	0.00
Other (zero creator comp)	32	0.00	0.00
Total/Weighted-Average	100	2.55	2.55

Willig WDT ¶ 41, Table 2.

As his tabular data demonstrate, Professor Willig calculated the full opportunity cost across all alternative modes of distribution as totaling $2.55 per subscriber per month. Willig WDT at ¶ 41. This opportunity cost calculation is consistent with SoundExchange's proposed per-subscriber royalty range of $2.48 in 2018 to $2.79 in 2022. Given Sirius XM's ARPU of $[REDACTED] per month, Professor Willig's $2.55 per subscriber rate is equivalent to [REDACTED] % of revenue.[89] Thus, Professor Willig's conclusion is consistent with SoundExchange's 23%-of-revenue rate proposal covering all five years in the forthcoming rate period.

1. Survey Data Underlying ''Opportunity Cost'' Approach

Professor Willig's opportunity cost approach is dependent upon the weights he placed on various distribution channels. The Judges, therefore, test the underlying survey data on which he relied to assess their reliability or, more specifically, their strength in supporting Professor Willig's conclusions.

The Dhar Survey was conducted as an online survey. The purpose was to measure, *inter alia,* the preferences of Sirius XM subscribers who would choose to cancel their Sirius XM subscriptions at a given price. Dhar CWDT ¶ 10; 5/8/17 Tr. 2728 (Dhar). The survey respondents consisted of current paid Sirius XM subscribers who stated they have the Sirius Select package, as well as current users of a free trial subscription to Sirius XM (typically available with certain new or used vehicle purchases). Dhar CWDT ¶ 10. Accordingly, the potential population of survey respondents excluded those who understood (correctly or incorrectly) that they subscribed to any other Sirius XM package, such as ''XM Select,'' ''Mostly Music,'' or ''All Access.''

Professor Dhar directed and conducted the survey between September 14 and September 22, 2016. To ensure the reliability and validity of his online survey results, Professor Dhar designed and administered the survey by applying principles of survey research applicable to online surveys. In total, 2,602 respondents completed the survey. Dhar CWDT ¶¶ 18–19.[90]

As noted above, the Dhar Survey consisted of two broad types of questions: ''pricing questions'' and ''switching questions.'' The pricing questions measured the preferences of Sirius XM subscribers who would choose to cancel their subscriptions at given prices. The Dhar Survey results demonstrated that 76% of Sirius XM subscribers would cancel their subscriptions to Sirius XM at various prices between $11.49 and $20.49 per month.

The first of the ''switching questions'' asked the 76% who said they would cancel their Sirius XM subscription (at any of the price levels examined) to identify the type of music distribution channel to which they would *subscribe.* The results showed that 28% of Sirius XM subscribers said they would switch to a paid on-demand (*i.e.,* interactive) music streaming service and 14% said they would switch to a paid not-on-demand (*i.e.,* noninteractive) music streaming service. 5/8/17 Tr. 2761–62 (Dhar).[91] In offering survey respondents

[88] Professor Willig detailed how he derived the creator compensation data for each line item in his table. *See* Willig WDT ¶¶ 477–485. (The calculation methods are not in dispute.)

[89] ARPU is the industry acronym for ''Average Revenue per User.'' *See also infra* note 142 regarding the quantification of ARPU.

[90] An online survey obtains respondents from existing panels of individuals who have expressed a willingness to participate. Thus, the respondents are not randomly selected from a statistical perspective and, accordingly, no margin of error or confidence interval can be applied to the results. However, Professor Dhar used what is known as a ''bootstrapping procedure,'' by which a sampling of the survey respondents is itself randomly selected and thereby created a confidence interval around each of the reported survey results. Dhar CWDT ¶ 90.

[91] The percentages of respondents selecting an alternative service are stated as a portion of the entire population of the Sirius XM respondents in the survey, rather than as a portion of those who would choose to cancel their Sirius XM subscription. There were 388 respondents who stated they would cancel their Sirius XM subscription at various price points, which is the denominator Professor Dhar used in his trial testimony to arrive at the 28% and 14% figures. Dhar CWDT ¶ 92. Professor Willig's percentages were higher because he excluded 33 respondents who answered ''Don't Know/Unsure'' to the switching question. Professor Willig thus determined that 31% (not 28%) of the relevant universe would switch to a paid on-demand service and 15% (not 14%) to a paid not-on-demand service. Willig WDT, App. B at B–2. Sirius XM's witness, Professor Farrell, did not dispute that the relevant denominator is the number of respondents

alternative *subscription* services, the Dhar survey specified a cost of $9.99 per month for interactive services and $4.99 per month for noninteractive services. Respondents were prompted to choose only ''a new subscription . . . not . . . a music service that you currently subscribe to.'' Dhar CWDT App. D at 69.

The Dhar Survey also explored preferences of respondents who indicated they would not subscribe to a paid music service. Respondents were permitted to choose more than one alternative music source from among: (1) Purchased physical or digital tracks or albums, (2) free music, (3) other, (4) none of the above, and (5) ''don't know/unsure.'' The follow-on question to those respondents who chose ''free music'' asked them to identify all of the free music sources they would choose. Dhar CWDT at 59–60. The free music options listed included, *inter alia,* (1) free not-on demand (including AM/FM radio over the internet), (2) free (ad-supported) on-demand music services, (3) borrowed recordings, (4) recordings the respondent already owns, and (5) AM/FM or AM/FM HD broadcast radio. *Id.*

Professor Willig used the results of this Dhar Survey to identify the ''Alternative Mode Mix'' in his Opportunity Cost analysis, and presented his results in the previous table.

2. Professor Hauser's Criticisms of the Dhar Survey

Sirius XM called Professor John Hauser as a rebuttal expert witness on survey design and methodology. In his written and oral testimony, Professor Hauser leveled a number of criticisms at the Dhar Survey. In particular, he criticized the switching questions and accompanying response choices in the Dhar Survey. Professor Hauser testified that the Dhar Survey was constructed in a manner that biased its results because it: (1) Over-emphasized paid interactive and paid noninteractive subscriptions in a biased and artificial manner; (2) ''buried'' the choice of free music, such as terrestrial radio [92] as an alternative to Sirius XM; and (3) failed to give respondents the option of replacing a Sirius XM subscription with increased listening to an *existing* (as opposed to a new) paid interactive or non-interactive subscription. Rebuttal Expert Report of John Hauser, Trial Ex. 11, ¶¶ 66–69 (Hauser WRT).

As a preliminary matter, Sirius XM and Professor Hauser asserted that Professor Dhar's tilt toward paid subscription services was the consequence of his understanding that the relevant inquiry was ''if [respondents] cancelled their [Sirius XM] subscription, what would they *subscribe* to.'' 5/8/17 Tr. 2886–87 (Dhar). Accordingly, Sirius XM asserted that the Dhar Survey was tainted from the inception because it presented respondents only with definitions for three types of services: Satellite radio, on-demand services, and non-on-demand services. Dhar CWDT at 66 (Question 200), 69 (Question 200 and 210). According to Professor Hauser, putting *only* these three types of services in respondents' minds immediately prior to asking the switching questions ''emphasize[d] both on-demand and not on-demand services.'' 5/9/17 Tr. 3034–35 (Hauser). Professor Hauser contended that the Dhar survey ''provided no cues to aid in the recall of other music options (*e.g.,* terrestrial radio) to which respondents could switch.'' Hauser WRT ¶ 68. As Professor Hauser explained, ''[b]y aiding in the recall of paid music services, but relying on unaided recall for other music options (including free music options), Professor Dhar biase[d] his results in favor of switching to paid music services.'' *Id.*

According to Professor Hauser, this phrasing and choice selection inevitably skewed responses in a way that did not reflect real-world behavior. Specifically, he opined that the non-subscription option that Professor Dhar provided as a potential response (''No, I would not subscribe to a paid music service'') was not nearly specific enough to capture a wide range of non-paid music options that respondents might consider, including terrestrial radio. He further testified that, if Professor Dhar had ''provided a list of non-paid alternatives or existing paid subscriptions to which respondents might reasonably switch, respondents may have been more likely to select non-paid alternatives or existing paid subscriptions and less likely to select new paid subscriptions.'' Hauser WRT ¶ 69; *see also* 5/9/17 Tr. 3034–35 (Hauser) (discussing ''availability heuristic'' and how ''when you show people something, it becomes available in memory and they're much more likely . . . to choose it'').

Accordingly, Professor Hauser concluded that the Dhar Survey wrongly *buried* other switching options such as listening to terrestrial radio and omitted altogether listening to services to which the respondents *already paid* to subscribe. Hauser WRT ¶¶ 65–70.[93] He described the terrestrial radio option as *buried* because, for a Dhar Survey respondent to select terrestrial radio as a choice, he or she would first need to indicate an unwillingness to subscribe to a paid music service in place of Sirius XM. Only then would the respondent be shown the undifferentiated choice of listening to ''free music.'' Even then, the respondent would need to indicate that he or she would ''listen to free music,'' and still would not be offered the explicit choices of listening to terrestrial radio or to increase listening to a streaming service to which he or she already subscribed or listened. Only if the survey respondent selected the ''free music'' option would he or she be presented—for the first time—with terrestrial radio as an optional answer. *See* SXM PFF ¶ 390 (citing Dhar CWDT at 69; 5/8/17 Tr. 2916–20 (Dhar)).

In addition to critiquing the Dhar Survey's switching questions, Professor Hauser created and implemented a ''Modified Dhar Survey.'' In the Modified Dhar Survey, he essentially repeated Professor Dhar's pricing questions, but attempted to reformulate the switching questions in order to provide respondents with the immediate and explicit choices of replacing Sirius XM with either terrestrial radio or increased listening to streaming services to which they already subscribed.[94]

In the Modified Dhar Survey, Professor Hauser first moved the option of listening to terrestrial radio forward in the survey. 5/9/17 Tr. 3049–50 (Hauser). He also added additional alternative responses to the options of

who would choose to cancel their Sirius XM subscription. He used the same adjustment in his rebuttal opportunity cost analysis, as explained elsewhere in this Determination.

[92] In this Determination, ''terrestrial radio'' refers to free, over-the-air AM/FM and AM/FM HD radio, but not to AM/FM radio streamed over the internet.

[93] Confirming the importance of this criticism, Professor Willig criticized the survey by Joseph Lenski, on behalf of Sirius XM, *for the same failure* to offer the alternative of more intense listening to an existing subscription service. Willig WRT ¶ 48. This is an important failure, according to Professor Willig, because a survey that does not offer respondents the option of listening more to an existing subscription ''cannot provide the information needed to assess the relevant effect, namely, the impact on creator compensation.'' Willig WRT ¶ 46.

[94] Professor Hauser also criticized the ''pricing'' questions in the Dhar Survey for listing from ''low to high'' the choice of prices at which Sirius XM subscribers would not renew their subscriptions, rather than also randomly reversing the order to ''high to low'' for 50% of the surveys. He also found fault with the overall Dhar Survey because it only permitted participation by individuals who thought they were subscribers to Sirius Select. Only about 27% of all Sirius XM subscribers subscribe to the Sirius Select package, and it was unclear whether subscribers knew the name of the Sirius XM product to which they subscribed. Hauser WRT ¶ 124 & Figure 13; *see also* 5/8/17 Tr. 2858–2859 (Dhar). However, Professor Hauser essentially utilized the same predicates to the ''switching'' questions in his Modified Dhar Survey.

choosing ''new CDS and/or music downloads,'' the respondent's ''existing collection of CD and/or music downloads,'' and ''other free music option(s) (*e.g.,* free, ad-supported Pandora or Spotify, AM/FM radio over the internet, and YouTube.)'' Hauser WRT ¶ 79; *id.* App. I at 10. Professor Hauser then added yet more response options to allow respondents to choose explicitly to switch to *existing* music service subscriptions. Hauser WRT ¶¶ 79, 88, App. I at 10; 5/9/17 Tr. 3061 (Hauser).

When Professor Hauser administered his Modified Dhar Survey to a group of on-line survey respondents, he obtained results significantly different from those Professor Dhar reported. Specifically, Professor Hauser's modifications led to a material drop in the percentage of Sirius Select respondents who indicated that they would replace their Sirius XM subscription with a new paid on-demand service: From 28% of respondents in Professor Dhar's survey (31% as measured by Professor Willig) to only 15% in the Modified Dhar Survey. *See* Hauser WRT Table 1 & ¶¶ 101, 104; 5/9/17 Tr. 3056 (Hauser).

In addition, when Professor Hauser provided respondents the terrestrial radio option early and explicitly, approximately 78% of Sirius Select respondents indicated they would switch to terrestrial radio. Hauser WRT Figure 11–A; 5/9/17 Tr. 3059 (Hauser). This result was in stark contrast to the results from the original Dhar Survey, which indicated that only 29% of the total Sirius Select respondents would replace Sirius XM with terrestrial radio. Hauser WRT Fig 10–B; Dhar CWDT ¶ 52, Table 1. Sirius XM notes that Professor Dhar himself was *unsurprised* by these results. He testified at the hearing that he anticipated that, if he had explicitly offered respondents the choice of free music or AM/FM radio from the outset, he would have expected the number of people who chose those options to be higher. 5/8/17 Tr. 2920–22 (Dhar).

The Judges find the original Dhar Survey to be seriously flawed. The Dhar Survey failed to make prominent to respondents the option of selecting terrestrial radio as an alternative source of music if they made a price-based decision not to renew their Sirius XM subscriptions. Equally problematic are the absences from the Dhar Survey of any choice for a respondent to state that he or she would either increase listening to a streaming service *to which he or she already subscribed,* or to increase listening to downloads or CDs *that the respondent already owned.*

Professor Dhar testified that the purpose of the study, as explained to him by the SoundExchange economic expert witnesses, was to estimate the number of cancelling Sirius XM subscribers who would then subscribe to an on-demand or a ''not-on-demand'' music streaming service. He explained that he did not make alternative free choices more prominent and explicit because the ''marketplace context'' that ''the [SoundExchange] economists . . . were really interested in'' was the subscription streaming context. Tr. 5/18/17 2752 (Dhar); *see also id.* at 2751, 2752, 2754, 2810, 2889, 2921 (multiple instances of justifying the original formulation by reference to ''marketplace context''). The Judges find this testimony to be credible, and it suggests that Professor Dhar was not engaged to prepare a study that would give equal prominence to the potential alternative that Sirius XM subscribers might choose free alternatives. Thus, the Judges agree with Sirius XM that, by his own admission, Professor Dhar did not comprehensively measure what Sirius XM subscribers would do if they stopped using Sirius XM. By focusing myopically on what he (misleadingly) was told was the ''marketplace context'' of subscription streaming, the Dhar Survey essentially assumed its conclusion. This is a crucial defect, given that the use for which the Dhar Survey was intended was to weight ''opportunity costs'' in a manner that expressly included at least one free alternative, *i.e.,* the substitution of terrestrial radio. It is disingenuous for SoundExchange to argue, through Professor Dhar, that its intention was not to identify the percent of Sirius XM listeners who would choose terrestrial radio (or any other free alternative), given that the Dhar Survey actually *did* solicit such responses, albeit in a fashion that reduced the frequency of that response, particularly in contrast with the results of the Modified Dhar Survey.

The switching questions in the original Dhar survey are problematic for additional reasons. First, the power of a ''free'' alternative is well-understood. *See* C. Anderson, *Free: The Future of a Radical Price* 4, 2 (2009) (''Free is both a familiar concept and a deeply mysterious one. . . . 'Free-to-air' radio . . . created the mass market.''); D. Ariely, *Predictably Irrational* at 51–52 (2009) (when offered a Lindt Truffle for 26 cents and a Hershey's Kiss for 1 cent, 40% opted for each choice; when price of each decreased by one cent (making the Kiss free), 90% opted for free chocolate).

Second, as the Lenski Survey [95] made clear, 62% of Sirius XM subscribers had listened primarily to terrestrial radio before switching to Sirius XM. Written Direct Testimony of Joe Lenski, Trial Ex. 7, at 8 (Lenski WDT). Notwithstanding any problems in the Lenski Survey, it is not disputed that a substantial portion of the Sirius XM listener base migrated from listening to terrestrial radio. Sirius XM also presented testimony that the ''vast majority'' of Sirius XM listening, occurs in the automobile, and most listeners in automobiles still utilize terrestrial radio as their primary music source. *See* Written Direct Testimony of James Meyer, Trial Ex. 1, ¶ 21 (Meyer WDT). Simply put, the marketplace is suffused with evidence of the substantial past and present use of terrestrial radio.

These data underscore the Judges' finding that the Dhar Survey's burying of the terrestrial radio alternative fails to depict the marketplace reality. Indeed, it is surprising that Professor Dhar (and anyone who directed him regarding the purpose of his survey) would repeatedly rely on the ''marketplace context'' rationale to justify the construction of the switching questions in the Dhar Survey and the results those questions elicited. The failure of the Dhar Survey explicitly to offer to a respondent, *in any set of responses to any questions,* the choice of increased listening to a streaming service to which the respondent has an *existing* subscription is especially problematic. From an economic perspective increased listening by a respondent to a service to which a respondent *already subscribes* is marginally ''free,'' because there is no increase in cost to access an *existing* monthly ''all-you-can-eat'' subscription to a music service in the car. More egregiously, the Dhar Survey explicitly instructs respondents before presenting the first switching question:

> Keeping in mind all other music services you subscribe to would you or would you not subscribe to a paid music service in place of Sirius? This would only include a new subscription, and would not include a music service that you currently subscribe to.

Dhar CWDT, at 69, App. D. Thus, not only did the Dhar Survey fail to provide respondents with an explicit choice to utilize a music streaming service to which they had an existing subscription, it explicitly primed them to think specifically of such services

[95] Sirius XM commissioned a listener survey to determine the sources of Sirius XM listeners and the destinations to which they would migrate if Sirius XM were not available. The Lenski survey is discussed *infra,* section VII.D.

and then to consciously NOT select that service as an alternative.

The Judges' foregoing critique should not be understood as a finding that Professor Hauser's Modified Dhar Survey is without defects. Professor Hauser altered the composition of the survey population by excluding respondents who had recently taken a music survey (in an attempt, he claimed, to eliminate respondents who participated in the original Dhar Survey). Hauser WRT ¶ 96. Professor Hauser's different population renders the Modified Dhar Survey less than perfectly analogous to the original Dhar Survey. The record does not reflect that this alteration of the survey population biased the results; nor is there any evidence that the change was in any way material. Consequently, the Judges do not find this defect to render the Modified Dhar Survey unreliable.

In addition, 24 participants in the Modified Dhar survey said they would listen to an on-demand service to which they already subscribe, even though they had answered the ''pricing question'' by stating that they were not then subscribing to such a service.[96] *See* 5/8/17 Tr. 2822 (Dhar); Trial Ex. 293, at 1. In his defense, Professor Hauser explained that he used Professor Dhar's non-switching (*i.e.,* pricing) questions verbatim in order to tease out any differences arising from the switching questions, and that the non-switching questions listed only Spotify and Apple Music as interactive services, and Pandora, then a noninteractive service. *See* Dhar CWDT, App. D at 61, 63. Professor Hauser testified that, in his opinion, the anomaly *could* be explained by the fact that respondents who used *other interactive streaming services,* such as those offered by Amazon or Google, might have thought the ''pricing'' question about existing subscriptions to interactive services was limited to Apple Music and Spotify. Thus the respondents indicated they did not subscribe to either of them, but could respond affirmatively that they would listen to *another* On-Demand service to which they subscribed. 5/9/17 Tr. 3104–05 (Hauser). While that explanation is plausible, it is unsupported by record evidence.[97] As Professor Dhar demonstrated, this anomaly materially affected the survey results: If one were to re-categorize those 24 responses as having stated that they would subscribe to a new on-demand service, the percentage of respondents who would switch to a new interactive service would increase from 15% to 19%. 5/8/17 Tr. 2822–23 (Dhar).[98] The Judges adopt Professor Dhar's re-categorization to correct this anomaly in the Modified Dhar Survey.

Finally, Professor Hauser did not identify confidence intervals around his survey results which could have been estimated by use of the ''bootstrap'' method. Such a subsequent sub-sampling and calculation would have bolstered Professor Hauser's weighting based on the Modified Dhar Survey. *Cf.* Dhar CWDT ¶ 90. There is no evidentiary requirement that an on-line survey that, by its non-random nature, fails to produce a statistical random sample must be subjected to a bootstrapping approach to carry evidentiary weight. Indeed, the requirements for precise statistical reliability that exist in the academic world should not constrain Judges from accepting and relying on evidence that is otherwise probative when considered in the context of the entire evidentiary record. *See, e.g., Matrixx Initiatives, Inc.* v. *Siracusano,* 563 U.S. 27, 44 (2011) (demonstration of ''statistical significance'' not required to demonstrate reliable causal relationship when relationship demonstrated through ''content and context'' evidence). Moreover, the standard-setting organization for survey work, the American Association for Public Opinion Research (AAPOR), upon which Professor Dhar relied to use a bootstrapping approach, is by its express language a ''nonbinding document,'' and thus does not require the use of the bootstrapping technique through which statistical significance could be ascertained. *See* Dhar WDT, Ex. G, at 1(*AAPOR Guidance on Reporting Precision for Nonprobability Samples*).

On balance, the Judges find the Modified Dhar Survey (corrected by Professor Dhar, as noted *supra*) to be more probative than the original Dhar Survey. Once corrected to account for the anomalous responses described above, the potential deficiencies in Professor Hauser's Modified Dhar Survey appear to the Judges to be of relatively marginal significance when compared with the defects in the original Dhar survey. The Modified Dhar Survey came closer to the core of the issue at hand: Distinguishing among the alternative distribution channels to which erstwhile Sirius XM subscribers would migrate if the Sirius subscription price became so high as to dissuade renewal.

3. Re-Weighting Opportunity Cost Calculation With Modified Dhar Survey

Professor Farrell took Professor Hauser's data from the Modified Dhar Survey and plugged them into Professor Willig's opportunity cost calculations. In so doing, Professor Farrell persuasively demonstrated that Professor Willig's opportunity cost fell significantly below the $2.55 per subscriber per month level, and thus below the [REDACTED]% royalty rate Professor Willig found to be implied by that $2.55 figure.[99] *See* 4/24/17 Tr. 636–37 (Farrell); Farrell WRT ¶¶ 62–66.

Professor Farrell noted that the Modified Dhar Survey had 498 respondents who self-identified as paid Sirius XM subscribers. Among these 498 respondents, 13 answered the survey's pricing questions by stating that they would continue to subscribe to Sirius XM at any price. Therefore, like Professor Willig, Professor Farrell excluded these 13 from the pool used to weight the opportunity cost calculation. Another 22 respondents to the Modified Dhar Survey answered ''Don't know/unsure'' to whether they would cancel at various hypothetical Sirius XM subscription prices. Again, consistent with Professor Willig's treatment of respondents who answered in this manner, Professor Farrell excluded these 22 respondents from the pool used to weight the opportunity cost calculation. The remaining 463 respondents were then asked what source of music they would switch to *in lieu* of listening to Sirius XM. Farrell WRT, App. F at F–1.

Professor Farrell presented in tabular form (1) the options from which the 463 respondents in the Modified Dhar Survey could choose; (2) the counts of respondents who chose each option; (3) the ratio by which the respondents would divert to each option; and (4) the creator compensation for each option. His calculations are detailed on the following table.

[96] Professor Dhar identified a potential similar problem with regard to respondents who indicated they would switch to an existing *noninteractive* service, but had previously indicated they did not subscribe to such a service. However, he did not make any adjustments to correct this problem.

[97] Professor Dhar posited a different explanation for this anomaly. *See* 5/8/17 Tr. 2814–16 (Dhar). In light of Professor Hauser's failure adequately to explain the anomaly, the Judges need not consider Professor Dhar's alternative explanation.

[98] Professor Hauser also conceded that he checked all the numbers in Trial Ex. 293 (in which Professor Dhar tabulated inconsistent answers in Professor Hauser's survey and listed the sources for the data), and Professor Hauser found them to be correct. 5/9/17 Tr. 3143–44 (Hauser).

[99] To be clear, Professor Farrell did not agree with the opportunity cost *values* that Professor Willig calculated, because Professor Farrell described them as monopoly-based opportunity costs (as noted, *supra,* Professor Willig called them walk-away opportunity costs). However, Professor Farrell's re-working of Professor Willig's opportunity cost analysis utilizes, *arguendo,* Professor Willig's ''walk-away'' opportunity costs.

MODIFIED DHAR SURVEY RESPONSES—DIVERSION AND CREATOR COMPENSATION

Respondent choice	Count	Diversion ratio (%)	Creator comp/ subscriber/mo.
Alternate paid interactive service (*e.g.,* Spotify/Apple Music)	69	15.10%	$[REDACTED]
Existing paid interactive service (*e.g.,* Spotify/Apple Music)	57	12.50	0.00
Alternate paid non-interactive service (*e.g.,* Pandora One etc.)	45	9.90	[REDACTED]
Existing paid non-interactive service (*e.g.,* Pandora One etc.)	30	6.60	[REDACTED]
Alternate CDs or music downloads	97	21.30	[REDACTED]
Existing CDs or music collection	240	52.60	0.00
AM/FM radio	359	78.70	0.00
Other free options	184		
Free, ad-supported non-interactive service	138	30.30	[REDACTED]
Free, ad-supported interactive service	92	20.20	[REDACTED]
Free, ad-supported music video sites	70	15.40	[REDACTED]
Music channel included in existing cable/SAT TV subscription	59	12.90	0.00
Peer-to-peer file sharing or free download sites	17	3.70	0.00
Borrow CDs, vinyl or tapes from friends or a library	52	11.40	0.00
Other free services	13	2.90	0.00
Don't know/unsure	9	2.00	[REDACTED]
Other	15	3.30	0.00
None	8	1.80	0.00
Don't know/unsure	7		
Total	463		

Farrell WRT, App. F at F–2 (Table 3).[100]

Professor Farrell used the above data to calculate the opportunity cost (*i.e.,* the walk-away opportunity cost). More particularly, Professor Farrell engaged in a nine-step calculation to compute opportunity costs.

Professor Farrell first eliminated the seven respondents who chose ''Don't know/unsure,'' noting that this was equivalent to assuming that these seven would divert to the different options in the same proportions as the remaining 456 respondents.[101] He calculated the diversion ratio for each option as the number of respondents who chose that option divided by 456. Professor Farrell then used the same values for ''creator compensation per subscriber per month'' as set forth in Table 2 of Professor Willig's WDT, including Professor Willig's adjustments for intensity of use.[102] *See* Farrell WRT, App. F at F–2.

Professor Farrell noted that in both the Dhar Survey and the Modified Dhar Survey, many respondents chose multiple nonsubscription options. Professor Farrell generally matched Professor Willig's approach, assuming equal intensity of use for the multiple options chosen by a given respondent.[103] Professor Farrell calculated the *overall* intensity of use for a given option across all respondents who selected that option as equal to the *average* intensity of use for that option across all respondents who selected that option. *See* Farrell WRT, App. F at F–3. Applying this foregoing approach for each option, Professor Farrell calculated an ''intensity-adjusted creator compensation.'' [104] Professor Farrell's calculation generated an opportunity cost of $1.44 per subscriber per month.[105] (Professor Farrell also applied the diversion data from the Lenski Survey (discussed later in this Determination) and arrived at a similar opportunity cost estimate of $1.43. Farrell WRT ¶ 66.[106])

Professor Farrell used the same methodology for survey respondents who were Sirius XM free trial subscribers. *See id.,* App F at F–3–F–4. However, the Judges do not find the trial subscriber population to be an appropriate universe from which to calculate opportunity cost because trial subscribers have not demonstrated a positive WTP.

SoundExchange failed to raise persuasive objections to Professor Farrell's opportunity cost calculation

[100] Professor Farrell used the creator compensation figures from Table 2 in the Willig WDT whenever available. However, Professor Willig had not covered in his Table 2: Peer-to-peer file sharing or free download sites, borrowed CDs, vinyl or tapes from friends or a library, other free services, don't know/unsure regarding free options, and ''other.'' Professor Farrell discounted this point, noting that (with the exception of ''Don't know/unsure'' under free options), these other services not in Professor Willig's Table 2 have zero creator compensation value.

[101] Professor Willig adopted the same approach when treating ''Don't know/unsure.'' Willig WDT at B–3.

[102] Professor Farrell did not opine on the appropriateness of Professor Willig's adjustment for intensity of use. Farrell WRT at F–2.

[103] *See* Willig WDT at B–3 and B–4. Unlike Professor Willig, Professor Farrell assumed equal intensity of use percentages whenever individuals selected combined free options and paid services in in their multiple option choices, whereas Professor Willig assigned 50% to alternate CD or music downloads, and 25% to each of the free options. According to Professor Farrell, this difference did not have a large impact on the size of the opportunity cost.

[104] Professor Farrell assumed that creator compensation for the option ''Other'' to be zero. *See* Farrell WRT, App. F, at F–3. Professor Willig appeared to make the same assumption. *See* Willig WDT at B–8.

[105] Professor Farrell recognized that the value (unweighted) of the monthly ''unit creator compensation $ per subscriber'' could decrease if a lower intensity of use (fewer plays) among those who selected multiple options also reduced the overall revenue base under a per play royalty structure as calculated under Professor Willig's assumptions. The $1.44 opportunity cost set forth in the accompanying text assumes (in favor of the licensors) that creator compensation for paid services and paid non-interactive services does *not* decrease for decreased intensity of use. Professor Farrell opined that—if *noninteractive* services alone would pay a lower royalty (because their royalty payments are based on a per-play/intensity-based formula), but *interactive* service royalties would not be similarly reduced because of a reduction in intensity of use (*i.e.,* if they more likely to pay royalties on a per-subscriber or percent-of-revenue basis)—his opportunity cost calculation would generate a lower opportunity cost of $1.35. *See* Farrell WRT, App. F, at F–3. However, Professor Farrell does not provide in his written or oral testimony a basis to make this ''creator contribution'' adjustment based on relative changes in intensity, and the Judges therefore do not credit his argument that—under his reworking of Professor Willig's opportunity cost calculations—the opportunity cost can be reduced from $1.44 to $1.35.

[106] As explained elsewhere in this Determination, the Lenski Survey did not provide pricing information to respondents, making it a less valuable tool for estimating opportunity cost. Accordingly, the Judges do not rely on Professor Farrell's $1.43 opportunity cost calculation that is based on the Lenski Survey as an independent basis to calculate opportunity cost, but rather consider it as confirmation that Professor Willig's opportunity cost calculation (based on the original Dhar Survey) was too high.

based on the Modified Dhar Survey. In its PFF, SoundExchange asserts only:

> Professor Farrell also revised Professor Willig's opportunity cost calculations to show what the industry-wide opportunity cost would be if one used diversion ratios from the Hauser and Lenski surveys. Trial Ex. 10 at 17–21 (Farrell WRT); 4/24/17 Tr. 636:2–7 (Farrell). It is not clear what the point of this exercise was — neither the Lenksi nor the Hauser survey can reliably be used to calculate opportunity costs, as Sirius XM's own experts admit.

SEPFF561. Likewise, in its RPFF, SoundExchange does not attack any aspect of Professor Farrell's application of the Modified Dhar Survey, but rather renews its attack on the underlying work of Professor Hauser:

> Professor Farrell's recasting of Professor Willig's calculations using the Hauser survey is invalid since the Hauser survey entirely misstated the switching question, *see* SE FOF ¶¶614–22, and since Professor Hauser conceded unequivocally that the economists should not rely on his survey, *see* SE FOF ¶619 (citing Hauser testimony).

SERPFF, Response to ¶ 408 at 266.

SoundExchange's objection to the use of Professor Farrell's approach is dependent on its antecedent criticism of Professor Hauser's analysis. As discussed, however, the Judges have found the Modified Dhar Survey results to be more accurate and probative than the results produced by the Dhar Survey. Accordingly, SoundExchange's criticism is without merit.[107]

Using Professor Dhar's corrected calculation indicating that 19% of Sirius XM subscribers would switch to a new interactive subscription service, the per Sirius XM subscriber opportunity cost increases from $1.44 to $[REDACTED].[108] Given Sirius XM's ARPU of $[REDACTED], the percent-of-revenue royalty rate derived from the $[REDACTED] per subscriber per month opportunity cost is 15.5%.[109]

C. Opportunity Cost Model and Effective Competition

In *Web IV,* the Judges reconfirmed that a statutory willing-buyer, willing-seller royalty rate is one that would emerge in a market that is effectively competitive. *See Web IV,* 81 FR at 26334. Both SoundExchange and Sirius XM acknowledged that the rate set in this proceeding must reflect a market with such effective competition. 4/26/17 Tr. 1103 (Orszag) (agreeing that ''the rates to be set here by the Judges . . . must reflect the workings of effective competition''); Shapiro CWDT at 21 (''My approach here is consistent with the one taken by the Judges in *Web IV* . . . . I use the terms 'workably competitive' and 'effectively competitive interchangeably.''); 4/20/17 Tr. 366 (Shapiro) (''prices . . . at a complementary oligopoly level [are] not [at] a workably competitive level.'').

The Judges defined an effectively competitive market In *Web IV* as one that ''mitigate[s] the effect of complementary oligopoly on the prices paid by . . . services . . . .'' *Web IV,* 81 FR at 26366. To obtain the rate that is effectively competitive, the Judges considered the services' ability to ''steer'' listeners as a sufficient counterweight to the Majors' complementary oligopoly power. *Id.* at 26343. The Judges also noted in *Web IV* that SoundExchange had correctly described the concept of effective competition as ''fuzzy'' and that ''no 'bright line' can be drawn between effectively competitive and noncompetitive rates.'' *Id.* As the Judges further noted, the implication of this ''fuzziness'' was not that the principle of effective competition should be discarded, but rather that this ''fuzzy line'' needs to be drawn *on a case-by-case basis,* from the evidence and testimony adduced at the hearing.'' *Id.* (emphasis added).

In the present proceeding, the parties' economists proposed that the Judges once again adjust for improper market power by applying a steering adjustment. SoundExchange proposed that the Judges select from one of three possible adjustments: (1) The 12% steering adjustment revealed by the specific steering evidence in *Web IV;* (2) a [REDACTED]% steering adjustment allegedly implied by the provisions of ''Mid-tier'' agreements[110] between record companies and streaming services, *see* 4/25/17 Tr. at 1053 (Orszag); or (3) a [REDACTED]% steering adjustment implied by rates in direct licenses between Sirius XM and certain Indies. *See* Written Rebuttal Testimony of Jonathan Orszag, Trial Ex. 43, ¶ 70 (Orszag WRT). However, in this proceeding, these proposed adjustments are unacceptable.

The Judges cannot simply import the 12% steering adjustment from *Web IV* into the satellite market; that 12% figure was derived from highly specific evidence presented in *Web IV.* There is not an adequate basis in the present record to support a finding that the noninteractive market from which that steering adjustment arose is sufficiently similar to the satellite radio market to render reasonable an importation of the 12% steering adjustment here. In particular, the record shows that Sirius XM does *not* steer in the satellite market despite the ability of its human programmers (as opposed to algorithmic programmers) to do so in order to potentially reduce rates in exchange for additional plays, which is the essence of steering. *See infra,* section VII.C.

For two reasons, the Judges cannot accept the proffered [REDACTED]% steering adjustment that SoundExchange divined from the Mid-tier agreements. First, there is no evidence in the record to indicate whether that proposed adjustment may reflect a premium that a Major may impose not to prohibit a licensee from steering away from the licensor, rather than a discount offered to encourage a licensee to steer toward the licensor. Further, the rate differentials in those agreements on which SoundExchange's economic expert, Mr. Orszag, relied appear to be the product of many other differences in those agreements in addition to the steering/no-steering distinction, as Mr. Orszag candidly acknowledged. 4/26/17 Tr. 1155–56 (Orszag); *see also* SXM RPFF ¶¶ 85–86 (and record citations therein).

Finally, the Judges reject any steering adjustment based on the direct licenses between Sirius XM and various Indies. As explained in the discussion of

[107] In its RPFF, SoundExchange added to its argument: ''Professor Hauser conceded unequivocally that the economists should not rely on his survey.'' However, Professor Hauser made this comment because he also objected to other aspects of the Dhar Survey, particularly with regard to its ''pricing'' questions, that he nonetheless retained in the Modified Dhar Survey. Thus, he argued that these antecedent deficiencies in the Modified Dhar Survey precluded reliance on the results derived from his modified ''switching'' questions in the Modified Dhar Survey. The Judges disagree with Professor Hauser's characterization of the deficiencies he identified in the Dhar Survey that were unrelated to the ''switching'' questions. Thus, the Judges can and do give considerable weight to the Modified Dhar Survey, which they find sufficiently credible and probative.

[108] 15.1% of the ''creator contribution'' value of $[REDACTED] equals $[REDACTED]. 19% of $[REDACTED] equals $[REDACTED]. The difference is $[REDACTED] ($[REDACTED] − $[REDACTED] = $[REDACTED]). When that $[REDACTED] is added to the $1.44 calculated by Professor Farrell, the full opportunity cost based on the Modified Dhar Survey (as adjusted for the foregoing anomaly in the Hauser survey answers) is $[REDACTED].

[109] Professor Willig attempted to corroborate Professor Dhar's diversion ratios with a regression analysis seeking to measure relative cross-elasticities. The Judges do not apply that analysis because: (1) The Dhar Survey results are without value (as discussed previously) and therefore cannot be ''corroborated''; and (2) there were significant disputes regarding the accuracy of Professor Willig's regression that rendered the value of that analysis inconclusive. *See* Shapiro WRT at 27–37.

[110] ''Mid-tier'' services means internet streaming services that offer only limited interactivity, and thus offer a tier of service between a noninteractive service and a fully interactive service. The limited interactive functionality of the mid-tier service offerings includes limited caching and playbacks.

Professor Shapiro's reliance on these direct licenses as benchmarks, the record is clear that multiple other provisions of those direct licenses provided substantial consideration to the Indie licensors to justify their willingness to enter into those deals. Moreover, the Indie direct licenses contain neither legal guarantees nor economic incentives that would compel or motivate steering by Sirius XM in favor of direct licensors.

Accordingly, the Judges must review the record in this proceeding to identify a means to establish rates that are consistent with effective competition. The Judges accept certain principles regarding the nature of effective competition. ''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 mindboggling array of different markets' . . . all of which possess varying characteristics of a 'competitive marketplace.' '' *Web IV* at 26333 (citing *Web III Remand,* 79 FR at 23114, n.37).[111] Economists have long understood that the ''fuzzy'' nature of the concept of effective competition is inescapable, yet the concept must be applied, lest pragmatic economic analysis be straightjacketed by rigid textbook models such as perfect competition and simple monopoly.[112] The D.C. Circuit has recognized this conceptual fuzziness, acknowledging in the rate-setting context the need for pragmatic market analysis, establishing rates intermediate between the pedagogical poles of perfect competition and pure monopoly. *See Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 757 (D.C. Cir. 2009) (*IBS*) (statutory provisions ''do[ ] not require that the market assumed by the Judges achieve *metaphysical* perfection in competitiveness'' (emphasis added)).[113]

D. Professor Willig's ''Fork in the Road'' Approach and Sirius XM's Own Market Power

The Judges find no basis to lock themselves into a Hobson's choice by which they must either adopt an inapplicable steering adjustment as a proxy for an adjustment to reflect effective competition, or accept a rate that is higher than an effectively competitive rate.[114] ''Steering'' is not the only way the inefficient market power of complementary oligopoly can be offset or mitigated in order to establish an effectively competitive rate.

In this regard, in his hearing testimony, Professor Willig explained how and why his opportunity cost approach would result in a rate that is effectively competitive. Professor Willig described a ''fork in the road'' for the Judges as follows:

> [T]he fork in the road is whether, in considering the comparison between the opportunity cost and the royalty rate in the target market, should you take the other markets as they are or should you bring in hypotheticals and make adjustments to the opportunity cost based on . . . changes in the other markets? And that to me is a very consequential fork in the road . . . .

5/2/17 Tr. 2040 (Willig); *see id.* at 2047, 2153. Professor Willig opined that attempts to adjust one rate downward, such as the interactive rate, to account for the complementary oligopoly effect, would be incomplete, *because other distribution modes, such as terrestrial radio, do not generate sound recording royalties and thus do not create a positive opportunity cost.* Thus, Professor Willig described as a ''morass'' any attempt to take the ''fork-in-the-road'' by which the Judges attempt to adjust every rate that fails to reflect market forces. *See id.* at 2057, 2048. Rather, he recommends that the Judges ''should take the fork in the road that says take those markets as they are because that's what drives honest-to-goodness opportunity cost.'' *Id.* at 2057.

This is precisely what the Judges accomplish by taking the opportunity cost analysis that results in the 15.5% rate.[115] The Judges further note that Sirius XM did not challenge Professor Willig's ''fork in the road'' concept, either in cross-examination or in its post-hearing proposed findings and replies to proposed findings.

Accordingly, the Judges find that the 15.5% opportunity-cost derived rate: (1) Reflects the offsetting market forces of higher complementary oligopoly rates and lower (zero) opportunity costs attributable to listeners who otherwise would migrate to terrestrial radio; and (2) is consistent with Professor Willig's opinion regarding the need for a consistent treatment of market forces, as described in his ''fork in the road'' analysis.

This ''fork in the road'' approach is also consistent with a recognition of the countervailing downstream market power that Sirius XM, the sole SDARS licensee, possesses as a monopolist in that downstream market, narrowly defined as the market for the sale of subscriptions to satellite radio. To be sure, this narrow definition of the market ignores various other forms of music distribution, such as terrestrial radio and all other alternative distribution channels identified in the survey analyses. However, as that survey evidence makes clear, even terrestrial radio, which is free to the listener, cannot attract sufficient listeners to deprive Sirius XM of the substantial profits it realizes from its unique position as the only supplier of satellite radio in the market. Further, Sirius XM is priced higher than interactive (and noninteractive) streaming services. Yet, despite their differentiated features, those services to date have been unable to convince enough Sirius XM subscribers to convert to a new paid subscription service to reduce the revenues and profits realized by Sirius XM. Clearly, Sirius XM's uniquely differentiated service has struck a chord with music listeners—particularly those who listen to Sirius XM in the car. This point was made clearly by Professor Shapiro, who testified:

> Sirius XM spends substantial sums of money on its infrastructure and satellites. In doing so, it creates a unique differentiated service. That is quite valuable to consumers. That's why they are willing to pay for the service and, of course, most of the listening is in the car.

5/4/17 Tr. 2550 (Shapiro).[116]

[111] *See* J. M. Clark, *Toward a Concept of Effective Competition,* 30 a.m. Econ. Rev. 241, 243 (1940) (''The specific character of competition in any given case depends on a surprisingly large number of conditions . . . .'').

[112] *See* A. Kahn, *Antitrust Policy,* 67 Harv. L. Rev., 28, 35, (1953) (''[T]here exists *no generally accepted economic yardstick* appropriate for incorporation into law with which objectively to measure monopoly power or determine what degree is compatible with workable competition.''); J. Markham, *An Alternative Approach to the Concept of Workable Competition* 349, 361 (1950) (The concepts of ''market performance and workable competition are essentially pragmatic''); G. Stocking, *Economic Change and the Sherman Act: Some Reflections on ''Workable Competition,''* 44 Va. L. Rev. 537, 553 (1958) (''the economists' concept of workable competition . . . is vague . . . .).

[113] The quoted language refers to section 114(f)(2)(B), which governs the compulsory license for eligible nonsubscription services and new subscription services. Under the license at issue in the present case, the D.C. Circuit has not required the Judges to adopt market rates. However, to the extent that the Judges choose to use market rates as an input for the development of rates under section 801(b)(1) (as they do here), the quoted language from *IBS* is instructive.

[114] A third possibility would be to utilize an otherwise appropriate market benchmark rate that is effectively competitive. However, the Judges cannot identify such a rate in the present record.

[115] The Judges' rate is less than the rate proposed by Professor Willig, because the Judges give less probative weight to the Dhar Survey, not because they disagree with Professor Willig's opportunity cost approach.

[116] Sirius XM is both a monopolist, in the sale of satellite radio subscriptions, and a competitor among the various distribution channels more broadly. This is not an inconsistency. Since 1933, economists have recognized that a firm may be a ''monopolistic competitor,'' with the power of a

Correspondingly, Sirius XM bears all the hallmarks of a ''natural monopoly.'' A natural monopoly develops when ''it is cheaper for [an] entrepreneur to produce *q* units than it is to have those units produced by two [or more] smaller firms . . . .'' A. Schotter, *Microeconomics: A Modern Approach* 416 (2009); *see also* W. Baumol and R. Willig, *Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly,* 96 Q.J.Econ. 405, 409, 418 (1981) (''[A]n industry has been called a natural monopoly if . . . industry outputs can be produced more cheaply by a single firm than by any combination of several firms. These per unit costs arise from relatively large sunk costs (compared to marginal costs) and those sunk costs act as ''barriers to entry [that] . . . impede the establishment of new firms [because] [t]he need to sink money into a new enterprise, whether into physical capital, advertising, or anything else imposes a difference between the incremental cost and the incremental risk that are faced by an entrant and an incumbent''); H. Varian, *Intermediate Economics: A Modern Approach* at 453 (''When there are large fixed costs and small marginal costs, [that] situation is referred to as a natural monopoly.''). As a natural monopolist in the satellite radio market, Sirius XM can, and does, realize substantial profits, as demonstrated in fine detail by Professor Lys. The history of Sirius XM bears out this point. When there were only two satellite firms—Sirius and XM—both were on the brink of bankruptcy. *See SDARS II,* 78 FR at 23069. After they merged, they were transformed from two pumpkins into a single coach, as it were, realizing profits across many financial measures. *See* Lys WDT, *passim.*

In the hypothetical market the Judges construct in this proceeding, they identify significant power on both the licensor side and the licensee side. On the licensor side, that power is reflected in the opportunity cost analysis—the ''creator contribution'' values identified by Professor Willig. Those values embody the complementary oligopoly features that flow from the ''must have'' nature of the Majors' repertoires. On the licensee side, there are profits that flow from two sources: (1) The highly differentiated nature of Sirius XM's offerings that permits it to attract listeners who otherwise would listen to free terrestrial radio; and (2) the entrepreneurial ability by which Sirius XM has harnessed the natural monopoly structure of satellite radio delivery to its financial benefit.

The Judges find from this record that the hypothetical upstream market negotiations between such economically powerful entities would resemble a bilateral monopoly. Thus, as Professor Willig testified, the record companies would be expected to recover their opportunity costs (inclusive of any complementary oligopoly profits). Through its own market power, Sirius XM could afford to pay those opportunity costs because, as Professor Lys explained,[117] it earns sufficient profits to pay those opportunity costs and still earn a significant profit.

Thus, Professor Willig's ''fork in the road'' approach, and Sirius XM's capacity to pay the market-based opportunity costs, taken together or separately, are supportive of the 15.5% rate determined by the Judges.

E. The ''Efficient Component Pricing Rule''

Professor Willig identified another approach to rate-setting: The Efficient Component Pricing Rule (ECPR). As he described this approach:

> The ECPR rates would be calculated by adding on to the direct cost of providing access the opportunity cost of the competitive entry; *i.e.* the margin on the competitive business that the copyright owners would lose if the entrant won that business away. In short, ECPR prescribes rates for access equal to direct plus competitive opportunity costs.

Willig WDT ¶35.

Professor Willig testified that the ECPR could be ''somewhat relevant here since the statutory royalty at issue can be construed as the price of access to the copyrights protecting the sound recordings, and since the various modes of distribution of the sound recordings do compete with each other to various extents.'' Willig WDT ¶14. Moreover, Professor Willig noted that ''by its very design, ECPR is arguably consistent with the policy objectives (a), (b), and (c) of section 801(b)(1).'' *Id.* At first blush, it is puzzling that Professor Willig did not include in his written testimony an *explicit* application of the ECPR model.[118] However, in a colloquy with the Judges, Professor Willig acknowledged that his ''opportunity cost'' model constituted an application of the ECPR model.[119]

Professor Willig testified that he was reluctant to rely solely on the ECPR approach because it is intended to establish rates that correct for the case in which an owner of an upstream essential (''must have'') input *also competes downstream in the retail market* (*i.e.,* a vertically-integrated firm) but refuses to make the essential input available to would-be competitors (*i.e.,* the upstream firm engages in what is known as ''foreclosure'').

The Judges find the Opportunity Cost/ECPR approach to be more applicable here than Professor Willig suggested. Although the Judges do not constitute an ''antitrust court,'' the parties acknowledge that the Judges must establish rates that are effectively competitive, *i.e.,* that adjust or offset sufficiently for any complementary oligopoly power in the benchmark markets or in the markets from which opportunity costs arise. Whereas an ''antitrust court'' would seek to remedy, *ex post,* pricing that was in excess of an ECPR-derived price, the Judges here are charged with setting a rate, *ex ante,* that reflects an effectively competitive rate. There is no reason why an ECPR rate could not accommodate *ex ante* rate-setting as well provide an *ex post* remedy.[120]

Moreover, a particular limitation of the Opportunity Cost/ECPR approach is expressly accounted for in the present statutory and regulatory structure. That is, some economists have questioned whether the ECPR truly models for an efficient and competitive price, because the opportunity cost of the upstream supplier(s) that must be covered by the rate has embedded within it supracompetitive profits that are not the consequence of more efficient operations. *See generally* C. Decker, *Modern Economic Regulation* 151 (2015) (''[T]he ECPR does not seek to

monopoly (as reflected in the downward sloping demand curve it faces) but the restraints of competition (making that demand curve relatively elastic compared to the demand curve for the product of a full-fledged monopolist). *See* E. Chamberlin, *The Theory of Monopolistic Competition* (1933).

[117] Professor Lys's detailed examination of Sirius XM's profitability is discussed later in this Determination.

[118] The absence of a more explicit application of the ECPR approach by Professor Willig in his Written Direct Testimony is also somewhat surprising because Professor Willig has been identified by his colleagues as the economist who first developed the ECPR approach, also known as the ''parity pricing'' principle. *See* W. Baumol, J. Ordover, and R.D. Willig, *Parity Pricing and Its Critics: A Necessary Condition for Efficiency in the Provision of Bottleneck Services to Competitors,* 14 Yale J. Reg. 145, 148 n.4 (1997) (''So far as we have been able to determine, the ECPR proposal stems from Willig's work. Robert D. Willig, *The Theory of Network Access Pricing,* in *Issues in Public Utility Regulation* 109 (1979).'').

[119] *See* 5/2/17 Tr. at 2107.

[120] One of Professor Willig's colleagues and frequent co-authors, and a developer of the ECPR approach, the late Professor William Baumol, explicitly noted the appropriateness of applying the ECPR approach to the setting of royalties for licenses in the music industry. W. Baumol, *The Socially Desirable Size of Copyright Fees,* 1 Rev. Econ. Res. on Copyright Issues 83 (2004).

address concerns about monopoly pricing . . . . [T]he ECPR approach effectively guarantees the pre-entry profits of the incumbent, including any inefficiency associated with its historic activities.'').[121] In rate-setting proceedings, when presented with sufficient evidence, the Judges can and do expressly adjust or offset marketplace rates in order to reduce the royalty to a level that better reflects effective competition, rather than simply allowing the rate to incorporate (without a downward adjustment or offset) the full complementary oligopoly effect baked into the opportunity cost.

On balance, the Judges find Professor Willig's discussion of the ECPR approach to be persuasive confirmation of the Judges' finding that his Opportunity Cost approach provides an appropriate basis for setting a reasonable rate when the proper survey data are used as inputs.[122]

F. Professor Willig's Nash Bargaining Solution Approach

Professor Willig asserted that the walk-away opportunity cost he calculated, $2.55 per subscriber per month, represented only the *minimum* that each label would accept in unregulated negotiations with Sirius XM. As he further explained, in an unregulated market, even after receiving the full walk-away opportunity cost, the label would still negotiate with Sirius XM for a portion of the surplus value (revenue over costs) that remained. In order to quantify this surplus, and to calculate and then add the label's share of the surplus to the label's walk-away opportunity cost, Professor Willig applied what is known in game theory and in economics as the ''Nash Bargaining Solution,'' which he described as a type of price discovery engaged in by an ''unregulated profit-maximizing firm.'' Willig WDT ¶38. The Nash Bargaining Solution is an analytic approach that identifies a price agreed to in a bilateral negotiation between one buyer and one seller, in which each party will refuse to accept a value below that which it would receive absent an agreement (referred to as its ''threat,'' ''disagreement,'' or ''fallback'' point), and each party uses its ''bargaining power'' to negotiate for itself the greatest share of any surplus value (*i.e.,* value in excess of the sum of both parties' ''threat/disagreement'' point values). *See id.* Under this model, the surplus that can be created *may* be split evenly between the parties. 5/2/17 Tr. 2116–18 (Willig). A 50:50 split of the surplus assumes the parties have equal bargaining power and means the parties benefit equally by executing the agreement.[123] 5/2/17 Tr. 2110 (Willig).

In this model a record label's fallback point would be its walk-away opportunity cost, which Professor Willig calculated to be $2.55 per subscriber per month. Willig WDT ¶48; 5/2/17 Tr. 2110–11 (Willig). Sirius XM's fallback point would be its projected ARPU in the absence of music programming, less variable costs (*i.e.,* its earnings in a world absent an agreement with the single seller (record company) in this model).[124] Professor Willig computed this amount to be $[REDACTED] per subscriber per month. *See* Willig WDT ¶48.

Professor Willig calculated the total earnings created by Sirius XM's compulsory license (Sirius XM's ARPU less variable costs exclusive of royalties) as $[REDACTED] per subscriber per month. This resulted in a surplus from the agreement of $2.78 per subscriber per month.[125] Assuming that the parties would divide the surplus equally, Professor Willig opined that the record labels would earn from the agreement their opportunity cost of $2.55 plus one-half of the surplus ($1.39) for a total of $3.94 per subscriber per month. *See id.* ¶49. Given a Sirius XM ARPU of $[REDACTED], this per subscriber rate is equivalent to a percent-of-revenue rate of [REDACTED]%.

Based on this alternative approach, SoundExchange concluded that ''Professor Willig's Nash Bargaining Solution therefore appropriately *suggests* a rate above the copyright owners' opportunity costs.'' SEPFF ¶725 (emphasis added). As such, SoundExchange argued that this approach confirms the reasonableness of its even lower $2.55 per month subscriber royalty and the equivalent 23%-of-revenue rate implied by that per-subscriber proposal.

Sirius XM leveled two basic criticisms at Professor Willig's Nash Bargaining Solution model. First, it asserted that Professor Willig's Nash Bargaining Solution posited a monopoly seller of sound recording performance licenses, which is antithetical to the requirement that the statutory rate must represent the product of a hypothetical market that is effectively competitive. SXMRPFF ¶196 (and record citations therein).[126] Second, Sirius XM noted that SoundExchange's proposal that the Nash surplus be deemed split 50/50 (rather than in favor of a record company) is irrelevant, because the opportunity cost figure of $2.55 is already inflated by the complementary oligopoly effect in that opportunity cost figure. *See id.* ¶197 (and record citations therein).

As the Judges have held previously, a significant problem with a Nashian analysis is that the bargaining power of the respective parties is speculative and thus the outcome of the bargain is *indeterminate. See SDARS I,* 74 FR at 23058; *see also id.* at 23083 (dissenting opinion) (concurring on the indeterminacy of a ''surplus-splitting'' analysis). In the present case, the Nash Bargaining Solution again was not developed sufficiently in the record for the Judges to rely on that approach as an independent useful tool for setting the statutory rate.

G. Professor Willig's ''Ramsey Pricing'' Approach

In another pricing approach, Professor Willig applied the economic concept of ''Ramsey Pricing.'' This approach is

[121] The inefficiently high downstream price is set when, in the usual situation, the vertically-integrated supplier sells at a monopoly retail price. In the present context, the Majors, as complementary oligopolists, price their sound recordings in the unregulated interactive market above even the monopoly level and the retail interactive services must cover their input costs through retail prices higher than they would be in the absence of such inefficiently high input prices. *See Web IV,* 81 FR at 26343.

[122] As discussed in connection with Factor C in the itemized 801(b)(1) factors, Sirius XM's development of a differentiated product through its satellite-based network constitutes a form of product differentiation that creates value and profits that, under Factor C (and under an appropriate consideration of the ECPR approach) should continue to inure to the benefit of Sirius XM, net of the licensors' opportunity costs.

[123] Importantly, this does *not* mean each party enjoys equal profit. The parties may not profit equally ''because their fallback values (opportunity costs) may have been different.'' 5/2/17 Tr. 2110 (Willig). Even if parties do not possess equal bargaining power, and even if that disparity in bargaining power is incorporated into a Nash model, neither party would be compelled by the assumptions of the model to accept less than its fallback value, *i.e.,* its opportunity cost. *Id.* at 2110–11 (Willig).

[124] Professor Willig based his projection on the finding in the Boedeker Survey that 70% of Sirius subscribers would leave in the absence of music programming. *See* Willig WDT ¶48 & n.22. He computed variable costs as [REDACTED]% of ARPU, based on Professor Lys's testimony. *See id.* ¶48 & n.21.

[125] Professor Willig computed the surplus as the total earnings from the agreement less the sum of the parties' fallback points. *See* Willig WDT ¶48.

[126] Sirius XM also relies on Professor Farrell's ''Nash-in-Nash'' model, as a counterpoint to Professor Willig's Nash Bargaining Solution. Professor Farrell injects a second record company to the Nash approach, as contrasted with the single record company assumed by Professor Willig. However, Sirius XM acknowledged that Professor Farrell's ''Nash-in-Nash'' approach was not intended to provide a separate rate proposal, but rather to demonstrate the fact that the absence of competition would inflate the rate above an effectively competitive rate. *Id.* ¶¶198–200 (and record citations therein).

designed to address the economic issue of ''[h]ow to price various products or services whose supply draws on common assets in a fashion that maximizes consumer welfare while also providing enough net revenue to meet an overall financial target.'' Willig WDT ¶13.[127] In the context of this proceeding the ''common assets'' are the sound recordings supplied by the record labels. Professor Willig did not look to the Ramsey Pricing approach to recommend an SDARS royalty rate; rather, he used the Ramsey Pricing approach as ''directional'' guidance to substantiate his conclusion that the SDARS royalty rate should be higher than the current statutory rate. 5/2/17 Tr. 2086 (Willig).

Ramsey pricing requires that for different modes of distribution of sound recordings, price-cost margins should be inversely proportional to each distributor's own price elasticity of demand. *See* Willig WDT ¶32; 5/2/17 Tr. 2094 (Willig). In setting prices to meet the Ramsey financial target, ''the Services that should contribute relatively more, relative to their cost, on a percentage basis are the Services with the relatively low own price elasticities of demand.'' 5/2/17 Tr. 2095 (Willig).[128]

When demand for a music service is relatively less sensitive to price, that suggests that the service is relatively more valuable to its users. Willig WDT ¶33. Accordingly, it follows that Ramsey prices should be relatively higher for users of that service, to allow for greater contributions toward compensation to the producers of the recorded music (*i.e.,* the common asset used by all distribution channels). Willig WDT ¶32. Services with relatively lower elasticities of demand will lose relatively less downstream revenue, so higher royalties, even if passed on to subscribers or advertisers, will have less impact on usage decisions made by those distribution modes and their consumers, as compared to services with higher elasticities of demand. *See* Willig WDT ¶¶32–33.

Ramsey pricing reasonably assumes there is a target amount of money that the producers of the common assets need to realize. In the present context, Professor Willig identified that financial target as equal to the monetary value of download sales lost by the labels due to the increase in streaming. Willig WDT ¶31. To identify his Ramsey target, Professor Willig measured the amount of creator compensation lost as a result of the movement toward streaming and away from paid downloads since 2010. Willig WDT ¶22. Based on his econometric analysis, he concluded that substitution of streaming services for downloads has cost the recording industry about $800 million per year from 2010 through 2016. Willig WDT ¶¶22–28, & App. B. Professor Willig concluded that the Ramsey Pricing across distribution channels must be sufficient to offset these shortfalls, and that, specifically, SDARS royalties must be increased.

Professor Willig then estimated the relevant upstream elasticity of Sirius XM's demand for sound recordings, factoring in both downstream and upstream effects. He opined that, at current royalty rates, Sirius XM's upstream demand for sound recordings is much more inelastic than the upstream demand of interactive services. Given this finding, Professor Willig concluded that ''even at royalty rates proposed by SoundExchange, the music input would still be a significantly smaller percentage of the downstream price for Sirius, meaning that upstream [price] elasticity is not going to be bigger, probably lower than the upstream elasticities for the other Services that we're talking about.'' 5/2/17 Tr. 2099–2100 (Willig). Thus, Professor Willig estimated that Sirius XM could pay a royalty of $[REDACTED] per subscriber per month and still achieve the same margin as the interactive streaming services. Willig WDT ¶50. According to Professor Willig the upshot of that conclusion is that Ramsey pricing principles suggest that Sirius XM should pay a substantially higher royalty in order to contribute appropriately (under his Ramsey approach) to meet the Ramsey revenue target. Willig WDT ¶50.

Sirius XM noted the facial ''theoretical attractions'' of an appropriately specified Ramsey pricing approach, but finds Professor Willig's approach not to constitute an actual Ramsey pricing analysis. Sirius XM found two essential elements of the Ramsey pricing approach missing from Professor Willig's analysis. First, he did not identify a financial target sufficient to provide for the creation of the sound recordings. *See* 5/2/17 Tr. 2171–72 (Willig); 4/24/17 Tr. 652 (Farrell); *see also* 5/2/17 Tr. 2176–77 (Willig) (acknowledging no analysis of ''how much revenue is actually necessary to fund the recording industry's investment in sound recordings'').[129]

Second, Sirius XM asserted that Professor Willig did not identify all users of the common assets and set prices for each that collectively would meet the Ramsey financial target, *i.e.,* cover record industry costs while maximizing consumer welfare. Professor Willig concedes this point. *See* 5/2/17 Tr. 2172 (Willig) (did not ''analyze[ ] all the different modes of distribution that use sound recordings and determine[ ] the Ramsey prices that would result''); *id.* at 2177–78 (Willig) (''I have not done a formal financial analysis of impacts of royalty rates on either creation or what you just called availability.'').

In addition, Sirius XM noted that the analysis takes as its starting point the same measure of opportunity cost used in all of Professor Willig's approaches, the improper $2.55 opportunity cost inflated by complementary oligopoly effects. *See* Farrell WRT ¶¶90–94; *see also* 4/24/17 Tr. 653–54 (Farrell).

The Judges find Professor Willig's implementation of the Ramsey pricing approach unhelpful. Professor Willig ultimately neither derived nor proposed a royalty rate from this analysis.[130] Nor could he do so, given that his analysis does not establish a revenue target, and does not factor in the contribution of other users of the common assets. To the extent Professor Willig's assertion that his Ramsey approach has value in this proceeding because it provides ''directional'' evidence has any validity, the Judges note that the adoption of the 15.5% rate derived from his opportunity cost analysis is consistent with this directional guidance.

H. Mr. Orszag's Ratio Equivalency Model

SoundExchange also presented expert testimony from Mr. Jonathan Orszag. Mr. Orszag's approach to determining

[127] Ramsey pricing is frequently employed as an analytic framework for such applications as sales taxes levied to raise sufficient revenue to meet a government financial target, prices for various telecommunications services that all are enabled by the same underlying electronic network, and prices for various railroad services that all make use of the same track infrastructure. Willig WDT ¶13 n.4.

[128] Shorn of economic jargon: For certain distribution channels, subscribers will be relatively less likely to cancel their subscriptions if their subscription charge increases, as compared with other distribution channels.

[129] While (as noted in the text, *supra*) Professor Willig did offer a regression analysis purporting to identify $800 million in annual losses to the record industry over the past several years caused by ''streaming'' (not simply satellite radio), Willig WDT ¶¶22–27, he acknowledged that the figure played no direct role in any of his calculations, including his ''Ramsey'' analysis. 5/2/17 Tr. 2167:24–2169:18 (Willig).

[130] Professor Willig stated that one reason he declined to propose the $[REDACTED] monthly per subscriber royalty (which the Judges understand to be equivalent to [REDACTED]% of revenue) is that he could not evaluate how such a substantial increase in the royalty rate would increase subscription rates and create a loss of subscribers and subscriber revenue. In economic terms, he could not opine as to whether, assuming that Sirius XM passed through to subscribers such a higher royalty rate, the downstream elasticity at that price point would be so high as to actually reduce Sirius XM's revenue.

SDARS rates was based upon ratio equivalencies. Specifically, he opined that the royalties in the target market (*i.e.,* those paid by an SDARS) should be set at a rate that makes the ratio between royalties and revenues in that target market equal to the ratio between royalties and revenues in a benchmark market. Mr. Orszag noted that the Judges ''found this assumption to be warranted as a matter of economic theory'' in *Web IV.* Amended Written Direct Testimony of Jonathan Orszag, Trial Ex. 26, ¶37(Orszag AWDT).

Mr. Orszag began his analysis by opining that in this case ''[i]t is . . . appropriate to use current *marketplace* agreements in evaluating the range of reasonable rates for the upcoming licensing period.'' 4/25/17 Tr. 953 (Orszag) (emphasis added). Marketplace rates are the appropriate starting points, according to Mr. Orszag, because ''a standard way in which economists estimate a reasonable royalty rate for the blanket license under consideration in this proceeding is by examining comparable rates generated through arm's length negotiations outside the purview of the compulsory license regime for which satellite radio qualifies,'' *i.e.,* ''[r]ates yielded through . . . unfettered negotiations . . . .'' Orszag AWDT ¶12. Accordingly, Mr. Orszag utilized a marketplace benchmarking approach.

Mr. Orszag's first step was to identify what he found to be comparable benchmark rates that he could adjust, if and as warranted, to determine the rates that would apply in the target market (SDARS) if it were unregulated. Orszag AWDT ¶13. He looked first at royalty rates in the interactive music streaming services for data. Then, he analyzed retail price data for both the interactive and noninteractive music streaming services. In selecting his benchmarks, Mr. Orszag looked for agreements entered into by record companies with streaming services that in his opinion are comparable to satellite radio across pertinent dimensions. Additionally, he considered whether the benchmark evidence permitted him to account for material differences, if any, between the benchmarks and the target market. Orszag AWDT ¶28.

1. Mr. Orszag's Benchmark ''Approach One'': Ratio Equivalency With the Interactive Market

Applying these considerations, Mr. Orszag identified the market for the licensing of sound recordings by record companies to interactive streaming subscription services as the best available benchmark category for satellite radio, due to what he believed to be ''the comparability of the two types of service along key dimensions and the availability of reasonable methodologies with which to adjust for pertinent differences.'' Orszag AWDT ¶29. More particularly, Mr. Orszag identified the following alleged comparable qualities in the ''downstream market'' [131] between the target and benchmark markets:

- Both categories of services offer a full repertoire of music;
- both categories of services offer subscription-based models, thereby demonstrating that their listeners' have a positive willingness to pay;
- both categories of services face similar downstream elasticities of demand;
- both categories of services offer products that compete with each other;
- consumers in both categories of services receive music digitally;
- consumers in both categories of services obtain unlimited usage;
- both categories of services offer mobile functionality, Sirius XM principally through in-vehicle receivers and interactive streaming through smartphones and other mobile devices; and
- interactive streaming services increasingly offer a ''lean-back'' [132] functionality (akin to the functionality of Sirius XM listening) through playlists generated by the services, third parties, and subscribers, as well as algorithmic streams.

4/25/17 Tr. 968 (Orszag); Orszag AWDT ¶32.

Mr. Orszag further opined that sound recording performance rights are similarly *indispensable* inputs in the upstream market for both interactive streaming services and Sirius XM. From an economic perspective, he explains that the upstream demand for sound recording rights is what economists call a ''derived demand,'' *i.e.,* upstream demand is derivative of downstream consumer demand. Mr. Orszag further opined that, because of this indispensability, sound recording copyright holders should receive a material portion of the overall value of satellite radio service, as reflected in the prices paid by subscribers, just as they do for interactive music services. Orszag AWDT ¶31.

To determine the rates actually paid by subscription interactive services, Mr. Orszag reviewed the monthly royalty rates and royalty payments set in 27 current license agreements between three major record labels [133] and nine interactive streaming services,[134] from January 2014 through June 2016. Orszag AWDT ¶45; *see* 4/25/17 Tr. 985 (Orszag) (''So I got the royalty statements from each of the . . . Services for each of the labels by month, and I went to what they actually were being paid, which prong was governing.'').[135]

The table below presents the actual monthly per-subscriber royalty payments made by the subscription interactive services to each of the Majors. These data produce an average monthly per-subscriber payment of $[REDACTED], weighted by the number of subscribers per service. Orszag AWDT ¶46.

[131] The ''downstream market'' is the market in which licensees of sound recordings offer their services to subscribers or other end users/consumers. The ''upstream market'' is the market in which record companies (a/k/a/labels), as licensors, license their repertoires to services, as licensees, for ultimate dissemination in the downstream market. *See Web IV,* 81 FR at 26332 n.69.

[132] Functionally noninteractive services are generally described in the industry as ''lean-back'' services, as contrasted with ''lean forward'' services that have varying degrees of interactivity. *See Web IV,* 81 FR at 26336 n.75.

[133] Sony Music Entertainment (Sony), Universal Music Group (UMG), and Warner Music Group (WMG) are the three major record labels (together, the Majors).

[134] The nine services are listed in the table that follows in the text, *infra.*

[135] The agreements Mr. Orszag studied contain royalty rate provisions that require the services to calculate royalty obligations under separate ''prongs'': a [REDACTED] metric and a [REDACTED] metric, and in some cases a [REDACTED] metric, and then pay each label its pro rata share of [REDACTED]. A label's pro rata share of the royalty is based on the share of the total performances on the service accounted for by sound recordings controlled by that label. Orszag AWDT ¶45.

ACTUAL LICENSING FEES PER-SUBSCRIBER

	Sony			UM			WM		
	2014	2015	2016	2014	2015	2016	2014	2015	2016
Apple Music		$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]
Beats	$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]	
Google Play	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]
Microsoft	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]
Rdio	$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]	
Rhapsody	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]
Slacker	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]
Spotify	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]	$[REDACTED]
TIDAL		$[REDACTED	$[REDACTED]		$[REDACTED]	$[REDACTED]		$[REDACTED]	$[REDACTED]

Source: Royalty payment data from Sony, UMG, and WMG.

Orszag AWDT at 19, Table One.

For the nine subscription interactive services in the above table, over the 2014–2016 period covered, individual subscriptions were offered to consumers at $9.99 per month. At that monthly price, the weighted average monthly per-subscriber payment of $[REDACTED] translates to a royalty equal to approximately [REDACTED] % of the services' revenues ($9.99 × [REDACTED]). Orszag AWDT ¶ 47.[136]

Because Mr. Orszag's interactive data were limited to agreements with the Majors, he also considered whether the rates paid by subscription interactive streaming services to the Indies were lower than those paid to the Majors. He determined that, whether the Indies' recordings were distributed by a Major or a Major affiliate, or were distributed by another entity, the terms regarding royalties were ''highly similar'' to the rates paid to the Majors. Consequently, Mr. Orszag made no adjustment to his interactive benchmark to account for the rates paid by interactive services to independent record labels. Orszag AWDT ¶¶ 101–105; *see* Written Direct Testimony of Jeremy Sirota, Trial Ex. 36, at 3 (Sirota WDT).

Mr. Orszag utilized the concept of ''ratio equivalency'' to compare his benchmark rate for the interactive streaming market to the target SDARS market. He applied essentially the same ratio equivalency approach as the Judges applied to the noninteractive subscription market in *Web IV*.[137] Orszag AWDT ¶ 37. More specifically, Mr. Orszag relied on the following points from *Web IV* to identify what he considered necessary conditions for the application of a ratio equivalency approach:

(1) Revenues in both markets must be derived from subscription revenues and thus be reflective of buyers with a positive willingness to pay (WTP) for streamed music;

(2) Functional convergence and downstream competition for potential listeners must 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

(3) The benchmark market rate must be adjusted downward[138] to eliminate the ''complementary oligopoly'' effect arising from the presence of multiple ''must have'' suppliers, thereby establishing a rate that is ''effectively competitive.''

Id. ¶ 41 (citing *Web IV,* 81 FR at 26353). Mr. Orszag posited that all three of these *Web IV* conditions are satisfied in this proceeding.

He noted that in both the interactive streaming and SDARS markets revenues are derived from subscribers with a positive WTP. More particularly, subscribers to interactive services typically pay $9.99 per month, Orszag AWDT ¶ 36, while subscribers to Sirius XM typically pay at least that amount. *Id.* at ¶ 49 & n.40. With regard to the second condition, Mr. Orszag cites record evidence of functional ''lean-back'' convergence and downstream competition, particularly with regard to the use of playlists and enhanced mobile technology, which have allowed interactive streaming services to gain an increasing share of in-car listening. *See* 4/24/17 Tr. 605 (Farrell); Orszag AWDT ¶ 39. Finally, Mr. Orszag testified that changes in the interactive market after *Web IV* had obviated the need for a complementary oligopoly adjustment. Nonetheless, he provided three alternative potential steering adjustments in the event the Judges disagreed with his conclusion regarding complementary oligopoly: (1) A [REDACTED]% steering adjustment derived from Sirius XM's direct licenses; (2) a 12% steering adjustment borrowed from *Web IV;* or (3) a [REDACTED]% steering adjustment identified in a comparison of two ''Mid-tier'' services contracts, one with a prohibition on steering and the other without.[139]

The interactive market benchmark ratio equivalency approach is well-depicted in algebraic form:[140]

[136] Mr. Orszag did not include in his royalty calculation any non-rate consideration, such as access to the services' user data and user email addresses; the services' marketing and promotional support; and the record companies' right to offer exclusives to services; including the right to ''window'' certain sound recordings (*i.e.,* to offer an initial, time-limited exclusivity). Because these non-pecuniary items are not available under the statutory license at issue in this proceeding, Mr. Orszag asserts that his omission of these non-monetary benefits renders his calculated royalty payment lower than it otherwise would be, thus reducing the royalty rate derived from his benchmark in favor of Sirius XM. Orszag AWDT ¶ 106. *See also* SE PFF ¶¶ 119–122 (and record citations therein).

[137] In *Web IV,* the Judges stated that the ratio equivalency concept ''assume[s] equality between two ratios: (1) subscription revenues to royalties in the interactive market; and (2) subscription revenues to royalties in the noninteractive market.'' *Web IV,* 81 FR at 26344.

[138] In *Web IV,* the Judges applied a ''steering adjustment'' to reflect noninteractive services' ability to offset the complementary oligopoly power of the Majors by ''steering'' listeners to sound recordings licensed from Indies at lower royalty rates.

[139] These potential steering adjustments are discussed in detail *infra.*

[140] The ratios are sometimes expressed reciprocally, with royalties in the denominator and revenues in the numerator. Because royalty rates in this proceeding are expressed as a percent-of-revenue, it is more intuitive to state the ratio as set forth in the text, *supra.*

$$\text{Benchmark Ratio} = \text{Target Market Ratio}$$

$$\frac{\text{(A) Royalty Payment (in \$) in Benchmark Market}}{\text{(B) Downstream Revenue (in \$) in Benchmark Market}} = \frac{\text{(C) Royalty Payment (in \$) in Target Market}}{\text{(D) Downstream Revenue (in \$) in Target Market}}$$

(Rates and revenues to be calculated on a per-subscriber per month basis.)

By inserting the known (*i.e.,* calculable) values for (A) and (B), Mr. Orszag was able to calculate a ratio, or percentage, that—under the ratio equivalency approach—he opined would also be applicable to the target market. That is, the royalty payment (C) in the Target Market would be the same percent of (D) as (A) is a percent of (B) in the Benchmark Market.

In this, his ''Approach One,'' Mr. Orszag calculated the royalty payments of interactive subscription services as a percentage of their subscription revenues by dividing the effective monthly per-subscriber royalty payment by the monthly consumer subscription price of the benchmark services. Orszag AWDT at ¶ 43. Applying the theory of ratio equivalency, Mr. Orszag then proposed that the record companies receive the same percentage of Sirius XM's subscription revenue as they receive from the interactive services. *See* 4/25/17 Tr. 985–86 (Orszag).

Because Sirius XM provides listeners with both music and non-music content, Mr. Orszag opined that his Benchmark Market Ratio must be adjusted to be comparable to the Target Market Ratio. Relying principally on a survey by Stefan Boedeker, Mr. Orszag determined that the music content on Sirius XM constituted 50% of the value of total content.[141] Orszag AWDT ¶54. Additionally, SoundExchange asserted that the pricing structure reflects Sirius XM's understanding that its customers value music at least as much as non-music content. *Id.* ¶ 49 & n.40 (discussing Sirius XM monthly pricing of $10.99 for News, Sports & Talk versus $12.52 for Mostly Music). Moreover, as SoundExchange noted, in the previous *SDARS* proceeding, Sirius XM itself took the position that music accounts for more than 55% of Sirius XM's content value. *SDARS II,* 78 FR at 23064–65 (Sirius XM's expert Roger Noll attributed 55% of value to music content). Both parties and the Judges agreed on this issue. *See id.* at 23063, 23088 (noting SoundExchange's expert Dr. Ordover conservatively assumed music accounts for at least 50%); *id.* at 23065, 23089 (Judges finding ''the success of Sirius XM is dependent upon its access to music'' citing testimony of Sirius XM witnesses). The Judges take note that Sirius XM provided no evidence or argument to support a different position that might place in doubt Mr. Orszag's reliance on the Boedeker survey. Mr. Orszag reasonably and conservatively utilized an assumption that at least 50% of the value of a Sirius XM subscription is derived from music offerings. Applying this assumption, Mr. Orszag divided the benchmark ratio result, [REDACTED]% of revenue, by two to arrive at a proposed percentage-of-revenue rate of [REDACTED]% for Sirius XM. Orszag AWDT ¶ 54.

Mr. Orszag opined that a benefit of his ''Approach One'' is that it avoids the need to account explicitly for differences between the target and benchmark services. Rather, he stated that the differences are implicit in the formula and thus revealed by the market. A service's retail (subscription) revenues are a direct function of consumer subscription prices. Those prices should reasonably reflect consumer valuation of the features and functions of the benchmark and target services, respectively. In turn, according to Mr. Orszag, percentage-of-revenue royalty rates should reflect such differences, because the sound recordings performed by the services in the benchmark and target markets are identical. *Id.* ¶ 55.

As noted, SoundExchange is proposing a greater-of statutory rate with a per-subscriber prong as well as a percent-of-revenue prong. To obtain what Mr. Orszag described as an equivalent per-subscriber rate, he applied the [REDACTED]% of revenue rate (derived from his benchmark ratio equivalency analysis) to the ARPU. Mr. Orszag adjusted the Sirius XM ARPU of $[REDACTED] (as gross revenue is calculated using the statutory license terms) using the same ratio he applied to reach a percent-of-revenue rate.[142] This resulted in a per-subscriber rate of $[REDACTED] (*i.e.,* $[REDACTED] x [REDACTED]). *See id.* ¶ 54.

2. Mr. Orszag's ''Approach Two'': Retail Price Comparison

Mr. Orszag's Approach One implicitly accounted for the different values of interactive and noninteractive services by utilizing retail prices in the denominators that reflected the market-based differences in those values. In ''Approach Two,'' Mr. Orszag applied an alternative methodology designed to

[141] Mr. Boedeker surveyed subscribers to Sirius satellite radio packages that contain both music and non-music programming, (i) to measure the degree to which these subscribers value the music versus non-music content; (ii) to examine subscribers' willingness to accept a hypothetical Sirius XM package that contains just music programming or just non-music programming; and (iii) to identify the discounts they would demand for such a hypothetical product. Written Direct Testimony of Stefan Boedeker, Trial Ex. 21, ¶¶7, 19 (Boedeker WDT); 5/8/17 Tr. 2933, 2947–49 (Boedeker). Mr. Boedeker concluded from the survey results that Sirius XM subscribers value music content significantly more than non-music content. Boedeker WDT at ¶¶ 14, 97; 5/8/17 Tr. 2933–34, 2963 (Boedeker). More precisely, 70.1% of all survey respondents said they would no longer subscribe to Sirius XM satellite radio at their current subscription rates if music programming were no longer offered, while only 32.4% said they would no longer subscribe at their current subscription rates if non-music programming were no longer offered. Boedeker WDT ¶77; 5/8/17 Tr. 2951 (Boedeker). Even if discounts were offered for a non-music service, 42.7% of respondents still would no longer subscribe to their Sirius XM package, compared with only 10.0% of respondents would no longer subscribe to their current package if non-music programming were no longer offered (even with a discount). Boedeker WDT ¶¶83–84; *see also* 5/8/17 Tr. 2952–53 (Boedeker). In a critique of Mr. Boedeker's survey, Professor John Hauser, a Sirius XM expert witness, identified several inconsistencies in Mr. Boedeker's survey results. Nonetheless, it was undisputed by Sirius XM that Mr. Boedeker's results are generally consistent with other available evidence. *See* SEPFF ¶¶ 252–258 (and record citations therein). Thus, Mr. Orszag opined that his use of the 50% figure was conservative, in the sense that it favored Sirius XM rather than the party for whom he testified, SoundExchange. Orszag AWDT ¶ 54.

[142] Mr. Orszag calculated ARPU using Sirius XM's regulatory revenue base for the first six months of 2016. *See* Orszag AWDT ¶¶ 58–60 and Table Three. Professor Shapiro, on behalf of Sirius XM, initially identified a monthly ARPU of $[REDACTED] per subscriber, apparently using Sirius XM's 10–Q filing with the SEC and an internal Sirius XM planning document. *See* Lys WRT ¶¶ 151–152 nn.174, 177 & Fig. 18. However, the parties apparently reached agreement that, under the current definition of ''Gross Revenues,'' the appropriate monthly ARPU is $[REDACTED]. *See* SX RPFF ¶ 392 (''That $[REDACTED] figure was used directly by economists from both parties to convert monthly per-subscriber fees into proposed percent-of-revenue rates.''); *see also* Lys WRT ¶¶ 149–155.

account *explicitly* for the absence of interactivity in the target SDARS market. Orszag AWDT ¶ 56.

In Approach Two, Mr. Orszag continued to use the interactive market as his polestar. In this approach, however, he compared the interactive retail subscription price *not to the target SDARS market,* but to the market for *noninteractive services,* on the assumption that an SDARS functionally is a noninteractive service.[143] In this manner Mr. Orszag was able to isolate explicitly the value of interactivity by comparing the retail prices of interactive and noninteractive subscription services. *See* 4/25/17 Tr. 986 (Orszag). Mr. Orszag opined that this approach is sensible because these two categories of service differ only with respect to the distinguishing feature: Interactivity. *See id.*[144]

To determine the monthly retail price in the noninteractive market, Mr. Orszag used the retail prices of three non-interactive subscription services: Pandora One, Rhapsody (Napster) unRadio, and Slacker Radio. He calculated their weighted average monthly retail price to be $4.91. *See* Orszag AWDT ¶ 56 & Table Two.

As noted before, the monthly retail price for interactive subscription services was $9.99. Accordingly, the ratio of the subscription price from the noninteractive market to the subscription price from the interactive market was $4.91/$9.99, or 0.49. Mr. Orszag then used the ratio of 0.49 to convert the interactive subscription services monthly per-subscriber royalty rate of $[REDACTED] to an equivalent per-subscriber rate for Sirius XM of $[REDACTED] (0.49 × $[REDACTED]). *See id.* ¶ 57.

The final step in Mr. Orszag's Approach Two is the calculation of a percentage-of-revenue rate that corresponds to this $[REDACTED] per-subscriber rate. Applying the same $[REDACTED] ARPU[145] to the per-subscriber rate of $[REDACTED], Mr. Orszag derived a percentage-of-revenue rate of [REDACTED]%. *See id.* ¶ 60.

3. Adjustment for Lack of Effective Competition in Benchmark Market

In his attempt to apply the *Web IV* prerequisites for use of a ''ratio equivalency'' benchmarking approach, Mr. Orszag considered whether to apply a downward adjustment to reflect any alleged lack of ''effective competition'' in his benchmark interactive market. He acknowledged that in *Web IV* the Judges found that the market for subscription interactive services (*i.e.,* Mr. Orszag's benchmark market here) was *not* effectively competitive. The Judges, therefore, adjusted downward the rate SoundExchange's economic expert calculated using an interactive services benchmark. *Web IV,* 81 FR at 26344.

In this proceeding, however, Mr. Orszag concluded that the record establishes that more recently the market for subscription interactive services has become effectively competitive. Mr. Orszag concluded that he need not adjust to offset a lack of effective competition. Mr. Orszag's opinion is based on:

- The presence in the market of larger interactive streaming services, such as Amazon, Apple, Google, and Spotify, which has injected countervailing ''substantial bargaining power and leverage'' on the licensee side of the equation, offsetting any relative disproportionate power that the record companies might have previously possessed. Written Rebuttal Testimony of Aaron Harrison, Trial Ex. 49, ¶¶3–5 (Harrison WRT); 5/16/17 Tr. at 3953–57 (Harrison).
- The increasing importance of interactive services as a revenue source to the record companies, which gives the services leverage strengthen their bargaining position in negotiations for sound recording performance licenses. Written Rebuttal Testimony of David Blackburn, Trial Ex. 39, ¶¶18, 20 (Blackburn WRT).
- The treatment of Spotify's licensing agreement with the Majors when it expired, by not [REDACTED], but rather [REDACTED]. 5/01/17 Tr. 1703–04, 1804–05 (Blackburn).
- The additional bargaining power of individual services because they have differentiated their offerings, based on platform preference ([REDACTED]); catalog size ([REDACTED]); and payment terms ([REDACTED]), meaning that the withdrawal of any differentiated service from the market would result in customer ''churn'' that would negatively affect record companies financially. 5/16/17 Tr. 3942–45 (Harrison).
- The lack of market evidence of: (1) Suppression of the output of recorded music; (2) supracompetitive profits achieved by the record companies; or (3) ready alternatives to which downstream consumers might turn. SEPFF ¶¶ 305–322 (and record citations therein).
- The inability of the Majors to act as price-setters, [REDACTED]. 5/16/17 Tr. 3926–27, 3946–47 (Harrison).
- The Majors' agreements in the Mid-Tier limited interactivity sector to rates as low as [REDACTED] % of revenue when the licensing agreement includes [REDACTED]. SEPFF ¶ 356 (and record citations therein).
- The agreements between Indies and interactive streaming services that [REDACTED]. SEPFF ¶¶ 335–340 (and record citations therein).

Mr. Orszag maintained that the interactive streaming rates reflect an ''effectively competitive'' market. He nonetheless offered three alternative ''steering adjustments'' to apply to those benchmark rates, should the Judges find the interactive market to be not effectively competitive. Mr. Orszag first presented a [REDACTED]% steering adjustment, reflecting his calculation of an arguable steering effect arising from Sirius XM's direct licenses with certain Indies.[146] Next, Mr. Orszag proposed a 12% steering adjustment, simply adopting the adjustment the Judges made in *Web IV. See Web IV,* 81 FR at 26404–05. Finally, he presented a [REDACTED]% steering adjustment, that reflects the differences in royalty rates in the mid-tier market, depending upon whether the license agreement has a [REDACTED] (and an attendant *lower* rate) or [REDACTED] (with an attendant *higher* royalty rate). *See* 4/25/17 Tr. 1054 (Orszag). The Table below summarizes Mr. Orszag's alternative rates based on the absence of a steering adjustment and on all three of the alternative steering adjustments.

Steering adj %	Approach One		Approach Two	
	Rev. %	Per sub	Rev. %	Per sub
None	28.0	$ 3.00	25.7	$ 2.76
[REDACTED]	[REDACTED]	$[REDACTED]	[REDACTED]	$[REDACTED]
12	24.6	$ 2.64	22.7	$ 2.43

[143] A noninteractive service is one that meets the statutory definition and pays statutory royalties calculated under 17 U.S.C. 114(f)(2)(B). An SDARS service may be described as *functionally* a noninteractive service because the listener cannot interact with the service to select, repeat, skip, or cache specific sound recordings. *See supra,* n.73 and accompanying text.

[144] Approach Two avoids the need to adjust for non-music content because streaming services are music-only services. It also avoids any purported need to adjust for the separate value of a satellite network because streaming services are internet-based. *See* Orszag AWDT at ¶56. The Judges address later the question Sirius XM raises relating to whether its satellite network creates an additional value that should reduce the statutory royalty rate.

[145] *See supra* note 142 and accompanying text.

[146] These direct licenses are discussed in more detail in the Judges' consideration of Sirius XM's reliance on these licenses as potential benchmarks.

Steering adj %	Approach One		Approach Two	
	Rev. %	Per sub	Rev. %	Per sub
[REDACTED]	[REDACTED]	$[REDACTED]	[REDACTED]	$[REDACTED]

SE PFF ¶ 361 (Sirius XM did not dispute the accuracy of this summary table derived from record evidence.).

4. The Mid-Tier Agreements as Corroboration

According to Mr. Orszag, the applicability of the theory of ratio equivalency is further supported by agreements between record companies and Mid-tier services. These Mid-tier Agreements'' are comprised of recently executed voluntary direct licenses for subscription mid-tier services, between Pandora and iHeart, respectively, as licensees, and the Majors and Merlin, a digital rights agency representing Indie record companies, as licensors.[147]

The Table below provides a breakdown of rates contained in Mid-tier Agreements that were admitted into evidence in this proceeding: [148]

[RESTRICTED]—MID-TIER AGREEMENTS

	Pandora plus ($4.99)		Pandora premium ($9.99)		iHeart plus ($4.99)		iHeart all access ($9.99)	
	% of Revenue	Per sub	% of Revenue	Per sub	% of Revenue	Per sub	% of Revenue	Per sub
Sony	[REDACTED]	$[REDACTED]	[REDACTED], [REDACTED].	$[REDACTED],– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED]
UMG	[REDACTED]– [REDACTED].	$[REDACTED]– $[REDACTED].	[REDACTED]– [REDACTED].	$[REDACTED]– $[REDACTED].	[REDACTED]	$[REDACTED]	[REDACTED]	$[REDACTED]
WMG	[REDACTED]– [REDACTED].	$[REDACTED]– $[REDACTED].	[REDACTED], [REDACTED].	$[REDACTED]– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED]
Merlin	[REDACTED]	$[REDACTED]	[REDACTED], [REDACTED].	$[REDACTED],– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED].	[REDACTED],– [REDACTED].	$[REDACTED],– $[REDACTED]

These Mid-tier Agreements bundled terms for separate tiers offered by Pandora and iHeart, respectively, including the actual mid-tier services identified as Pandora Plus and iHeart Plus, respectively, with limited interactive functionality, and a tier providing fully interactive functionality. Orszag WDT ¶ 38.

Mr. Orszag found confirmation for his benchmarking approach in the rates at which Pandora and iHeart will license from major and independent record companies, *i.e.,* at rates ranging from $[REDACTED]–$[REDACTED] per subscriber per month. These rates are similar to the per subscriber rates SoundExchange proposes in this proceeding. Trial Exs. 112–114. Mr. Orszag also noted that these Mid-tier Agreements include [REDACTED]. *See* Orszag AWDT at ¶ 38. When these percent-of-revenue rates are halved (as in his Approach One) to reflect that 50% of the value of Sirius XM's service is attributable to non-music content, the percent-of-revenue rates in these Mid-tier Agreements lie in the range of [REDACTED]–[REDACTED]%, ''strikingly similar'' to the 23% royalty rate SoundExchange has proposed. *See* SXPFF ¶¶ 845–847.

Mr. Orszag found the rates in these Mid-tier Agreements to be instructive and corroborative of SoundExchange's rate proposal. SoundExchange conceded that the mid-tier services of iHeart and Pandora offer some interactivity, whereas Sirius XM's satellite service offers no interactivity. Mr. Orszag opined, however, that it is not plausible that the differential would have a significant impact on consumer valuations and, consequently, on per-subscriber rates. In support of that argument, he noted that subscriptions to the mid-tier services offered by Pandora and iHeart are priced at the same $4.99 per month as Pandora's prior noninteractive offering. *See* Harrison WDT at ¶ 19. Further, Mr. Orszag noted that his highly conservative estimate of the value of music content on Sirius XM, is even higher, at $[REDACTED]. *See* Orszag WRT ¶ 55 & n.68.

More particularly, Mr. Orszag noted that Pandora's offering of increased skips, rewind capability, and limited caching to convert its noninteractive service into a mid-tier service did not cause Pandora to increase its monthly subscription price above the $4.99 it charged previously for its noninteractive service. Mr. Orszag testified that this suggests that consumers' valuation of the increased functionality is not so high as to allow Pandora to increase its mid-tier retail subscribership price off the $4.99 per month and closer to the $9.99 monthly price for fully interactive services. 4/25/17 Tr. 1063–64 (Orszag). Mr. Orszag concluded that these facts demonstrate that the mid-tier services have a value commensurate with a noninteractive service.

Finally, Mr. Orszag recognized the hypothetical possibility that, because these Mid-tier Agreements bundle fully interactive services, the record companies could have applied their market power in that segment to extract higher rates and better terms in the mid-tier segments. To test that hypothetical, Mr. Orszag reviewed the negotiation documents relating to the Mid-tier Agreements and concluded that they contained no evidence that the Majors used their alleged market power in the fully-interactive services market to obtain concessions on mid-tier terms. Orszag WRT ¶ 55. To the contrary, the evidence suggests that Merlin obtained

[147] The agreements executed by Pandora and iHeart also covered fully interactive tiers and, in the case of Pandora, an ad-supported tier. *See, e.g.,* Trial Exs. 112–114. For ease of exposition, the Judges use the term ''Mid-tier Agreements'' to refer to the portion of each agreement that relates to the subscription service offered to consumers for $4.99 and providing limited on-demand functionality.

[148] The agreements in the table were made a part of the record. *See* Trial Ex. 112–16B at sec. 11 (SoundX_000107538–39) (Pandora Plus and Pandora Premium royalty provisions); Trial Ex. 112–16A at Service Schedule #1 sec. 7(a) (SoundX_000107458) (iHeart Plus royalty provisions); Trial Ex. 112–16A at Service Schedule #2 sec. 7(a) (SoundX_000107492) (iHeart All Access royalty provisions); Trial Ex. 113–017B at Schedule 1 sec. 3.1(a)(i)–(ii), sec. 3.2(a)(i)–(ii), sec. 4.1 and sec. 4.2 (SoundX_000107051–52, 056); (Pandora Plus and Pandora Premium Royalty provisions); Trial Ex. 113–017A at Schedule 1 sec. 1.1 and sec. 1.2 (SoundX_000106973) (iHeart Plus and iHeart All Access royalty provisions). Trial Ex. 113–017B at Schedule 1 sec. 3.2(a)(iii) (SoundX_000107052, 056). Trial Ex. 114–018B at 11–14 (SoundX_000107127–30) (Pandora Plus and Pandora Premium royalty provisions); Trial Ex. 114–018A at sec. 3(a) and sec. 3(b) (SoundX_000107206–07) (iHeart Plus and iHeart All Access provisions). Trial Ex. 243 at sec. 3(b) and sec. 3(c) (SoundX_000477169–170) (Pandora Plus and Pandora Premium royalty provisions); Trial Ex. 272 at Schedule 3 (SoundX_000488916) (iHeart Plus and iHeart All Access).

rates similar to those negotiated by the Majors in its licensing agreements with [REDACTED]. *Id.* Sirius XM did not proffer any evidence that the record companies leveraged their alleged interactive market power to obtain better terms in the mid-tier market.

5. Evaluating Orszag Ratio Equivalency Benchmarking Approaches

Sirius XM asserted that Mr. Orszag incorrectly emphasized an economically unimportant point, *i.e.,* that ''there is no difference between interactive streaming services and satellite radio *in terms of the music content they deliver to subscribers.*'' *See* 4/26/17 Tr. 1190–91 (Orszag) (emphasis added). According to Sirius XM, similarity ''at this high level of generality'' is meaningless. SXM RPFF ¶11.

The Judges agree. Although markets in which sound recording performances are licensed (upstream) and delivered (downstream) to subscribers may be *considered* as potential benchmarks for each other, that broad brush of comparability does not indicate whether the benchmark is suitable on the whole. Mr. Orszag was correct that the benchmarking approach can *commence* at a high level of generality, even though that basic level of comparison is by no means probative or dispositive.[149] Not every market in which sound recording performances are licensed could serve as a benchmark for every other sound recording performance market.

Sirius XM argued that the common use of digital transmissions and the allowance of unlimited usage by listeners are not illuminating similarities. SXM PFF ¶ 12. Once again, the Judges agree; these basic points are not probative of the usefulness of the interactive market as a benchmark. Nonetheless, Mr. Orszag's reliance on such common elements is helpful in identifying *and then narrowing* the range of potential benchmarks.

Sirius XM criticized as superficial Mr. Orszag's assertion that the target and benchmark markets are similar because each offers ''mobile functionality.'' SXM RPFF at 19; Orszag AWDT ¶ 32. The Judges find this criticism to be without merit.[150] The majority of Sirius XM listening occurs in the car, Meyer WDT ¶ 21 n.5, and the improved mobile functionality of interactive streaming through ''connected cars'' and more complete cellular coverage allows listeners to access streaming services in the car. SE PFF ¶¶ 156–159 (and record citations therein). Thus, the Judges do not agree with Sirius XM that Mr. Orszag's reliance on the interactive services' mobile functionality is superficial; indeed, the issue of whether their respective mobile functionalities are substitutional for each other bears on the Opportunity Cost/ECPR analysis undertaken by Professor Willig.

Nonetheless, the Judges decline to adopt Mr. Orszag's reliance on evidence he claimed suggested a ''growing'' use of streaming services, including interactive services, in the car. Orszag AWDT ¶ 39(C). Although the evidence on which he relied is somewhat supportive of this point, it is not sufficiently persuasive. The Judges are reluctant to adopt or extrapolate from *potential* market trends or rates of change and use them as a basis for a fixed five-year rate. As the Judges have noted on other occasions, the adoption of market *predictions* is a fraught exercise. More probative in the Judges' opinion are the results from the survey experts who have appeared for both parties. These experts have attempted to measure *present* intentions regarding the substitutability of interactive services (and other services) for Sirius XM. While their surveys yield starkly different results when attempting to elicit whether Sirius XM listeners would switch to interactive services if Sirius XM were nonexistent or too expensive, none shows anything close to a 1:1 substitutability of interactive services for Sirius XM.[151]

The survey results highlight a related criticism by Sirius XM of Mr. Orszag's ratio equivalency approaches. Sirius XM correctly argued that the economic rationale that supports a ratio equivalency approach requires ''significant competition, or a high cross-elasticity of demand, between Sirius XM and subscription services. . . . [A] limited degree of head-to-head competition . . . will not suffice.'' Shapiro CWRT at 12; *see also Web IV,* 81 FR at 26353; 4/26/17 Tr. 1198 (Orszag).

In *Web IV,* the Judges stated that the ratio equivalency approach might be appropriate if the record reflected that

> 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[.]

81 FR at 26353. In the present case, Mr. Orszag did not provide either qualitative or quantitative evidence of a sufficiently high cross-elasticity. In fact, it is noteworthy that even the survey results reported by SoundExchange's own survey witnesses, Professors Ravi Dhar and Itmar Simonson, indicated that there is no such high substitutability between subscribership to interactive services and to Sirius XM. These survey conclusions negate any complete or overwhelming ratio equivalency Mr. Orszag has posited. Moreover, even Professor Willig, another SoundExchange economic expert, relied on and adopted Professor Dhar's survey, which revealed a substitutability of interactive services for Sirius XM at significantly less than 1:1. *See* Willig WDT ¶ 41.

Sirius XM also challenged SoundExchange's predicate that there is ''increasing convergence of the interactive services and Sirius XM'' because of ''some 'lean back' functionality'' offered by the interactive services (in the form of pre-programmed playlists). Sirius XM noted that Mr. Orszag acknowledged on cross-examination that, if the rate-setting exercise were based solely on his posited convergence, any increased use of playlists by interactive services would suggest that interactive services were becoming more like noninteractive services, rather than *vice versa.* If any purported convergence is in the direction of lean-back service, then interactive services' rates should be falling in an effectively competitive market, rather than noninteractive or satellite services' rates increasing. 4/26/17 Tr. 1191–92 (Orszag).

Sirius XM's criticism in this regard is well-taken. There is insufficient evidence in the record to show that interactive services' royalty rates have fallen in response to any asserted increase in listener use of playlists. Indeed, as Sirius XM correctly noted, [REDACTED]. *See, e.g.,* 5/16/17 Tr. at 3939 (Harrison); 5/15/17 Tr. at 3836 (Walker).[152]

Ultimately, the Judges place no weight on the alleged corroboration of the Mid-tier Agreements identified by Mr. Orszag, for several reasons. First, as

[149] In fact, a market in which some product *other than music* is delivered could be a useful benchmark market if it is otherwise comparable in terms of economic structure. For example, patents, as a form of intellectual property, may be found to have similar economic characteristics as copyrights, rendering relevant information from the market for patent licenses.

[150] The Judges address the value of Sirius XM mobile functionality elsewhere in this Determination.

[151] The Judges analyze these survey results in detail, *supra,* sections VI.B.1–VI.B.2.

[152] Playlists *could* engender price competition. As the Judges noted in *Web IV,* services could lower royalty rates with playlist steering. Further, the *possibility* of steering could result in lower industrywide rates without any actual steering taking place. *See Web IV,* 81 FR at 26367. In the present case, there is no evidence of any such price competition through playlist-based steering in the *fully* interactive market.

a SoundExchange industry witness testified, UMG requires [REDACTED]. Harrison WDT ¶ 20 (''Even if mid-tier subscription services succeed in drawing some consumers away from poorly-monetized free ad-supported streaming services, there is also a danger that they could to a degree cannibalize the premium on-demand subscription services. [REDACTED].

Second, the mid-tier services include interactive features which the record companies recognize are valuable to subscribers. *Id.* Absent evidence in this record of an interactivity adjustment specifically related to the valuable but limited interactive functionality of the mid-tier services, the probative value of the mid-tier rates in this proceeding is compromised.

In sum, the Judges agree with Sirius XM that the record does not provide sufficient evidence to support Mr. Orszag's ratio equivalency approaches to rate-setting in this proceeding.[153]

VII. SDARS Performance License—Sirius XM Proposal

In its specific proposed rate regulations, Sirius XM advocated a single royalty fee—8.1% of ''Gross Revenues.'' *See* Second Amended Proposed Rates and Terms of Sirius XM . . . at § 382.12(a) (2d APR). However, more broadly, Sirius XM proposed a rate range of 8.1% to 11% of relevant revenue, which it claims is consistent with the evidence. 2d APR at 1. The existing rate, for 2017, is 11%.

Sirius XM's expert witness, Professor Carl Shapiro, analyzed three possible starting points for setting the performance royalty rates in this proceeding. Professor Shapiro began with an analysis of the existing rates. He also analyzed two potential benchmarks: Direct licenses negotiated between Sirius XM and 498 Indie record labels and the rates determined by the Judges for noninteractive digital performances over the internet (webcasting).[154]

A. Current Rates

Professor Shapiro noted that the current statutory rate is 11% of ''Gross Revenues,'' as defined by the relevant regulations. *See* 37 CFR part 382, subpart B. The Judges configured the SDARS rates for the period 2013 to 2017 to increase from 9% to 11% over the five-year period. Before recommending adoption of the extant rate for the ensuing rate period, Professor Shapiro analyzed the state of the music industry to determine whether any changes in the marketplace might warrant a deviation from the current rate. *See* Shapiro WDT at 27. Evidence in this proceeding overwhelmingly supports a finding of increased use of streaming, both interactive and noninteractive, as the preferred method of ''consuming'' music. Professor Shapiro's testimony was no exception. *Id.* at 28. As Professor Shapiro noted, in 2012, streaming accounted for approximately 12% of record industry revenues; whereas in the first half of 2016, streaming accounted for 43% of record industry revenues.[155] *Id.* Analogously, Sirius XM's subscribership grew from approximately 24.9 million subscribers in 2014 to 28.3 million subscribers in 2015. *Id.* at 29.[156] This growth in subscribers increased satellite radio's share of music industry revenues during the period from [REDACTED]% to [REDACTED]%. *Id.* at 28, Fig. 5.

Professor Shapiro proposed continuing the current percent-of-revenue rate structure. He concluded that, when using percent-of-revenue rates, any increase in Sirius XM's relevant revenue would redound to the benefit of the record companies obviating a need to change the rate. *See* Shapiro WDT at 29–30.

He further argued that the relevant starting consideration for the Judges would be the rate that would emerge in an effectively competitive marketplace. 5/3/17 Tr. 2479–80 (Shapiro). Professor Shapiro asserted that Sirius XM's overall profits would be irrelevant to the negotiation. Shapiro WRT at 51–52. He opined that, in an effectively competitive market, the negotiating parties would look only to the licensee's ''contribution margin''; that is, ''the percentage of Sirius XM's receipts from a subscriber . . . that drops to their bottom line.'' *Id.* This contribution margin is the measure of sales revenue available for fixed costs and profit after paying variable costs. *See* Lys WDT ¶ 83. According to Professor Lys, Sirius XM includes in variable costs [REDACTED]. *Id.* ¶ 85. Professor Shapiro and Professor Lys agree that Sirius XM's contribution margin has remained ''remarkably consistent'' over time. *See id.* ¶ 87; Shapiro WRT at 5.

Professor Shapiro focused on the stability of the Sirius XM contribution margin to argue for a like stability in royalty rates. Countering that proposition, Professor Lys looked at an economic bargaining model and concluded that with greater overall profitability, Sirius XM and any licensor would negotiate to divide those overall profits, which would result in a higher percentage royalty rate.

Neither expert's opinion in this regard, however, is persuasive. Professor Lys may well be correct that record companies, given their ''must have'' status, *i.e.,* in the absence of effective competition, would seek in unregulated market negotiations to appropriate a portion of the additional profits (through a rate increase *in addition to* the automatic increase from a larger pool of revenue), notwithstanding that the profits accrued via Sirius XM's scale and growth rather than through an increase in the contribution margin. On the other hand, as discussed elsewhere in this Determination, the growth of Sirius XM's profits allows it to compensate the record companies for the opportunity costs the latter incur when licensing to Sirius XM. But neither of these factors is relevant to the appropriateness of adopting the extant rate in the forthcoming rate period.

SoundExchange opposed reliance on the current, *SDARS II* royalty rates, asserting that the current rates do not capture the effect of the expansion of music streaming on the labels' opportunity cost. SoundExchange contended that Professor Shapiro's analysis of current rates fails to acknowledge or address changes (1) in opportunity cost, (2) in Sirius XM's financial performance, (3) in the upstream market for digital sound recording rights,[157] and (4) in current

[153] Therefore, Mr. Orszag's attempted steering adjustments are moot with regard to his approaches. The applicability of those adjustments, *vel non,* is addressed in connection with the establishment of effectively competitive rates elsewhere in this Determination. Also, because Mr. Orszag did not present the mid-tier royalties as benchmarks in their own right, but rather as corroborative evidence supporting his (now rejected) ratio equivalency approach, the Judges do not accept Mr. Orszag's use of mid-tier royalties as corroborative or probative.

[154] Professor Shapiro did not label the existing rate as a ''benchmark'' *per se.* Rather, he opined that the existing ''11 percent of revenue rate that Sirius XM will pay in 2017 can be viewed as an upper bound on the reasonable royalty level for the 2018–2022 period.'' Shapiro WDT at 34. The Judges consider Professor Shapiro's use of the existing rate as an ''upper bound'' is functionally similar to a use of that rate as a ''benchmark.'' That is, he is urging a similarity between: (1) The description of the SDARS market as it was presented to the Judges in *SDARS II* in 2012, and the rates that were set in that Determination (the *de facto* benchmark); and (2) the description of the SDARS market (the target market) as it has been presented to the Judges in this 2017 proceeding.

[155] Professor Shapiro defined revenue from streaming services as that derived from subscription and on-demand services as well as webcasting. Music industry revenues included those streaming services, physical sound recording sales, digital downloads, synchronization royalties, and satellite radio. Shapiro WDT at 28.

[156] Sirius XM predicts [REDACTED] during the upcoming rate period from an estimated [REDACTED] million subscribers in 2018 to [REDACTED] million subscribers in 2021. Shapiro WDT at 29.

[157] For this third point of criticism, SoundExchange focused on the direct licenses

circumstances as opposed to those prevailing at the time of the *SDARS II* determination.

SoundExchange's arguments regarding opportunity cost relied on the assumption that Sirius XM and streaming services are closely substitutable for one another. However, that assumed close substitutability is contradicted by the survey results as analyzed by the Judges, *supra,* in connection with Professor Willig's opportunity cost analysis. SoundExchange also does not take into account Sirius XM's unique position of being the only satellite radio provider—resulting in a remarkable growth in subscribers—as well as the fact that changes in Sirius XM revenues have resulted from additional factors, *i.e.,* lower non-music content costs and lower royalty rates in negotiated direct licenses.[158] Thus, to the extent discussed above, changes in the overall market do militate against using current rates as an appropriate starting point.

Moreover, the current rates as set in *SDARS II* were a function of the deficiencies in the proffered evidence in that proceeding, evidence that, by comparison, made the then extant rates a relatively superior guide to an appropriate rate. The Judges were dissatisfied with a benchmark derived from licenses in the interactive streaming business. Further, the Judges found it necessary to allow for a downward adjustment (within the zone of reasonableness) to account for the enormity of Sirius XM's satellite launch and replacement costs. *See SDARS II,* 78 FR at 23069. SoundExchange argued that the ''incredible financial success'' enjoyed by Sirius XM during the current license period obviates the need for consideration of Sirius XM's costs of doing business for the license period at issue in this proceeding. *See* Lys WRT ¶ 56. The Judges agree; in fact, that financial success is a basis for increasing the royalty rate in this proceeding, as indicated above.

For the reasons highlighted by SoundExchange and its experts, the Judges will not use the extant rates as a starting point (or benchmark or upper bound) for determination of appropriate rates for the period 2018 through 2022. The *SDARS II* rates were derived on a record much less robust than the record in this proceeding. The participants in this proceeding have presented sufficient facts and analysis to inform the Judges and to lessen the value of the current rates as a desired starting point for analysis in these changed circumstances.

B. Current Direct Licenses Negotiated by Sirius XM

Professor Shapiro proposed a benchmark derived from direct licenses Sirius XM has negotiated in the market at issue in this proceeding, *i.e.,* the satellite radio music streaming (upstream) market. In 2012, when the Judges established rates for the 2013 through 2017 rate period, direct licensing was in its infancy, with approximately 100 direct licenses executed at the time of the determination. Shapiro WDT at 34. By 2016, Sirius XM had negotiated almost 500 direct licenses with record labels. *Id.* at 35. Because of its direct license effort, Sirius XM has access to approximately 23,000 music catalogs containing as many as 5 million tracks, or 6.4% of the tracks on the Sirius XM playlists. Shapiro WDT at 35 (citing White WDT). Professor Shapiro promoted the direct licenses as ideal benchmarks, asserting that they represent market outcomes involving the same sellers (record labels), the same buyer (Sirius XM), and the same rights (digital performance of sound recordings) and effectively competitive conditions for the negotiations. *Id.* at 37.

Professor Shapiro reasoned that these negotiations reflect an effectively competitive marketplace because Sirius XM controls such a small share of the record industry's overall revenues (approximately [REDACTED]%). *See* Shapiro WDT at 37. Measuring Sirius XM's royalties against the entirety of music industry revenues, however, ignores the fact that Sirius XM dominates the market for paid services that listeners use in a vehicle. As the primary alternative to (non-royalty paying) terrestrial radio in cars, Sirius XM in fact wields tremendous bargaining power, which would tend to drive down the negotiated rates. Professor Shapiro contended that, in fact, direct license rates negotiated in an unregulated market would be lower because based on recent trends, he believes the statutory license rates act as a ''magnet'' to pull directly negotiated rates up to the statutory rates. *Id.* at 45.

Professor Shapiro's endorsement of direct licenses as a benchmark ignored the difficulties inherent in determining the effective royalty rates the parties negotiated. With the direct licenses, Sirius XM receives the same rights it would under the statutory license and additional benefits, such as a relaxation of the statutory performance complement rule, allowing Sirius XM to rely more heavily on the (lower priced) directly-licensed tracks. *Id.* at 35–36. Licensors also benefit from consideration negotiated in direct licenses that is not available under a statutory license. Licensors might receive more exposure for their recordings, might benefit from direct payment of both recording and artist royalties, and could avoid the SoundExchange administrative fee. No expert in this (or any similar) proceeding has attempted to value the considerations behind the headline percent-of-revenue rates in direct licenses, let alone determine which party enjoys the net benefit.

Looking at the upstream market (record labels to streaming services), Professor Shapiro anticipated more negotiation of direct licenses influenced by the noninteractive streaming services' ability to ''steer'' listeners to a particular catalog of music. *Id.* at 30. As Professor Shapiro noted, in the webcasting market, the availability of steering resulted in negotiation of direct licenses with headline rates below the statutory rates based on the potential benefits of greater streaming frequency of the labels' music. *Id.* at 30.

SoundExchange was critical of Professor Shapiro's reliance on direct licenses primarily because more recent direct license agreements have omitted steering incentives or have included anti-steering alternatives that recognize the prospect of steering but muddy the analytical waters with regard to the effect steering might have on their negotiated rates. Even Professor Shapiro conceded that he could not ''quantify the value of steering.'' 4/20/17 Tr. 488 (Shapiro). Furthermore, the direct licenses involve exchanges of consideration apart from the headline royalty rate that no party has attempted to value.[159]

The Judges do not accept Sirius XM's direct licenses as sufficiently probative of the relevant market to accept them as a meaningful benchmark. Direct licenses cover only a small portion of the sound recordings on Sirius XM's playlists.

Sirius XM negotiated with Indie labels. The criticism is better directed at the direct license benchmark and the Judges will discuss it in that portion of the Determination, section VII.B.

[158] The Judges do acknowledge Sirius XM's increased profitability in a different context, *i.e.,* whether Sirius XM should contribute to the legitimate opportunity costs incurred by the record companies without disruption that would threaten the viability of Sirius XM. *See infra,* section X.D.

[159] The record labels also derive benefit from the direct licenses. *See* Shapiro WDT at 36. Notably, Sirius XM is able to distribute both the label's share and the artists' share of performance royalties directly to the contracting label. Sirius XM provides administration of the royalties without charging the fee that would be payable to SoundExchange under the statutory scheme. Under the direct license agreements with Sirius XM, some licensors also benefit from a more generous methodology for calculating the label's royalty pool. *Id.*

They are uninformative of any effect of steering on royalty rates because none of them contain steering guarantees or economic incentives to promote (or avoid) steering. There is no basis for the Judges to segregate consideration in these licenses that is properly attributed to elements that are unavailable under the compulsory license.

C. Web IV Rates

Professor Shapiro offered as a final benchmark the rates established by the Judges in *Web IV.* The Judges used benchmarks in *Web IV,* including direct licenses,[160] and considered interactive market (non-statutory) negotiated direct license rates to determine the *Web IV* rates. *See* Shapiro WDT at 49. Professor Shapiro converted the *Web IV* per-performance rate of $0.0022 to derive a percentage-of-revenue rate applicable in this proceeding of 8.1%. *Id.* at 55. Professor Shapiro used a figure of 469 performances per subscriber per month for his conversion. *Id.* at 54.[161]

Anticipating questions regarding whether webcasting and satellite radio are too different to warrant this benchmark, Professor Shapiro analyzed the *Web IV* benchmark to resolve the differences. According to Professor Shapiro, there are two key differences to examine. First is the possible difference between a label's full marginal cost of a Sirius XM satellite performance and a webcast performance. Specifically, Professor Shapiro defined the marginal cost difference, if any, as one of relative promotional or substitutional effects. Second, Professor Shapiro looked at differences in the ability to steer as between Sirius XM and a webcaster. Noting that Sirius XM relies on human programmers while webcasters rely more heavily on algorithms, Professor Shapiro felt Sirius XM might be more able to steer without losing listeners. On the other hand, he noted that webcasters (using Pandora as an example) have the ability to and the practice of allowing listeners to create individualized ''stations'' giving Pandora greater flexibility to steer without alienating listeners. *See* Shapiro WDT at 56–57.

In the end, Professor Shapiro concluded that Sirius XM and webcasters are ''quite comparable along both dimensions.'' Shapiro WDT at 50. When he combined the favorable comparison of satellite radio and webcasting with the fact that the sellers in both markets are the same, the rights at issue are the same, and that the *Web IV* benchmark accounts for the forces of competition, ''it becomes clear that the *Web IV* benchmark is a very good benchmark for rate setting in this proceeding.'' *Id.*

Sirius XM witness, Steven Blatter, detailed anecdotal evidence of the promotional effects of sound recording plays on Sirius XM. *See* Written Direct Testimony of Steven Blatter, Trial Ex. 5, *passim* (Blatter WDT). Mr. Blatter touted Sirius XM's subscription model as supportive of its ability to broaden the listening (and presumably consumption) habits of its subscribers. Freed of the commercial demands of ad-supported radio, Mr. Blatter contended, Sirius XM can cultivate a broader audience than the ''Top-40'' stations. Listeners to Sirius XM's curated playlists and niche channels thus discover music that might otherwise have gone unnoticed. *Id.* ¶ 2. Mr. Blatter recited ''thank-you'' letters from artists and labels, trade publication reporting and analysis, and sales statistics on selected titles as evidence of Sirius XM's promotional value to licensors. In addition to artist testimonials and press coverage, Mr. Blatter noted that ''many musicians and record labels'' grant Sirius XM waivers of statutory limitations relating to frequency of play under a statutory license (*i.e.,* the ''sound recording performance complement'') in order to enjoy the benefits of promotion on Sirius XM. *Id.* ¶ 36.

Countering Mr. Blatter's assertions, SoundExchange expert, Dr. George Ford, opined that promotional effects of a particular platform are irrelevant to the Judges' task in this proceeding. *See* Written Direct Testimony of George S. Ford, Trial Ex. 23, at 3–4 (Ford WDT). Dr. Ford pointed out most notably that no ''broad inter-platform analysis'' of promotion and substitution is in evidence. *Id.* Further, he asserted promotional effect is meaningless unless it is net of substitutional effects. In the current music marketplace, Dr. Ford asserted, given the dramatic decline in sales of permanent music media, a streaming service's promotion of CD sales and downloads is outdated. *Id.* at 4. Professor Willig actually performed econometric analyses looking at all streaming services (including Sirius XM) and found a net substitutional effect when compared to permanent sales. Willig WDT ¶¶ 24–27. According to Professor Willig, the substitution of streaming for permanent sales contributed to a dramatic drop in creator compensation, meaning the opportunity cost to artists and labels of streaming is significant. *Id.* ¶ 30.

Mr. Orszag likewise disputed Professor Shapiro's reasoning relating to the relative ability to steer in satellite radio and webcasting. As Mr. Orszag reasoned, the Judges relied on direct licenses and their steering provisions to make an adjustment to bring the webcasters' marketplace in line with a hypothetical effectively competitive market. *See* Orszag WDT ¶¶ 64–66. Direct licenses negotiated by Sirius XM are [REDACTED], however. *Id.* ¶ 67. Nor is there any record evidence of *any* actual steering by Sirius XM. As the Judges noted elsewhere in this Determination, [REDACTED].

The most salient criticism of Professor Shapiro's *Web IV* benchmark came from Professor Willig. Professor Willig discounted use of the *Web IV* rates, specifically the Pandora noninteractive rates, for various reasons, but the most telling was his uncontradicted assertion that not even [REDACTED] uses the statutory rates. After the *Web IV* determination, [REDACTED] negotiated direct licenses with [REDACTED]. Using the renegotiated rates as a benchmark, Professor Willig calculated the SDARS rate resulting from Professor Shapiro's methodology would be [REDACTED]% of revenue, approximately [REDACTED] the 8.1% of revenue proposed by Professor Shapiro. *See* Willig WRT ¶ 57.

The Judges are troubled by the implicit assumption in Professor Shapiro's use of the *Web IV* per play rate, given that Sirius XM, as opposed to noninteractive streaming, is listened to predominantly in the car. As Mr. Orszag testified, any per play analysis implicitly starts with the questionable assumption that each play has an equivalent value in both distribution channels. Orszag WRT ¶ 53. Further diminishing the value of a per play analogy, the Judges note that the parties' use of a percent-of-revenue form of royalty is inconsistent with the idea that there is a single per play value that cuts across all distribution channels

Further, the Judges agree with Mr. Orszag that there is no valid reason—and certainly no proof in the record—that would permit the Judges to conclude or presume an equal per play value for a Sirius XM play—usually in the car—and a play of a noninteractive song. In fact, the Judges find that, as a matter of common sense, there is likely greater utility in a sound recording played in an automobile. A driver (in particular) has a limited set of options for entertainment, given his or her need to remain attentive to the road and to

[160] Professor Shapiro opined that the direct licenses, such as the Pandora/Merlin agreement, ''reflected the forces of competition at work,'' namely the leveling power of steering. Shapiro WDT at 49.

[161] In a similar exercise, Professor Willig used a weighted average figure of [REDACTED] performances per subscriber in his calculation of creator compensation cannibalization (opportunity cost). The higher opportunity cost would result in a higher percentage-of-revenue rate. *See* Willig WDT at B–7.

traffic. In the car, therefore, radio listening is a scarce form of entertainment and therefore more valuable product than it is elsewhere, where it competes with all other forms of utility and diversion (market and non-market).[162]

The participants have not provided evidence sufficient for the Judges to reach any conclusions regarding a conversion of the *Web IV* per-play rates to a Sirius XM percent-of-revenue rate. Even if the parties had provided sufficient evidence to make the conversion, the Judges are unconvinced that the characteristics of webcasting and satellite radio are sufficiently similar to transfer, without adjustment, the royalty rate from one platform to the other.

D. Lenski Survey Data

Sirius XM engaged Mr. Joe Lenski of Edison Research to collect empirical data regarding the sources of Sirius XM satellite radio listeners and to evaluate where those listeners might turn for music consumption if Sirius XM were unavailable. *See* Written Direct Testimony of Joe Lenski, Trial Ex. 7, 2 (Lenski WDT). Sirius XM also asked Mr. Lenski to develop similar data for Pandora listeners.[163] *See id.* Mr. Lenski conducted a national random digit dial telephone survey, using both landline and cellular telephone contacts (Lenski Survey). He employed a survey methodology ''widely recognized as the most reliable form of survey research and . . . used by most major polling organizations. . . .'' *Id.* at 3. The survey queried 983 Sirius XM listeners and 1,323 Pandora listeners. Of the total respondents, 350 identified themselves as listeners to both Sirius XM and Pandora. The surveyors asked respondents in the two groups (Sirius XM and Pandora) separate sets of questions. Respondents identifying as listeners to both Sirius XM and Pandora answered both sets of questions.

A large majority—62%—of Sirius XM listeners responded that they migrated from terrestrial radio, with 20% of respondents answering that before Sirius XM they listened to ''CDs or your own music downloads.'' *See id.* at 5. Online streaming services, AM/FM stations streaming on the internet, and interactive streaming services in the aggregate accounted for 7% of Sirius XM's current listeners. *Id.* As for alternatives to Sirius XM, survey respondents indicated they would turn to terrestrial radio (74%), CDs or music downloads (65%), online streaming services (49%) and interactive streaming services (32%).[164] *Id.* Once survey respondents identified all possible alternatives to Sirius XM, the surveyors asked respondents to distribute their possible alternatives by frequency. In this cut, a plurality of respondents' listening time, 40.8%, would be to terrestrial radio. *Id.* at 6. CDs and digital downloads would capture 23.1% of former Sirius XM listening time. In the aggregate, 22.1% of listening time would be to noninteractive (14.3%) and interactive (7.8%) streaming services.

By contrast, Pandora listeners reported migrating slightly more frequently from ''CDs or your own music'' (35%) than from terrestrial radio (33%).[165] As alternatives, if Pandora were no longer available, survey respondents chose CDs or music downloads (67%), terrestrial radio (59%), interactive streaming services (47%), noninteractive streaming services (46%), and Sirius XM (23%).[166] When asked to allocate their time among the alternatives, Pandora listeners allocated their listening time to CDs or music downloads (26.3%), terrestrial radio (24.4%), interactive streaming services (16.6%) and other noninteractive streaming services (11.7%). *Id.* at 7.

These survey results showed that Sirius XM competes most directly with terrestrial radio, whereas Pandora's noninteractive service competes almost equally with CDs and downloads, interactive streaming services, and terrestrial radio. Professor Shapiro applied these conclusions to support his assertion that Sirius XM is mostly substitutional for terrestrial, non-royalty paying, radio. *See* Shapiro WRT at 14. In other words, Sirius XM is not cannibalizing creator compensation from other sources; it is augmenting creator compensation with an alternate source of royalties. *Id.* at 37. Professor Shapiro pointed out that, using the Modified Dhar Survey, Professor Farrell calculated a much lower opportunity cost than Professor Willig, *viz.,* $1.35 per subscriber per month as compared with $2.55 per subscriber per month. *See id.* The Farrell conclusions, he testified are ''notably closer'' to the results Professor Shapiro obtained using the Lenski Survey. *Id.*

Professor Dhar criticized the Lenski Survey as having ''no scientific value.'' Dhar WRT ¶ 9. Professor Dhar criticized the methodology, the response order, and the word choices in the Lenski Survey. *See* Dhar WRT *passim.* In essence, Professor Dhar concluded the Lenski Survey could not be of any value in reflecting ''marketplace reality.'' *See, e.g., id.* ¶ 16. The thrust of the Dhar criticisms revealed the differences in the assignments the parties gave their survey experts. Sirius XM asked Professor Lenski to gather listener preference information, whereas SoundExchange tasked Professor Dhar with looking at a defined, limited marketplace.

Professor Willig acknowledged that the ''the structures of these two surveys [Dhar and Lenski] are fundamentally different: they ask fundamentally different questions.'' Willig WRT ¶ 41. Professor Willig also criticized the Lenski Survey because it purported to measure listeners' assessments of their use of *time* whereas the Dhar Survey measures listeners' assessment of their *spending,* or more precisely, their willingness to pay. *See* Willig WRT ¶¶ 13, 46. Professor Willig asserted that the latter would be a more appropriate measure to determine creator compensation cannibalization. *Id.* Professor Willig, at bottom, criticized Professor Shapiro's reliance on the Lenski Survey data to evaluate relative substitutional effects of webcasting and satellite radio because the Lenski Survey did not give Professor Shapiro a basis to quantify the effects. Professor Shapiro testified in response to that criticism that, nonetheless, ''switching behavior that's not price-based is quite useful in terms of how [economists] . . . see things,'' yet he cautioned that ''I would accept that because Mr. Lenski is

[162] Sirius XM asserted that Mr. Orszag did not undertake any empirical analysis in support of this argument. SXM RPFF ¶¶ 273–274. However, Mr. Orszag explained sufficiently that this value is a particular form of ''access'' value, whereby the driver knows he or she has the option of listening to music on Sirius XM in the car, a particular value given the limited alternatives for entertainment and diversion behind the wheel. *See* SE PFF ¶¶ 1228–1229 (and record citations therein). Moreover, the limited nature of alternatives for entertainment and diversion for a driver are matters of common knowledge, and that point is not dependent upon expert testimony. Further, because Sirius XM advanced the argument that the per play values are equivalent across these two distribution channels, it should have proffered evidence to support the assertion that consumers value access and per play values provided by Sirius XM the same as they value such benefits when provided by a noninteractive service, given the greater use of Sirius XM in the car.

[163] At the time of the Lenski Survey, Pandora had not yet launched its fully interactive subscription service. It operated only lean-back or Mid-tier services that were not fully interactive.

[164] At this juncture, listeners could choose more than one potential alternative to Sirius XM; hence the percentages exceed 100%. Notably, 28% of survey respondents answered they would listen to less audio overall if Sirius XM were unavailable. *See* Lenski WDT at 5.

[165] Sixteen percent of Pandora respondents answered that their Pandora listening was new listening time, not diverted from other sources. Lenski WDT at 6–7.

[166] As they did with Sirius XM, the surveyors first established all alternatives (adding to more than 100%) before having respondents allocate their time by preference. *Id.* at 6.

asking about where would you move your listening, that could give a different answer than what would you subscribe to if Sirius XM were more expensive.'' 4/20/17 Tr. 3765–76 (Shapiro).

The Judges accept that the Lenski Survey and the Dhar Survey (and even the Modified Dhar Survey) were not aimed at establishing the same empirical evidence. The Judges do not agree with Professor Dhar's criticism of the Lenski Survey methodology. Without parsing every question in the Lenski Survey for ambiguity or order bias, the Judges also accept that both the Lenski Survey and the Dhar Survey were faulty. Those surveys are, however, sources of empirical evidence available in this proceeding. The Modified Dhar Survey resulted in adjustment of Professor Willig's analyses and conclusions. The Lenski Survey supported Professor Shapiro's analyses and conclusions. But in addition, the Judges understand the Lenski Survey to be of limited use in comparing the opportunity cost analyses conducted by Professors Willig and Farrell, as discussed *supra.*

VIII. GEO Music Rate Proposals for PSS and SDARS

A. Rate Structures and Proposals

Mr. George D. Johnson testified [167] on behalf of GEO Music and proposed that the Judges bridge what he described as a ''gap'' in creator compensation. *See* 5/2/17 Tr. at 2203, 2209–10 (Johnson). The premise upon which GEO relied is that *each performance* of a copyrighted work should be compensated. *See* (Corrected) Testimony of George D. Johnson (GEO), Trial Ex. 60, at 24–25 (Johnson CWDT). GEO acknowledged, however, that for some digital services, including the two services seeking licenses in this proceeding, measurement of individual performances might not be possible. Consequently, GEO sought rate structures that could provide

> a livable music royalty rate . . . [with which creators] can be sure in our royalty payments, real payments, that are guaranteed, at a rate we would get if there were no 'shadow' of a compulsory license . . . .

Id. at 5; *see id.* at 14 (''to know that they are secure in their royalty income . . . .'').

The solutions GEO proposed appeared to arise from a per-work formula.[168] He began his analysis with reference to the history of ''mechanical'' royalties paid to license musical works.[169] Mechanical royalties for physical phonorecords and permanent digital downloads have and continue to be structured on a per-unit basis. To capture a value he considered equivalent to a per-unit royalty for streaming services, Mr. Johnson proposed four different rate structures: A per-subscriber rate, a percentage of revenue rate, a per-play rate, and a permanent download rate.

GEO proposed a per-subscriber SDARS rate ranging from $ 4.96 per subscriber per month in 2018 to $ 5.58 per subscriber per month in 2022. GEO would have this rate apply to all subscribers except those that receive channels with no, or incidental, music content and free trial period subscribers (limited to 30 days royalty free). Proposed Rates and Terms of George D. Johnson . . . at 10 (GEO Rates). GEO proposed PSS per-subscriber rates ranging from $ 0.10 in 2018 to $ 0.20 in 2022. *Id.* at 14.

GEO proposed a SDARS percentage of revenue rate within a ''current marketplace'' range of 25% to 40% of ''Gross Revenues.'' He proposed defining ''gross revenues'' in a manner similar to the current regulations, but to include payments or payments in kind to key executives or shareholders. *See id.* at 12. For PSS, GEO proposed using the same definition of ''gross revenues'' and calculating the royalty rate at 45% of gross revenues.

For per-play rates for SDARS, GEO relied on ''anonymous, but *actual*'' Sirius XM royalty rates and adjusted those rates by varying the percent-of-revenue target. *Id.* at 13.

As an additional revenue stream for both the services and the copyright owners, GEO proposed requiring both Sirius XM and Music Choice to create a ''BUY button.'' In this proposal, GEO envisioned listeners acquiring (1) a permanent download to the listener's device of choice, (2) a ''cloud locker'' stored sound recording, or (3) a permanent download to a purchased content locker or paid locker service.[170] GEO proposed a royalty range of $1.00 in 2018 to $2.50 in 2022 per purchase. *Id.* at 15.

The economic underpinnings of Mr. Johnson's proposals are that streaming and broadcasting music, *i.e.,* the access models of music consumption, have substituted for (''cannibalized'') music sales. With this shift in music consumption, Mr. Johnson opined, users and exploiters of the artists' work have continued to prosper as the artists' revenue streams have declined. *See* Johnson CWDT at 36–40.

Sirius XM did not rebut directly the GEO proposals, but filed replies to GEO's proposed findings and conclusions. *See generally* Sirius XM . . . Reply to George Johnson's Proposed Findings . . . (Sirius XM Reply to GEO). With one exception,[171] Sirius XM disputed all of GEO's proposed findings and conclusions. With respect to all other proposed findings and conclusions, Sirius XM did not uniformly dispute the content of GEO's cited material, but argued that the citations were inapposite or irrelevant to the SDARS/PSS rate proceeding or without factual or legal support. *Id., passim.* Sirius XM argued that GEO's proposals conflated with SDARS the rate configurations for different licenses, *e.g.,* Phonorecords and Webcasters, without regard for the differences in rate setting standards for those configurations and without acknowledging the separateness of the record evidence supporting those different rates.

Music Choice addressed directly the GEO proposals. Mr. David Del Beccaro, President and CEO of Music Choice, testified that he could not parse the GEO proposals. *See* Del Beccaro WRT at 65. Mr. Del Beccaro pointed out that the GEO rate proposals lacked explanation, ''benchmark, model, or any other evidence . . . .'' *Id.* at 66.

Further, Mr. Del Beccaro took issue with the GEO proposal that Music Choice be required to offer a digital download service. As Mr. Del Beccaro observed, the digital performance sound recording license at issue in this proceeding does not extend to sales of sound recordings—physical or digital. *Id.* Music Choice has not licensed the

[167] As adjuncts to his testimony, Mr. Johnson proffered numerous exhibits. Sirius XM and Music Choice filed objections to GEO's exhibits, citing lack of foundation, hearsay, and relevance objections. The Judges grant those objections in their entirety. The GEO exhibits are not admitted for the truth of the matters asserted therein, but are nonetheless permitted to remain in the record as illustrative of Mr. Johnson's testimony.

[168] Mr. Johnson has advocated in each of his appearances before the CRB a holistic approach to licensing music performances. *See id.* at 2209. In his approach he asked the Judges to take into account royalties for all uses of musical works embodied in sound recordings: Royalties for the publishers, songwriters, record companies, and artists.

[169] Section 115 of the Copyright Act creates the compulsory license to make and distribute phonorecords of musical works. *See* 17 U.S.C. 115; 106(1) and (3) (exclusive right to reproduce in copies or phonorecords and to distribute reproductions of musical works). The definition of phonorecords has evolved to include digital reproductions of embodied musical works.

[170] GEO did not clarify how a paid locker service or purchased content locker service might be different from a ''cloud locker.''

[171] Sirius XM did not dispute GEO's Proposed Conclusion of Law number 24, to wit: ''George D. Johnson is an individual *pro se* singer/songwriter, music publisher and independent sound recording creator.'' Sirius XM Reply to GEO at 27.

rights necessary to sell phonorecords. Further, Music Choice provided retail sales of physical phonorecords (CDs), a business that did not require a license from record companies. Ultimately, Music Choice abandoned that service because it was not profitable. *Id.* at 66–67.

The Judges agree with Sirius XM that GEO's proposed rates and terms are unsupported by record evidence. The Judges also agree with the Music Choice criticisms of GEO's presentations. GEO's arguments are primarily policy arguments beyond the scope of this proceeding. The GEO proposed findings, conclusions, and rate proposals are inadequately supported in the record.

B. Statutory and Constitutional Considerations

GEO referred to the constitutional provision giving Congress the power to provide for copyrights.[172] He acknowledged that Congress provided for certain ''exclusive rights'' for copyright holders in section 106 of the Act. He argued unconvincingly, however, that the statutory licenses inappropriately infringe on the exclusive rights Congress created. He also questioned whether the Judges, or their predecessors whose precedent the Judges consider, were at worst confiscating, or at best marginalizing, copyright owners' rights by failing to provide for fair compensation. *See* Johnson CWDT at 6, 13. GEO asserted that current statutory royalty rates are ''extremely low below-market'' rates. *Id.* at 13.

GEO made much of the ''full independence'' of the Judges. *See, e.g.,* Johnson CWDT at 7; 5/3/17 Tr. at 2244 (Johnson). Mr. Johnson appeared to equate judicial independence for the Copyright Royalty Judges with disconnection from the dictates of the law. His arguments failed to analyze the separate licenses created by Congress or the differing standards by which the Judges must set those rates. By focusing unduly on ''fair market'' considerations, Mr. Johnson ignores the policy factors Congress established for certain licenses in section 801(b)(1) of the Act. Further, in every rate setting or rate adjustment proceeding, the Judges hear testimony from economists and other market experts to determine a fair rate for each license under the circumstances extant at each license period.

Notwithstanding the import of Mr. Johnson's (and other's) evidence of economic imbalances in the present-day music industry, nothing in the Constitution or the Copyright Act empowers the Judges to create new law or fill in legislative ''gaps'' arising by the course of commerce. Only Congress has that power.

IX. Adjustment for Promotional or Substitutional Effect

Neither SoundExchange nor Sirius XM proposed an adjustment to the rates that they advocated to account for any promotional effect. *Compare* Shapiro WDT at 56 (''good reason'' to conclude promotional value from performances on Sirius XM greater than promotional value of performances by webcasters, ''I am not able to precisely quantify just how much lower the royalty rate would be, so I make no downward adjustment to the rate) *with* Orszag AWDT ¶¶ 97–100 (considered whether adjustment was required between target market (Sirius XM) and benchmark market (interactive services) with respect to promotion and concluded no adjustment necessary).

Additionally, as the Judges explained in *Web IV:*

> To the extent that 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.

Web IV, 81 FR at 26326

The Judges have also repeatedly found that *relative* promotion, not *absolute* promotion/substitution, is the relevant factor in their consideration of statutory rates. *See SDARS II,* 78 FR at 23066–67 (''Because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment''). Testimony from a SoundExchange economic expert in the present proceeding re-confirmed the logic of these conclusions in more formal economic terms. *See* 5/1/17 Tr. 1827 (Ford); *see generally* Ford WDT; Written Rebuttal Testimony of George Ford, Trial Ex. 41 (Ford WRT). In the present case, the parties' position is consistent with these pronouncements regarding relative promotion, in that they do not propose a rate adjustment on the basis of any *relative* promotional differences.

Accordingly, the Judges do not adjust the rates they establish in this proceeding to reflect any hypothetical, absolute or relative promotional effects arising from performances on Sirius XM.[173]

Further, as discussed elsewhere in this Determination, the substitution effects arising from record company licensing of sound recordings to Sirius XM is a lynchpin for the setting of the rate in this proceeding.

X. The Itemized Section 801(b) Policy Considerations

As detailed in this Determination, the Judges find that the 15.5% of revenue rate arising from the Opportunity Cost approach represents a market-based rate that, in its entirety, mitigates the complementary oligopoly effects of certain positive opportunity costs embedded within it and reflects the parties' existing market power. Further, the record in this proceeding does not support any adjustment to the resulting rate to account for performances on Sirius having a promotional or substitutional effect. Accordingly, the Judges find this 15.5% of revenue rate to be an effectively competitive rate, and therefore a ''reasonable rate'' under 17 U.S.C. 801(b)(1) before consideration of the policy factors within that statutory section.

The Judges now analyze each of the itemized 801(b)(1) policy considerations to determine whether they should make any upward or downward adjustment in this proceeding and, if so, the magnitude of any such adjustment. In this and prior proceedings, the Judges have concluded that these four factors cannot necessarily be considered separately from one another. *See, e.g., SDARS I,* 73 FR at 4094. Moreover, in the process of identifying the ''reasonable rate'' before specifically applying these four itemized factors, the Judges may have already considered issues that overlap with the four factors, such that any further application of the same considerations would constitute improper double-counting of those considerations.

SoundExchange argued that the first three statutory objectives promote policies that are generally advanced through market transactions. According to its economic expert, Mr. Orszag, ''market-based rates are consistent with

[172] Article I, Section 8, clause 8 of the Constitution gives Congress the power ''to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'' U.S. Const., Art. I, sec. 8, cl. 8.

[173] There is anecdotal evidence in the record regarding promotional effect. The Judges have previously noted the insufficiency of anecdotal evidence to support a rate adjustment. In this proceeding, however, they find that issue to be moot given that the parties' respective experts have not proposed a rate adjustment to reflect promotional effect.

the first three of the 801(b) factors.'' 4/25/17 Tr. 954 (Orszag). If that were true, then any attempt by the Judges to adjust a market-based rate would be improper or, to the extent the Judges had already considered market principles, a form of double-counting, were they to use those factors again to adjust the rate.

By contrast, Sirius XM asserted that, as a matter of law, ''it is well established that reasonable 801(b)(1) rates need not correspond to market rates.'' SXPFF ¶ 87 (citing *SoundExchange* v. *Librarian of Congress,* 571 F.3d 1220, 1224 (D.C. Cir. 2009) (any ''claim that [section 801(b)] clearly *requires* the use of market rates is simply wrong''); *Recording Indus. Ass'n of Am.* v. *Librarian of Congress,* 176 F.3d 528, 533 (D.C. Cir. 1999) (same).

Thus, Sirius XM further asserted that in a proceeding governed by the section 801(b)(1) rate standard, ''market-approximating rates'' *must* be further evaluated against the Section 801(b)(1) policy objectives in order to arrive at ''reasonable rates'' that comport with the statutory command. *Id.* The Judges do not agree that this construction of their statutory charge is legally mandated or otherwise necessary. The Judges understand that they may establish ''reasonable rates,'' and only thereafter decide whether or how to apply the four itemized factors. If the Judges find that a market-based rate [174] is consistent with a ''reasonable rate,'' they may adopt that rate and apply the four factors to that rate. And, if the record does not support a further adjustment based on an application of the four itemized factors, or any of them individually, then the Judges may allow their market-based reasonable rate to stand as the new statutory rate.

As the foregoing analysis of the parties' proposals makes clear, the Judges have found that the 15.5% rate is a ''reasonable rate'' derived from a combination of market-based opportunity costs, survey evidence and countervailing considerations. Thus, the Judges do not consider the four itemized factors in section 801(b)(1) as bearing upon the reasonableness of the market-based rate they have already identified as ''reasonable.'' Rather, in this case, the Judges consider whether these four factors, separately or in combination, require any policy-based adjustments of the 15.5% rate and whether the Judges have already incorporated those factors into the analysis that led them to identify the 15.5% rate.

Before embarking on an analysis of the parties' separate factor arguments, the Judges note an overarching theme in many of those discrete arguments. The parties argue broadly that their costs and investments are significant (Factor C issues) and that they are entitled to a ''fair'' income or return (Factor B issues) that is not disruptive of their businesses (Factor D issues), in order to maximize the distribution of sound recordings to the public (Factor A issues). These arguments echo the historical ambiguity in the creation of the itemized section 801(b)(1) factors and the debate between Messrs. Nathan and Arnold prior to the adoption of those factors, as discussed *supra.*[175] Because the historic antecedent of the factors is the traditional public utility rate-setting process, the Judges cannot easily apply the factors to a determination of rates that is not based on a rate of return that accounts for specified costs, invested capital, a delineated rate base and a return on invested capital. Rather, the arguments in this context are by necessity more directional in nature. With this caveat, the Judges examine the parties' evidence regarding the need for any adjustment pursuant to the four itemized factors in section 801(b)(1).

A. Factor A: Maximizing the Availability of Creative Works to the Public

SoundExchange construed Factor A as calling for royalty rates that are sufficiently high to foster the creation of new content, but not so high as to jeopardize the ongoing viability of a licensee-service ''that has gained acceptance among consumers in the marketplace.'' SE PFF ¶1435. Based on this understanding of Factor A, SoundExchange asserts that the market-based rates it has proposed do not require adjustment to satisfy the objectives of Factor A.

In support of this point, SoundExchange first relied on an explanation by Professor Willig as to why Factor A is consistent with his Ramsey Pricing approach. Willig WDT ¶ 13 (''The defining objective of Ramsey pricing is the maximization of consumer welfare, and this is an economic concept fully consistent with the portion[ ] of the Section 801(b)(1) criteria that call[s] for the maximization of the availability of creative works to the public.''); *see also* 5/2/17 Tr. 1981 (Willig) (''Ramsey pricing by definition . . . says the price has got to be high enough to be financially sustainable on the supply side, but balanced across uses in a way that maximizes consumer welfare.''). However, because Professor Willig did not identify a proposed rate under his Ramsey pricing approach, the Judges do not find that this approach compels a Factor A adjustment.

Nevertheless, Professor Willig did indicate that his Ramsey Pricing approach generally demonstrated that the statutory rate should increase from the present rate of 11%. Because the reasonable market-based rate identified by the Judges of 15.5% is 41% higher than the present rate, the Judges see no need to make an additional increase in order to be consonant with Professor Willig's directional recommendation arising from his Ramsey pricing approach.

SoundExchange's other economic expert, Mr. Orszag, provided a separate reason why SoundExchange's rate proposal was consistent with the Factor A principles. He stated that rates that are ''market-based'' meet the Factor A criteria because they cause rates to be ''sufficiently high to incentivize copyright holders to create content, as reflected in content distributors' [licensees']—and by extension consumers'—willingness to pay for sound recordings.'' Orszag WDT ¶ 15. In addition, Mr. Orszag opined that the presence of streaming services operating under market-based rates demonstrates that those ''market-based rates are not so high as to prevent content distributors from earning economic returns sufficiently attractive to induce the investments required to transmit content to consumers, to broaden their distribution networks, and to develop quality enhancements and a richer menu of features and functionality.'' *Id.* Thus, he concluded that ''market-based rates will produce rates that are high enough to incent artists and labels to create their product,'' and ''are high enough for the content distributors to earn sufficiently high returns that they will want to distribute that content.'' 4/25/17 Tr. 956–57 (Orszag).

In support of this argument, SoundExchange noted the many specific costly ways in which labels must invest in their businesses, incurring repeated ''sunk costs,'' in order to provide a continuing flow of recorded music. As SoundExchange noted, the testimony and evidence highlight these specific risky and costly investments incurred to sign artists, create and produce recordings, manufacture product, market and distribute the music, build an audience and fan base, and license the copyrighted content to services such as Sirius XM for listening by end users. *See, e.g.,* Written Direct Testimony of Jason Gallien, Trial Ex. 30, at 2 (Gallien WDT).

[174] Although the Judges are *not required* to utilize market-based rates, they surely are *not prohibited* from doing so, as discussed *supra.*

[175] *See supra,* section II.B

In opposition, Sirius XM correctly argued that Mr. Orszag ''merely offers truisms,'' such as that higher revenue encourages record companies to make sound recordings available to the public. However, Sirius XM noted that SoundExchange does not go beyond this truism to ''elucidate how properly determined market rates fail to ensure that record companies are fairly compensated.'' SXRPFF ¶ 340.

The mere (and obvious) fact that record companies incur substantial costs is not illuminating, because that fact simply begs the question whether rates are sufficient in light of those costs. Moreover, the Judges do not acknowledge that SoundExchange's position even rises to the level of a ''truism.'' An increase in the royalty rate will not necessarily result in an increase in revenue, if the increase causes a downstream retail percentage reduction in quantity demanded that is greater than a percentage increase in subscription prices.

The Judges find that a rate properly crafted to reflect an effectively competitive market rate will maximize the availability of creative works to the public by providing appropriate market incentives. Lower rates, *ceteris paribus,* would result in increased distribution but less incentive to produce sound recordings. Higher rates, *ceteris paribus,* would encourage increased production of sound recordings but discourage distribution. Nothing in the record indicates that, on balance, either an increase or a decrease in the reasonable rate of 15.5% would increase the availability to the public of sound recordings.

Further, because the 15.5% rate identified by the Judges is market-based, the Judges are advancing the general proposition asserted by SoundExchange, that the market, properly construed, will balance the interests of producers (licensors) and distributors (licensees), without an increase in that rate under Factor A. *See* 5/2/17 Tr. 1956–57 (Willig) (from economic perspective, factor will ''require rates, royalty rates and terms generally that perform the economic function of motivating the record companies and the artists to create desirable sound recordings . . . [and] at the same time, . . . those rates and those terms should motivate . . . the distribution Services, to distribute those recordings to the public in a way that reflects consumer preferences.'').

Sirius XM suggested that the record supports a reduction in the royalty rate below the present 11% rate. In support of that point, it relied on the testimony of Professor Shapiro, who noted that an element of providing proper economic incentives to both the creators of sound recordings and to Sirius XM to make the necessary investments to ''maximize the availability of creative works to the public'' is the extent to which plays on Sirius XM's satellite radio service promote or substitute for other record label revenue streams. Shapiro WDT at 57–58. The Judges find this argument to be as much a ''truism'' as SoundExchange's argument emphasizing the incentivizing effect of higher royalty rates, and thus equally unavailing. Moreover, the Judges have already incorporated into their rate analysis survey evidence that demonstrates the substitution patterns between Sirius XM and other distribution channels. In that analysis, the Judges relied on an evidentiary roadmap provided to them *by Sirius XM,* through Professors Hauser and Farrell, for the identification and valuation of the substitutability of other distribution channels for Sirius XM.

Finally with regard to Sirius XM's argument, although Professor Shapiro asserted that a downward adjustment is warranted because Sirius XM is more promotional and less substitutional than non-interactive webcasters for other record label revenue streams, he found it too difficult to measure the magnitude of such an adjustment. *Id.* at 58 & App. D. Accordingly, he declined to propose such an adjustment. Shapiro WDT at 58. The Judges, therefore, have no evidentiary basis to make such a downward adjustment, even if they had found that a reduction was warranted.

The Judges interpret the ''maximize'' directive more broadly than either party to this proceeding. SoundExchange interpreted maximization as an upstream supply issue while Sirius XM interpreted maximization as a downstream distribution issue. The Judges must look at both steps in the process. Aside from the economic issues the parties argued, there is also simply no record evidence that indicates a shortfall in the overall production of sound recordings, or in the dissemination of sound recordings through Sirius XM or other distribution channels. For all these reasons, the Judges find no basis in the record for a policy adjustment to the 15.5% ''reasonable rate'' based on Factor A.

B. Factor B: Fair Income/Fair Return Under Existing Market Conditions

Factor B requires the Judges to balance fair return to licensors and fair income to licensees. There is an inherent tension within this factor. Further, economic analysis cannot identify royalty rates or a division of revenue that is ''fair.'' *See* 4/25/17 Tr. 957 (Orszag) (''Fairness is not a well-defined term in the economics literature.''). Economics can, however, provide a framework for a fair process. *Id.* at 958 (''Market-based rates are fair in the sense of, as long as they are being determined in a workably competitive environment, they are going to produce outcomes that are efficient.''). Thus, the Judges analyze the Factor B issues with an understanding of the inherent subjectivity of the endeavor, and an appreciation for the nuanced distinction between a ''fair outcome'' and a ''fair process.''

Equating the market rate with a rate that provides a fair return, SoundExchange argued that the current rate does not afford a fair return to copyright owners because it is lower than a market rate. Exacerbating this problem, according to SoundExchange, is the decline in sales of downloads and physical products, which have made royalty revenues from Sirius XM (and other services that offer ''access'' rather than ''ownership'') even more important than in the past. *See* Gallien WDT at 3–6. To the extent this argument is simply a plea by SoundExchange for rates that subsidize declining business segments, it is rejected. As the Judges have said previously with regard to *services'* business models, rates are not set merely to support a particular business model. *See Web IV,* 81 FR at 26329 (the statute ''neither requires nor permits the Judges to protect any given business model proposed or adopted by a market participant''). Likewise in this proceeding, the Judges are not obliged to offset, mitigate, or subsidize a decline in physical or download sales by setting higher royalty rates for satellite radio. Moreover, as Sirius XM correctly argued, in this proceeding there is no record evidence that the decline in revenues from other distribution channels can be laid at the doorstep of Sirius XM and, further, any such decline cannot automatically mean that the current level of income received by the record companies is not ''fair.'' *See* SXM RPFF ¶ 344.

SoundExchange refined its argument by reformulating its substitution/cross-elasticity argument as a basis to raise rates pursuant to Factor B. More particularly, noting the self-evident fact that consumers have a limited amount of time to listen to music, SoundExchange pointed out that, when subscribers tune in to Sirius XM, they forego other direct revenue generating services, like Apple Music or Spotify, and that may also diminish their purchases of physical product and downloads because they spend their music-listening time tuned in to Sirius

XM. Gallien WDT at 7. The Judges reject this argument as a basis to adjust the rates pursuant to Factor B. In setting the ''reasonable rate'' of 15.5% for an effectively competitive market, the Judges examined the survey evidence that demonstrated the relevant substitution patterns. The Judges cannot gainfully pursue that same issue a second time by reconfiguring it as a basis for making adjustments under Factor B.

Approaching the Factor B issue from the other side of the ledger, so to speak, SoundExchange argued that ''Sirius XM earns far more than a fair income under the current 11% rate, and will continue to do so under SoundExchange's rate proposal.'' SE PFF at 605. In support of this conclusion SoundExchange pointed to several facts proffered by Professor Lys that demonstrate how and why Sirius XM has realized substantial and profitable growth: [176]

(a) At the time of *SDARS I,* Sirius and XM were two separate companies competing for subscribers based on price, and likewise engaged in price competition for non-music content such as sports leagues and talk show personalities. However, in July 2008, Sirius and XM merged, and the merged entity, Sirius XM, became the sole provider of satellite radio in the United States, holding a monopoly in this market segment. Lys CWDT ¶ 43.

(b) The merger eliminated price competition between the two pre-merger satellite radio services for subscribers and for non-music content, and also allowed the combined company to take advantage of the economies of scale that are central to its business model. Lys CWDT ¶ 44.

(c) Sirius XM's operating costs are predominantly fixed with respect to subscriber revenue. These fixed costs include programming and content, satellite and transmission, sales and marketing, engineering and design, subscriber acquisition costs, and general and administrative costs.[177] *Id.* ¶ 45.

(d) Sirius XM's variable operating costs (*i.e.,* costs that *do* vary with subscriber revenue) are small in comparison, and include royalties, customer service, and cost of equipment. *See id* ¶ 46; *see also id.* ¶ 46 n.17 (citation omitted).

(e) Because of its largely fixed cost structure and its post-merger market share growth, Sirius XM's profits increased dramatically once its sales reached its ''break-even point,'' *i.e.,* the point at which its fixed costs are covered. *Id.* ¶ 47.

(f) This growth in profits is reflected in Sirius XM's high contribution margin (*i.e.,* the fraction of each additional revenue dollar that covers fixed costs or increases profits). Specifically, by 2015, Sirius XM achieved a contribution margin of [REDACTED] %, meaning that each additional dollar of revenue increases pre-tax net income and cash flows by $[REDACTED]. *Id.*

(g) Sirius XM's ''free cash flow'' (FCF) (a metric commonly used to assess a company's performance and value), captures the amount of cash that is available, after necessary business investment (including satellite investments), that can be used to pay dividends and repurchase shares. In 2012, Sirius XM's FCF was [REDACTED]% of EBITDA,[178] a higher percentage than other large entertainment-media companies. That is, Sirius XM can distribute [REDACTED]% of its EBITDA to its shareholders without affecting its operations.

(h) Looking at FCF over a longer period, over the past decade Sirius XM has generated $2.6 billion in such FCF. Since the merger, starting in 2009 Sirius XM has recorded seven straight years of positive FCF and has over that seven-year period generated $4.91 billion of FCF. Lys CWDT ¶¶ 91–92. Sirius XM's FCF has increased from a *deficit* of $1.23 billion in 2006 (meaning that the company was not generating sufficient cash and needed to rely on external funding sources for its operations and investments) to a positive $1.32 billion in 2015. This means that after it satisfied its investment needs, its operations generated $1.32 billion in cash that it could distribute to its investors. *Id.* ¶ 55. Cumulatively, from 2006–2015, Sirius XM earned $5.9 billion in operating cash flows. *Id.* ¶ 90.

(i) Sirius XM's executives trumpet the company's more recent performance as ''one of the best growth stories in media,'' and conclude that its ''business is thriving''—a claim confirmed by Professor Lys's analysis. *Id.* ¶ 52 & nn.24–25.

(j) In the 2009–2015 post-merger period, Sirius XM earned a total of $5.6 billion in EBIT.[179] Similarly, in the period since the merger, Sirius XM has generated over $7 billion in adjusted EBITDA, an increase from negative $690 million in 2006 to positive $1.66 billion in 2015. Lys CWDT ¶ 54.

(k) Turning from financial to volume metrics, over the past decade, Sirius XM has substantially increased its number of subscribers, even as it has increased the prices and fees it charges. Lys CWDT ¶ 57; *see also* 4/26/17 Tr. 1323 (Lys) (Sirius XM's historic revenue base). Specifically, over the past decade Sirius XM's subscriber base has grown on average [REDACTED]% per year, more than doubling from [REDACTED] million subscribers in 2006 to [REDACTED] million subscribers at the end of 2015. Lys CWDT ¶ 59. As of March 2016, Sirius XM had over 30 million subscribers. *Id.* ¶ 58 & n.34.

(l) Sirius XM's total revenue has grown even faster than the growth in the number of its subscribers—from $1.57 billion in 2006 to $4.57 billion in 2015—a 12.6 percent compounded annual growth rate (CAGR). Lys CWDT ¶ 65. This higher revenue growth resulted from Sirius XM's increase in its subscription prices and fee charges that occurred *contemporaneous with the growth of its subscriber base,* allowing Sirius XM to realize a 15.8% increase in its ARPU between 2008 and 2015, corresponding to a compounded annual growth rate of 1.6%. *See id.* ¶ 66, Fig. 11. The table below presents the increase in the total effective monthly cost of subscribing to Sirius XM's most popular subscription package, the ''Select'' package), *i.e.,* combining the subscription fee *and* the U.S. Music Royalty Fee:

SIRIUS XM HISTORICAL EFFECTIVE MONTHLY TOTAL SUBSCRIPTION COST

[Select subscription package]

Date	Nominal subscription	U.S. Music royalty fee	Total effective subscription	Increase	% Increase
1–Jan–06	$12.95	$0.00	$12.95	n/a	n/a
29–Jul–09	12.95	1.98	14.93	1.98	15.3
6–Dec–10	12.95	1.40	14.35	(0.58)	−3.9
1–Jan–12	14.49	1.42	15.91	1.56	10.9
1–Feb–13	14.49	1.81	16.30	0.39	2.5
1–Jan–14	14.99	1.81	16.80	0.50	3.1
5–Jan–15	14.99	2.08	17.07	0.27	1.6
27–Apr–16	15.99	2.22	18.21	1.14	6.7

[176] The summary of Professor Lys's exhaustive analysis of Sirius XM's financial success lays out SoundExchange's Factor B analysis and also demonstrates that the 15.5% rate set by the Judges cannot be construed as ''unfair.'' The rate provides the record companies with their opportunity costs, a form of return that Professor Willig acknowledged to be appropriate, while allowing Sirius XM to realize ongoing profits.

[177] Alternatively, these costs are the same whether one person is listening to a Sirius XM broadcast, or millions.

[178] EBITDA means earnings before interest, taxes, depreciation and amortization.

[179] EBIT means earnings before interest and taxes.

Id. ¶ 70, Fig. 12; *see also* Summary of U.S. Music Royalty Fees by Package, Trial Ex. 321 (excerpt from Sirius XM website). As this figure shows, Sirius XM's pricing on its Select subscription package has increased by 41% over the past decade, from $12.95 in 2006 to $18.21 as of April 2016, corresponding to a total increase of $5.26 or a compounded annual increase of 3.5%. Lys CWDT ¶ 71.

According to Professor Lys, Sirius XM's pricing increases appear to have had little effect on demand for its services, as evidenced by the essentially non-existent impact of the price increases on subscriber ''churn'' (defined by Sirius XM as ''the monthly average of self-pay deactivations for the period divided by the average number of self-pay subscribers for the period''). Sirius XM Holdings, Inc., Proxy Statement & 2015 Annual Report, Trial Ex. 372, at 21 (Sirius XM 2015 Annual Report).[180]

Sirius XM's most recent annual performance has been consistent with its past post-merger growth and profitability, as evidenced by the following points.

In 2016 Sirius XM set records for subscribers, revenue, adjusted EBITDA, and free cash flow, beating its guidance on all of those metrics. 5/15/17 Tr. 3759–60 (Meyer).

In 2016, Sirius XM added more than 1.7 million net subscribers, outperforming expectations. It added 1.66 million ''self-pay net subscribers,'' also exceeding expectations (Sirius XM's original guidance was 1.4 million). Trial Ex. 25, Figs. 43 at 56.

In 2016, Sirius XM's subscriber level increased by 6%, raising its subscribership level to 31.346 million. Lys WRT ¶ 164.

In 2016, Sirius XM's 2016 revenue grew by 10% compared to 2015, to more than $5 billion; EBITDA grew by 13% to $1.9 billion; FCF per share grew 26% to $0.30; and net income grew 46% to $746 million. Lys WRT ¶ 166.

In sum, SoundExchange argued that there is abundant and undisputed evidence that Sirius XM's profitability has grown dramatically—and significantly faster than its revenue—indicating an improved ability to monetize the operational gains and scale.

Accordingly, SoundExchange's critical conclusion from Professor Lys's exhaustive analysis was this: Sirius XM has been facing a relatively inelastic demand, enabling it to increase prices to consumers without causing a loss of subscribers. Lys CWDT ¶ 74.[181]

Sirius XM did not challenge the wealth of evidence demonstrating its economic, market, and financial success. Rather, Sirius XM contended that these measures of Sirius XM's economic position are ''entirely irrelevant to the rate-setting task at hand.'' Shapiro CWRT at 5. More specifically, Sirius XM argued that ''Professor Shapiro has demonstrated'' through his direct and rebuttal testimony ''that Sirius XM's overall profitability would not be among the variables impacting the outcome of a license negotiation *in a workably competitive market.*'' *See* Shapiro CWRT, App. D. & 24–26.

Professor Shapiro explained that, in his opinion, it is not the *overall* profits that are relevant in a Factor B analysis, but ''the *incremental* profit f[rom] additional Sirius XM customers, as measured by the *contribution margin* (which takes into account only *variable* costs) that enters the analysis. Shapiro CWRT at 52 (emphasis added). Sirius XM noted that its ''contribution margin'' has been essentially unchanged over time, and that even Professor Lys acknowledged that the contribution margin had ''remained remarkably consistent over time.'' *See* Lys WDT ¶ 87) (emphasis added).

Sirius XM sought to impeach Professor Lys with excerpts from his testimony in *Web IV:*

From the standpoint of economics, a company's ability to pay royalties, while still remaining profitable, and the ''willing buyer/willing seller'' standard are two very distinct concepts.

See 4/27/17 Tr. 1592–93 (Lys).

It ''is wrong to suggest that [a service's] current or past profitability should be used to determine the royalty rate a willing buyer and a willing seller would agree upon.''

See 4/27/17 Tr. 1593 (Lys).

It was ''incorrect'' to ''suggest[ ] that Pandora's current profitability and financial performance determine its ability to pay royalties, and that Pandora's ability to pay determines the rates the Judges should adopt.''

See 4/27/17 Tr. 1592 (Lys).

Sirius XM also pointed out that its non-music content costs have declined, demonstrating that there is no positive correlation between its profitability and its content costs. *See* Shapiro CWDT at 52–53 & Fig. 4.

In sum, Sirius XM concluded that its potential ability to pay higher royalties out of increasing profits is simply irrelevant to the question whether it is receiving a ''fair return'' pursuant to Factor B.

The Judges find that Sirius XM's increased profitability does not provide an independent basis to adjust the 15.5% identified by the Judges. Sirius XM earns sufficient profits, as the only satellite radio provider, to allow it to pay the opportunity costs of its service to the record companies. Those opportunity costs, properly weighted, constitute the building blocks for the 15.5% rate. The evidence, again, as detailed by Professor Lys, makes it abundantly clear that Sirius XM, through its monopoly of the satellite radio distribution channel, has the financial capacity to pay higher rates and still maintain a high level of profitability.

The Judges find no inconsistency with regard to Professor Lys's *Web IV* testimony and his testimony in this proceeding. If a service were operating at a loss rather than a profit, the record companies would not consider that fact relevant, especially if the service did not add new (*i.e.,* non-cannibalizing) listeners who could be monetized by subscription or advertising revenues. However, when a service is profitable, in an unregulated market, the record companies, empowered by their ''must have'' status, can and will seek to acquire as much of the surplus (profits) as they can through the bargaining process. As explained in this determination (and in *Web IV*), though, the Judges reject a division of profits based on the ''must have'' power of the record companies, absent application of an appropriate offsetting factor, such as identified in the steering analysis in *Web IV* or in the opportunity cost analysis in this determination.

Beyond Professor Lys's financial analysis, SoundExchange made additional arguments with regard to Factor B that do not aid in the Judges' analysis. SoundExchange argued essentially that a fair allocation of the revenue attributable to satellite radio will arise either from: (1) A Ramsey pricing approach as described by Professor Willig; or (2) arm's-length negotiations in a benchmark market such as the interactive market suggested by Mr. Orszag. Neither of these points supports a Factor B analysis. First,

[180] The only noticeable bump is an increase in churn from 1.8% to 2.0% in 2009 when Sirius XM introduced the U.S. Music Royalty Fee, resulting in the largest percentage increase in the effective subscription price, and coinciding with the 2008–09 recession. Lys CWDT ¶ 73.

[181] Professor Lys also opined that Sirius XM will continue to grow across these metrics for all of 2017 and into the foreseeable future. *See* Lys CWDT ¶¶ 152–198. As the Judges have stated previously, they are less than sanguine about projections and forecasts given the inherent speculative nature of such a process. However, as Professor Lys pointed out, his projections in *SDARS II* regarding the future financial performance of Sirius XM were accurate, and prior financial forecasts, as well as Sirius XM's own internal forecasts, [REDACTED]. *See id.* These facts suggest that there is no present reason to project a scenario in which Sirius XM's current level of profitability will fall or will not be maintained.

Professor Willig did not identify a rate pursuant to his Ramsey pricing approach, and he argued that this approach counseled generally for an increase in the existing rate (which the Judges have found to be appropriate pursuant to their reasonable rate analysis). Mr. Orszag's assertion that arm's length negotiations in the interactive market demonstrate a fair process (if not necessarily a fair outcome) is belied by the fact that: (1) The survey results reached by all survey experts demonstrates the inapposite nature of the interactive benchmark; and (2) the interactive benchmark is tainted by a complementary oligopoly effect that cannot be mitigated, on the present record, by a fact-based steering adjustment.

SoundExchange, again relying on Mr. Orszag, cautioned that the Judges should not apply Factor B so as to provide an unjustified ceiling on the royalty rate, which could constitute a subsidy to Sirius XM. The Judges' 15.5% reasonable rate does not constitute an arbitrary ceiling or a subsidy, because it is derived pursuant to the ''opportunity cost'' approach that, according to Professor Willig, resulted in a reasonable rate.[182]

Sirius XM found no basis under Factor B to change its proposed rate. Shapiro WDT at 58. Of course, the Judges' 15.5% rate is above Sirius XM's proposed rate range that extends to 11% (the current rate). However, Sirius XM made no arguments that would support a reduction of the 15.5% rate pursuant to Factor B. *See* Shapiro WDT at 58. Sirius XM limited its Factor B analysis to the bald assertion that its benchmarking analysis (rejected by the Judges) led to a fair return for copyright owners and a fair income for copyright users.

C. Factor C: Relative Roles of the Parties

SoundExchange asserted that, pursuant to Factor C, the statutory rate should be above its proffered benchmark, or at least at the high end of its benchmark range. In support of this argument, SoundExchange pointed to testimony that record companies and artists make substantial contributions through their search for artistic talent, a process that is long, competitive, and often unsuccessful. *See* 5/11/17 Tr. at 3542–43 (Kushner). More particularly, SoundExchange explained that Artist & Repertoire (A&R) representatives from labels go to clubs and concerts worldwide, listen to thousands of demonstration (demo) recordings, and search the internet to identify emerging and undiscovered artists. According to SoundExchange, these tasks are labor-intensive, because finding musical talent requires people with sufficient industry knowledge and experience. Gallien WDT at 8. SoundExchange pointed to a 2015 RIAA study that found the major labels spent $13.4 billion between 2003 and 2012 to find new artists and help them reach an audience. Written Direct Testimony of Michael Kushner, Trial Ex. 34, ¶ 77 (Kushner WDT).

SoundExchange noted that after record companies incur the foregoing costs, they must also incur costs to shape the artists' music and image in order to maximize their commercial appeal. Those investments can include the costs of dance and vocal lessons, personal stylists, makeup artists, trainers, and media training. Many of those investments do not yield a financial return. *See* 5/11/17 Tr. 3542–43 (Kushner) (''[I]f you look at the totality of the number of artists we sign and the numbers that are successful, clearly the unsuccessful ones outweigh the successful ones'').

SoundExchange further noted that recording companies incur substantial additional costs to create recorded works, and to market, manufacture, and distribute recorded music.[183] SoundExchange avers, for example, that in 2015 alone, UMG spent $[REDACTED] million on recording costs, mastering costs, producer and sampling fees, royalty advances, and overhead funding to contracting parties who provide A&R services. Gallien WDT at 8. Mr. Kushner testified for Atlantic Records that, on an album basis, the recording costs for a maiden album from a new artist typically range from $[REDACTED] to $[REDACTED]—and can exceed $[REDACTED] for an established artist. Kushner WDT ¶ 36. If the record companies cannot recoup these expenditures and advances from sales revenue, they—not the artists or the music services—bear the unrecouped cost and foregone profits.[184]

As to marketing costs, Mr. Kushner testified that for Atlantic Records, the typical initial U.S. marketing budget for an album cycle for a new artist is in the range of $[REDACTED] to $[REDACTED]. *Id.* ¶ 68. In fiscal year 2015, UMG alone spent $[REDACTED] specifically on gross marketing costs, as well as $[REDACTED] in overhead costs for its various departments that also provided marketing services. For UMG, marketing costs included over $[REDACTED] in advertising, $[REDACTED] in artists' press and TV appearances, over $[REDACTED] in internet marketing & advertising, over $[REDACTED] in radio promotion, and over $[REDACTED] in video production costs. With specific reference to streaming and playlisting efforts, UMG has also invested in the setup costs and personnel to establish a team dedicated to streaming marketing and playlisting efforts. Gallien WDT at 13–14.

Regarding recording companies' manufacturing and distribution costs, they remain substantial in spite of the industry's transition away from physical media. Because of declining physical product sales, physical manufacturing has been declining, but it still carries high costs. UMG reported that its manufacturing costs for physical records, including costs they advance for pressing and distribution deals, were $[REDACTED] in fiscal year 2015. *Id.* at 14. Digital distribution has been increasing, and there is misperception that it is costless to the record companies. The reality is that digital distribution is highly complex and requires expensive investments. UMG reported that since the early 2000s, it has invested over $[REDACTED] in IT infrastructure and operating costs, as well as the professionals that today distribute the thousands of digital files it provides to hundreds of music services and to handle the processing of billions of micro transactions related to recognizing digital revenues and calculating the associated royalty obligations. *Id.* at 14. And in 2016 and throughout 2017, UMG will be investing in its 3rd generation of digital supply systems and digital revenue processing systems at an estimated cost of over $[REDACTED]. *Id.* at 15–16.[185]

[182] To be sure, Professor Willig calculated a higher rate because he used the diversion ratios in the Dhar Survey, but the Modified Dhar Survey (as corrected), with its superior diversion ratios, applies the same opportunity cost approach advocated by Professor Willig, and even applied his ''Creator Contribution'' walk-away values.

[183] These costs typically may include the additional expense of a producer's salary, studio rental, hiring a sound engineer, paying musicians to play with the featured artist, and preparing a master recording. *See* Written Direct Testimony of Bruce Iglauer, Trial Ex. 33, at 10–11 (Iglauer WDT); Kushner WDT at ¶¶ 48–50.

[184] For example, SoundExchange proffered UMG's 2015 income statement, which reflects $[REDACTED] in (1) advances and recording costs for new unproven artist signings and (2) write offs of investments in established artists, net of recoveries. Gallien WDT at 10.

[185] Indies' costs differ in magnitude from those of the Majors, but the categories are similar, according to SoundExchange. Mr. Iglauer provided qualitative testimony stating that his Indie label, Alligator Records, spends substantial time seeking out recording artists to sign—listening to demos, attending shows and music festivals, reading the music press, and taking referrals from other bands, labels, managers, and booking agents. It also devotes significant resources to promoting the

In sum, SoundExchange asserted that major labels spend *billions* of dollars finding and developing new artists, helping them reach an audience, and creating and marketing recorded music.

Sirius XM gave short shrift to these lengthy descriptions of the record companies' various expenses. First, Sirius XM claimed that SoundExchange's request for an upward adjustment pursuant to Factor C is inconsistent with the latter's prior broad proclamation that the first three itemized 801(b)(1) factors are satisfied by market rates. Second, Sirius XM noted that the categories of costs that SoundExchange has itemized ''have long prevailed in the recording industry,'' and that nothing set forth in SoundExchange's Factor C argument provided specific reasons to suggest that those costs have changed in a manner to support an adjustment upward in the statutory rate. Third, Sirius XM noted that SoundExchange did not measure ''the investments made by the record companies'' against ''Sirius XM's investments ''and thus did not perform the ''relative'' analysis of costs, risks, and other factors expressly required by the statutory language. In this criticism, Sirius XM also noted parenthetically that SoundExchange did not explain how or why particular portions of the record industry's costs should be allocable to Sirius XM, rather than other distribution channels.

Additionally, relying on Professor Shapiro's testimony, Sirius XM argued that when the emphasis is placed properly on the ''relative'' contributions of the parties, the record companies' cost of creating sound recordings, ''is almost certainly significantly less than the contribution that Sirius XM plans to make over the 2018–2022 license period,'' including the launching of two new satellites and improving its repeater network.'' Shapiro WDT at 58. Although he concluded that this relative difference points toward reducing the statutory rate, the relative balancing ''does not readily lend itself to quantifying'' an appropriate downward adjustment. *Id.*

Sirius XM also claimed that it contributes additional value through its ''delivery network.'' As Professor Shapiro argued: ''[B]y combining music, non-music, curation, *and a delivery platform* all into one bundle, Sirius XM is creating significant value for consumers, with each piece of the bundle contributing to the overall value of the service.'' 4/20/17 Tr. 398–99 (Shapiro) (emphasis added).[186]

In response, SoundExchange, through Mr. Orszag, asserted that Sirius XM's ''delivery platform'' does not add *separate* value, because any value created by that platform flows principally to Sirius XM; that is, even under the SoundExchange proposal the record companies receive only 23% of Sirius XM's revenue. Therefore, he noted, most of the gains flow to Sirius, ''but there is a portion that goes to the labels which [provide] a *necessary input,*'' 4/25/17 Tr. 1034 (Orszag), which is ''consistent with sound economics.'' *Id.* at 1034–35 (Orszag) (emphasis added).

In reply, Sirius XM argued that Mr. Orszag's justification for the labels' sharing of any value added (via revenue) from Sirius XM's unique inputs begs the question as to ''what the split should be,'' and fails to ''address whether an adjustment to the [interactive] benchmark is warranted to account for Sirius XM's independent contributions to the value of its service offerings.'' SXM RPFF ¶ 62.

The Judges agree with Sirius XM that the value of its unique inputs (relative to interactive and other services), such as its expensive satellite and ancillary technical equipment[187] and its use of live ''on-air'' talent and other specialized personnel,[188] are intended to—and do—create a product that is differentiated from interactive services. However, SoundExchange is correct that inputs do not have independent value *per se.*[189]

Rather, Sirius XM incurs the cost of these inputs to create a differentiated and thus more profitable service. If it succeeds, the benefits will be evidenced by higher revenues (in excess of those input costs) and will, therefore, result in higher profits. A separate accounting of the costs of the Sirius XM satellite radio platform would constitute a clear double-counting of value.

By contrast, if the cost of Sirius XM's investments in its unique inputs failed to differentiate its output (*i.e.,* its service) from, say, interactive services, then there would be no justification for Sirius XM to obtain any recompense for its investments, either through an adjustment to the revenue (royalty) base or to the royalty rate. As the Judges noted previously, a party is not entitled to a rate simply to preserve its particular business model. *See, e.g., Web IV,* 81 FR at 26329 (''the statute neither requires nor permits the Judges to protect any given business model proposed or adopted by a market participant.''). If Sirius XM's unique and expensive inputs have marketplace value, those inputs will differentiate its service in an attractive manner, resulting in relatively low cross-elasticities and own-elasticities, lower opportunity costs for the labels in licensing to Sirius XM, and higher profits for Sirius XM. It is through this economic transmission mechanism that Sirius XM may extract value from its unique inputs—not from a separate valuation of the inputs.

This argument does not fully address Mr. Orszag's point that the labels, as providers of a ''necessary input'' would, in an unregulated market, command a portion of the value created by these unique Sirius XM inputs. Again, Mr. Orszag concluded that such ''sharing'' is simply ''sound economics.'' However, that reasoning is ''sound'' only to the extent the Judges would find it appropriate to reject Professor Willig's opportunity cost approach and adopt instead his Nash Bargaining Solution model. For the reasons set forth at length *supra,* the Judges have done precisely the opposite: Accepting his opportunity cost approach and rejecting his Nash Bargaining Solution approach.[190]

D. Factor D: Minimizing Disruptive Impact on Structure of the Industries Involved and Generally Prevailing Industry Practices

The Judges' long-standing test for whether a rate is ''disruptive'' pursuant to Factor D provides that a rate change would be disruptive if it ''directly

music and touring of artists they have signed, including the payment of recording costs and advances. Iglauer WDT at 9.

[186] Sirius XM did not address its contribution of this additional network value in its Factor C argument. However, the Judges find that this issue is best considered in the context of Factor C, which broadly addresses relative contributions.

[187] *See, e.g.,* Written Direct Testimony of James E. Meyer, ¶ 12 (Meyer WDT); Written Direct Testimony of Bridget Neville, *passim* (Neville WDT); Written Direct Testimony of Terrence Smith, *passim* (Smith WDT).

[188] *See* Blatter WDT ¶¶ 9–10.

[189] As Professor Orszag asserted, David Frear, Sirius XM's CFO, conceded this point during the *SDARS II* proceeding: [REDACTED] *See* Orszag WRT ¶ 53 n.65.

[190] The Judges' finding appears consistent with Sirius XM's position: ''SoundExchange's attempt to expropriate a portion of the value that Sirius XM alone creates is entirely at odds with the section 801(b) factors.'' SXM RPFF ¶ 64. However, Sirius XM's claim of *expropriation* is hyperbolic. By its logic, Sirius XM's use of the labels' music likewise would constitute expropriation—of the sound recording value that the labels created. The difficult issue is the application of the statutory and economic factors to allocate the value of the output created by a production function (containing sound recordings and a delivery network) that utilizes these separate inputs in combination, to cover all costs (including opportunity costs) while rewarding the investment in technology that leads to innovative product differentiation. The Judges' 15.5% rate addresses these various and competing factors in a reasonable manner.

produce[s] an adverse impact that is substantial, immediate, and irreversible in the short-run because there is insufficient time for either the SDARS or the copyright owners to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.'' *SDARS II,* 78 FR at 23069 (quoting *SDARS I,* 73 FR at 4097). Accordingly, the Judges apply this standard to the 15.5% rate they have found to be reasonable in this proceeding to determine whether the 15.5% rate would be disruptive.[191]

SoundExchange relied on the testimony of Professor Lys, who demonstrated that Sirius XM would still earn substantial returns (compared to other companies in closely-related industry sectors), even if the Judges were to increase the statutory royalty rate to 24%. *See* 4/26/16 Tr. 1321–23 (Lys).[192] First, Professor Lys calculated that the pre-tax incremental impact of even a 24% royalty payment (based on 2015 figures available to him when preparing his direct testimony) was $[REDACTED] million and the net after-tax impact would be $[REDACTED] million. Lys CWDT ¶¶ 129–30. At those levels, Sirius XM would obtain the following financial results:

SIRIUS XM 2015 PERFORMANCE METRICS UNDER 24% ROYALTY RATE VS. SIC 483

Performance metric	SXM (@24% royalty)	Average for SIC 483 broadcast radio/TV (%)
Return on Assets	5.5	3.0
EBITDA Margin	27.4	19.9
Free Cash Flow Margin	23.0	6.1

Lys CWDT ¶¶ 132–42 & Fig. 33; *see* 4/26/17 Tr. 1321–22 (Lys).

Professor Lys also analyzed Sirius XM's forecasted performance, again assuming arguendo that the Judges set the statutory rate at 24% of revenue. His analysis shows that, at that rate, the incremental after-tax impact on Sirius XM would range between $[REDACTED] million in 2018 and $[REDACTED] million in 2021. Professor Lys noted that Sirius XM is expecting to perform so well in the future that it could easily absorb this higher rate for the *SDARS III* period, 2018 through 2022. Lys WRT ¶ 219. More particularly, under this scenario, Professor Lys testified that Sirius XM:

> Would earn between $[REDACTED] and $[REDACTED] in EBITDA in every year of the forecast, and would continue growing. *Id.* ¶ 220.
>
> Would earn over $[REDACTED] in net income each year of the forecast, and would continue growing. *Id.* ¶ 221.
>
> Would generate over $[REDACTED] in free cash flow almost every year of the forecast and would continue growing. *Id.* ¶ 222.

Professor Lys further noted that, even under Sirius XM's own internal forecasts, with a royalty rate of 24%, it would remain extremely profitable throughout the *SDARS III* term (2018–22), earning $[REDACTED] in EBITDA, $[REDACTED] in net income, and $[REDACTED] in free cash flow. *Id.* ¶ 223. Additionally, Sirius XM's 2016 [REDACTED] indicates that, at the end of the forecasted period (2022), it would have a strong balance sheet, with $[REDACTED] in cash and equivalents, total assets of $[REDACTED], and shareholder equity of $[REDACTED]. *Id.* ¶ 224.[193]

For these reasons, SoundExchange argued that Sirius XM can comfortably afford a rate increase from the current 11% to its proposed 23% of revenue. As Professor Lys colorfully and emphatically opined: [REDACTED]. 4/27/17 Tr. 1391–92 (Lys).

Professor Lys also examined in great detail Sirius XM's growth in equity value compared to broader market metrics such as the S&P 500 and the Dow Jones Industrial Average, and noted that Sirius XM far outpaces those indices. He further noted that Sirius XM outperforms other firms in the noninteractive markets. From these facts, Professor Lys concluded that Sirius XM enjoys an ''unfair advantage over competing digital music services that pay higher royalty rates.'' SE PFF ¶ 1584; *see* Lys CWDT ¶¶ 117–124.

To provide yet another perspective on the financial success of Sirius XM, Professor Lys calculated how its performance would have changed in 2015 if the statutory rate had been increased above the 10% applicable in that year. His calculations demonstrated that:

> Sirius XM could have afforded to have its 2015 statutory royalty rate increased from 10.0% to up to 41.9%, 35.9% or 31.4% and still earned an average EBITDA level of $735.7 million . . . , $909.5 million . . . , or $1.037 billion . . . , respectively. While this level of the royalty rate would have reduced Sirius XM's EBITDA profitability by $921 million, $747 million, and $620 million, respectively (from the actual $1,657 million), would have only equated Sirius XM's performance with its industry peers' EBITDA profitability levels.

Lys CWDT ¶ 136.

> Sirius XM could afford to have its 2015 statutory royalty rate increased from 10.0% to 65.1% and still earn a *free cash flow* level commensurate with SIC 483 of $278.8 million.

Id. ¶ 138.

> Sirius XM could afford to have its 2015 statutory royalty rate increased from the actual 10.0% to 35.0% and still earn an average SIC 483-level (in terms of return on assets) net income level of $39.6 million.

Id. ¶ 142.

In sum, SoundExchange made a compelling case that an increase in rates far greater than the 15.5% identified as a reasonable rate by the Judges would be easily sustainable for Sirius XM, and therefore not disruptive under the Factor D standard as quoted *supra.* Moreover, Sirius XM did not provide any evidence sufficient to question Professor Lys's analysis, which indicated that Sirius XM could afford a much larger rate increase. Accordingly, the Judges find that, *a fortiori,* Professor Lys's analysis indicates that Sirius XM could also afford a smaller increase, to the 15.5% rate determined by the Judges.[194]

XI. Terms

Besides seeking a revision of the royalty rates for the 2018–22 rate period, the participants proposed certain additional changes to the extant regulations. The final regulations appended to this determination reflect

[191] Nothing in the record indicates that the reasonable rate of 15.5% identified by the Judges (a 41% rate increase from 11% to 15.5%) would be disruptive to the record companies, even though it is below the 23% rate sought by SoundExchange. *See* Shapiro WDT at Fig. 5 and p. 59 (noting industry data showing that Sirius XM accounted for only about 4% of overall record industry revenue in 2016). Given the 4% figure identified by Professor Shapiro, 23% of that percentage equals .9%, and 15% of that 4% equals .6%. The difference in revenue to SoundExchange between its percent-of-revenue proposal and the rate set in this Determination therefore is approximately .3% of overall record industry revenue, and thus not disruptive within the applicable standard. Accordingly, the Judges focus on whether this increase would be disruptive for Sirius XM.

[192] The Judges provide this detailed summary of Professor Lys's exhaustive analysis of Sirius XM's financial picture not only to demonstrate the proper application of an itemized factor, but also to underscore that Sirius XM can easily afford to pay the market-based reasonable rate of 15.5% crafted by the Judges.

[193] The Judges place much less emphasis on projections compared with current facts, absent additional proof that the entity making the projection has a track record that makes its projection credible. However, the Judges note that these projections are consistent with [REDACTED].

[194] SoundExchange also asserts that Sirius XM has paid less than an appropriate rate in previous rate terms. *See* SEPFF ¶¶ 1598–1606 (and record citations therein). However, the Judges do not conclude that, as a matter of law, they can set rates for a forthcoming period that reimburse a licensor for any alleged underpayments caused by a purported error in the statutory rate for a past rate period.

the Judges' decisions on points that were in controversy. For the reasons detailed below,[195] the Judges adopted some of the proposed changes and declined to adopt others, as indicated in the final regulatory language.

A. Generally Applicable Terms

1. Advance Payment and Minimum Fee

SoundExchange did not propose any substantive change to the current ephemeral royalty minimum fee of $100,000 per year, which is creditable to ephemeral royalty payments for the relevant year (37 CFR 382.3(b)). SE PFF 85. SoundExchange sought to designate the $100,000 annual advance payment as the minimum fee for use of the section 112 Ephemeral License by SDARS and PSS. Under SoundExchange's proposal, the advance payment would be applied first to section 112 royalties due, and the balance, if any, would be nonrefundable and not applicable to a subsequent year's license. Music Choice argued rightly that section 114 does not provide for a minimum fee for SDARS or PSS. *Compare* 17 U.S.C. 114 (f)(1)(A) *with* section 114(f)(2)(A).[196] Section 112 does, however, require the Judges to set a minimum fee for ''each type of service offered by transmitting organizations'' using the ephemeral license. *See* 17 U.S.C. 112(e)(3).

By agreement of the parties and in conformity with prior rate periods, the section 112 ephemeral license royalty fee is set at a five percent portion of the total bundled royalty for both section 112 and section 114 and is included in that bundled royalty payment. Music Choice contended that in *SDARS II,* SoundExchange and Music Choice stipulated to advance payment language that would have allowed the full advance payment to be creditable to the PSS's entire royalty payment, rather than to its ephemeral payment only. MC PFF ¶ 554. According to Music Choice, the stipulated language was changed in the final rule (*i.e.,* the advance payment is creditable only to the ephemeral royalty payment) with no explanation or justification. Music Choice asserted that the language SoundExchange and Music Choice stipulated to in *SDARS II* should be adopted and SoundExchange provided no rationale for retaining the current language. MC PFF ¶¶ 556–57. SoundExchange did not appear to dispute Music Choice's assessment that the extant recoupment provision differs from what the parties had stipulated to and has not provided a compelling reason to retain the current offset provision for PSSs. *See, e.g.,* 5/10/17 Tr. 3308–13 (Bender). Therefore, the Judges adopt the minimum fee language Music Choice proposes.

It would seem incongruous to require an advance payment for section 114 and section 112 royalties in the aggregate but to require the entirety of that payment to be applied as a ''minimum fee'' for the ephemeral license. No participant objects to the $100,000 advance royalty payment. The Judges have no basis upon which they could allocate 100% of that payment to the ephemeral license.

To comply with the statutory requirement that they set a minimum fee for use of the section 112 ephemeral license by transmission services, *viz.,* SDARS and PSS, the Judges set the section 112 minimum fee at five percent of the advance payment, or $5,000, for each type of SDARS or PSS service for which the Judges establish a different section 114 performance royalty. SoundExchange must, thereafter, apply the remaining amount of the advance payment, after application of $5,000 per type of service to ephemeral licenses, to section 114 royalties.

2. Definitions

Music Choice objected to the placement of ''Definitions'' at the end of each subpart of the regulations. The Judges agree with Music Choice that the placement seems counterintuitive. Definitions will migrate to the beginning of each subpart. In addition, Gross Revenues calculations will migrate from the Definitions section to the services' respective subparts.

a. GAAP

The parties were in essential agreement regarding imposing a U.S. geographical limitation in the definition of GAAP. Sirius XM asked the Judges to apply a temporal element to the definition requiring application of the version of GAAP in effect ''during the month when the performances giving rise to a Licensee's royalty payment obligation were transmitted.'' SoundExchange countered that a more definite time limit would be preferable, *viz.,* ''on the last day of the accounting period to which the subject payment relates'' or ''the date payment [was] due.'' The Judges adopt the definitive date for choosing GAAP principles as the date payment was due.

b. Qualified Auditor

In prior iterations of royalty rate regulations relating to various licenses, the Judges noted the repetition of the phrase ''independent and qualified auditor.'' In their *Web IV* determination, the Judges cut the verbiage by 50% by defining a Qualified Auditor to be one that is independent. In this proceeding, the parties have proposed language to assure both the qualification and the independence of any auditor working to verify royalty payment and distribution.

In a slight departure from the *Web IV* language, the Judges eliminate the *Web IV* requirement for an auditor to be licensed in the state in which the audit is conducted. In this proceeding, the Judges accept that Certified Public Accountants are governed by a code of ethics that permits them the ''mobility'' to practice across state lines. To remove any doubt, the Judges refer to the Code of Professional Conduct adopted by the American Institute of Certified Public Accountants.

c. Additional Definitions

On their own motion, the Judges added ''Payor'' and ''Verifying Entity'' as defined terms. These terms were added during the revamping of regulations following the *Web IV* proceeding because they clarified that auditing rights did not reside exclusively in the Collective. In this iteration, the Judges clarify the terms they added to convey this reciprocal audit right.

The Judges also amended SoundExchange's proposed definition of ''Licensee'' for clarity.

3. Regulatory Terms

a. Section 382.3(a)[197]—Payment to the Collective

In general, any due date in federal litigation that falls on a Saturday, Sunday, or federal holiday is tolled until the next following business day. The Judges regulations currently adopt this convention as a general procedural rule when discussing litigation filing deadlines. *See* 37 CFR 350.5. The Judges see no reason not to adopt the suggestion of Sirius XM to enunciate the same rule when referring to royalty payment due dates.

[195] The Judges do not provide narrative discussion about every detail of the regulatory changes; rather, they concentrate on the areas of legally significant controversy.

[196] The extant regulation setting the PSS advance payment does not mention a ''minimum fee'' but it does limit application of the advance payment to ephemeral license royalties and prohibit rollover of any portion of the advance payment to subsequent royalty years. *See* 37 CFR 382.3(b) (2016). Perversely, the current regulation establishing the $100,000 advance payment by SDARS is entitled ''Ephemeral Recordings Minimum Fee.'' *See* 37 CFR 382.12(c) (2016). Nothing in the subsection mentions a minimum fee, however. *Id.*

[197] Section references are to the *new* numbering system that results from reorganizing the regulations in part 382.

b. Section 382.4(a)(3)—Signature

In updating the royalty regulations after the *Web IV* proceeding, the Judges clarified the capacity of signers of Statements of Account. Music Choice objected to reconfiguration of the *Web IV* language suggested by SoundExchange. The Judges agree with Music Choice that the language in the *Web IV* regulation is more appropriate for these participants.[198]

c. Section 382.5(a)(2)—Best Efforts

SoundExchange is obliged to use ''best efforts'' to locate Copyright Owners and Performers entitled to receive a distribution of royalty payments. The Judges' regulations need not specify the specifics of those ''best efforts.''

d. Section 382.5(b)—Unclaimed Funds

At the conclusion of the *Web IV* proceeding, the Judges adopted language proposed by one of the Licensees directing SoundExchange to treat unclaimed funds in accordance with federal, state, or state common law. SoundExchange argued against this provision seeking to retain permission to apply unclaimed funds to administrative expenses. The Judges conclude that governance of applicable law will provide more transparency regarding the disposition of unclaimed funds.

e. Section 382.6(c)(3)—Outside Counsel

SoundExchange proposed a change to the rule regarding dissemination and use of confidential information relating to royalty collection and distribution. Music Choice objected to the additional language SoundExchange proposed and the Judges agree with Music Choice. SoundExchange is required to use and analyze sensitive business information in its administration of royalty collection and distribution. On occasion, SoundExchange might employ consultants or experts to assist in that effort or in the auditing of the administrative systems.

SoundExchange sought to allow outside counsel access to confidential information ''for the purpose of performing their duties during the ordinary course of their work.'' This dissemination of confidential information is not sufficiently constrained to limit it to collection and distribution of royalty payments. The notion of outside counsel obtaining the sensitive information ''in the ordinary course of their work'' is too broad. The Judges will not grant that privilege. Outside counsel has express authority to see confidential information when acting on behalf of the Collective for ''verification of a . . . statement of account'' or on behalf of a Copyright Owner or Performer for purposes of ''verification of royalty distributions . . . .'' This permission is sufficient.[199]

f. Section 382.7(c)—Notice of Intent To Audit

SoundExchange requested that the Judges change the requirement that a Verifying Entity ''deliver'' a copy of its filed Notice of Intent to Audit to the Payor to a requirement that the Verifying Entity ''send'' the notice. Music Choice defended the term ''delivery'' because it provides ''protections'' to the PSS. *See* MCRFF at 323. The Judges conclude that this language issue is a solution in search of a problem. The language will remain unchanged.

g. Section 382.7(d)—The Audit

Music Choice and SoundExchange disagreed regarding language SoundExchange sought to add to the provision that permits a licensee to perform its own, independent audit.[200] SoundExchange asked the Judges to add the qualifier ''with respect to the information that is within the scope of the audit'' to describe an acceptable ''defensive audit.'' This qualifying language is in the current regulation relating to audits of SDARS and webcasters. The Judges see no reason not to make it equally applicable to PSS. A report of a Qualified Auditor will include a description of the scope of the audit and if the scope of the defensive audit is too narrow to meet the specific needs of SoundExchange, then SoundExchange should be permitted to round out the findings with its own audit, limited to the points omitted from the scope of the defensive audit.

h. Section 382.7(f)—Issuance of Audit Report

On their own motion, the Judges change the word ''rendering'' to the word ''issuing'' for clarity.

i. Section 382.7(g)—Interest on Underpayments Discovered by Audit

The current regulations do not provide for a specific interest accrual on underpayments discovered by audit. Sirius XM requested that the Judges add a provision setting interest on underpayments discovered by audit at the federal post-judgment rate in 28 U.S.C. 1961. SoundExchange urged applying the late payment interest rate of 1.5% per month, compounded monthly. Sirius XM requested that the federal post-judgment rate that it seeks to be applied to late payments also be applied to underpayments and overpayments discovered by audit. However, Sirius XM opposed as punitive the use of SoundExchange's proposed 1.5% per month interest rate, noting that audits may be delayed by up to three years, while interest accrues. Barry WDT ¶ 8.

The proposed regulations the Judges adopt in this proceeding utilize the federal post-judgment rate rather than the more punitive 1.5% per month rate. Audits can uncover good faith errors as well as bad faith manipulations, and the Judges do not find that a punitive interest rate, spanning up to three years on underpayments, is appropriate in such a circumstance.

j. Section 382.7(h)—Cost Shifting

Current SDARS/PSS regulations provide that the Verifying Entity bears the cost of an audit, unless the auditor finds an underpayment of sufficient magnitude to justify shifting responsibility for payment to the Payor. For PSS, the underpayment that triggers cost-shifting currently is 5%. For SDARS, the underpayment that triggers cost-shifting is 10%.[201] Music Choice sought to equalize the cost-shifting threshold, making all services liable if an audit discrepancy reaches 10%. SoundExchange argued that cost-shifting should occur when an auditor discovers underpayment of 5% for PSS or SDARS. The rationale is that the absolute value of SDARS royalty payments justifies reducing the trigger.

The Judges are unconvinced that absolute payment amounts are a sufficient basis to change the cost-shifting trigger. Further, the Judges can find no evidentiary basis to change the cost-shifting threshold when all participants in this proceeding indicate that cost-shifting has yet to occur at the current thresholds.

[198] The Judges are not swayed by Music Choice's plaint that it could not have an authorized signer because Music Choice is a partnership made up of corporations. Music Choice's sophisticated representatives can figure out how the partnership may designate an authorized signer.

[199] Further, in a litigated rate proceeding, outside counsel are entitled to obtain confidential information without signing a non-disclosure agreement pursuant to a Protective Order specific to each proceeding.

[200] Music Choice uses the term ''defensive audit'' for this procedure.

[201] For Webcasters, the costs of the audit shift to the Payor when an underpayment equals 10% or more.

k. Sections 382.23(a) and (b)

SoundExchange proposed changes to the methodology for Sirius XM to calculate the direct license share and the pre-1972 license share. Besides inserting language relating to Aggregate Tuning Hours (ATH) data, SoundExchange sought to impose a requirement on Sirius XM to report that usage data for every eligible track it claims as a directly licensed or pre-1972 sound recording for which Sirius XM seeks a royalty adjustment. Sirius XM contended that current reporting requirements, based on Reference Channel metrics are sufficient to support the royalty adjustments it takes for these exempt sound recordings.

As the Judges decline to adopt the additional ATH language requested by SoundExchange, they see no basis to impose the additional reporting requirements on Sirius XM at this time.

l. Proposed Section—Distribution of SDARS Royalties

SoundExchange proposed a new section 382.22 adding language to the regulations that would permit it to adjust its distribution model by reference to ATH if and when Sirius XM becomes able to track listener usage of its satellite radio service. Sirius XM countered that it anticipates offering next-generation technology within the rate period at issue, but that this developing technology will not be sufficiently reliable or have sufficient market saturation to make any reports of its usage reliable. *See* 5/17/17 Tr. 4358 (Barry).

Given the contingent nature of both the launch and the saturation of Sirius XM's anticipated technological advances, the Judges decline to adopt contingency regulations at this time.

m. Proposed Section—Finality of Audit Results

Sirius XM proposed an additional subsection for the audit provisions to establish the finality of disputed audit reports. Sirius XM sought to establish a two-year statute of limitations for disputed audit findings after which the Licensee's calculations would be deemed binding and final, unless the Collective initiated a legal action before the running of that proposed limitations period.

SoundExchange objected to the creation of this statute of limitations, asserting that the change Sirius XM requests would have the effect of overriding the three-year statute of limitations provided for in the Copyright Act. As SoundExchange argued, the Judges do not have the authority to overrule a statutory provision by regulation.

The Judges see no reason to establish a statute of limitations in the context of rate setting proceedings where the Act does not provide for one. Further, any pursuit of remedies relating to audit findings would be outside the Judges' jurisdiction and the Judges would be overstepping to attempt to impose a limitation of actions over which they have no authority.

B. Gross Revenues

In this proceeding, SoundExchange proposed a per-subscriber rate structure for PSS and proffered PSS regulations consistent with its proposed rate structure. Accordingly, SoundExchange proposed to place its definition of ''Gross Revenues'' only in ''Subpart C,'' the subpart regarding SDARS. The Judges have determined that PSS rates shall continue to be calculated on a percent-of-revenue basis. Because the business models of SDARS and PSS are different, however, the Judges maintain separate elements for the calculation of the respective Gross Revenues bases for PSS and SDARS.

Neither Music Choice nor SoundExchange proposed a change to the current definition of Gross Revenues applicable to PSS. The Judges adopt that term to describe the method of calculating PSS royalties for the 2018 to 2022 period.

Sirius XM and SoundExchange proposed essentially the same definition to establish the SDARS base for Gross Revenues. Their substantive differences arose in the nature and explication of permissible exclusions from that base.[202] In adopting the definition applicable to the license period at issue in this proceeding, the Judges modified SoundExchange's proposed language to eliminate ambiguity [203] and to effect the decisions detailed below.

SoundExchange proposed to amend the definition of ''Gross Revenues'' currently found in 37 CFR 382.11 to confirm that revenue from non-music offerings ''offered for a separate charge'' shall be excludable only when those offerings are ''provided on a standalone basis.'' Bender WDT at 22. SoundExchange did not view this new proposed language as a substantive deviation from the existing regulations, but rather made the proposal ''[p]urely [as] a clarification to language that we had previously thought was sufficient.'' 5/10/17 Tr. 3184 (Bender).

SoundExchange recounted that, since *SDARS I,* it has consistently understood that the references to a ''separate charge'' in current paragraph (3)(vi)(A) and (B) were unambiguous. *See SDARS I,* 73 FR at 4087 (explaining that the ''gross revenues'' definition ''excludes monies attributable to premium channels of nonmusic programming that are offered for a charge separate from the general subscription charge for the service.''). *See id.* at 4081 (noting that, with regard to ''data services,'' the ''separate charge'' language was added by the Judges ''to make clear that this portion of the definition dealing with data services does not contemplate an exclusion of revenues from such data services, where such data services are not offered for a separate charge from the basic subscription product's revenues.''). Additionally, SoundExchange pointed out that, in *SDARS II,* the Judges reiterated the necessity of a ''separate charge,'' ''stress[ing] that the exclusion is available only to the extent that the channels, programming, products and/or other services are offered for a separate charge.'' *SDARS II,* 78 FR at 23072 n.45.[204]

Subsequent to the filing of direct cases in this proceeding, the Judges decided that ''the language in the revenue exclusion described in subsection (vi)(B) did *not* permit Sirius XM to exclude from the Gross Revenues

[202] Both SoundExchange and Sirius XM presented proposals to resolve long-standing controversies that were brought into focus by the primary jurisdiction referral of the questions from the D.C. District Court. The need for the referral arose in *SoundExchange* v. *Sirius XM,* 65 F. Supp. 3d 150 (D.D.C. 2014). In September 2017, the Judges issued their amended ruling on the referred questions. *See* Amended Restricted Ruling on Regulatory Interpretation Referred by the United States District Court for the District of Columbia, No. 2006–1 CRB DSTRA (20017–12) (Sept. 11, 2017). (*Ruling on Referred Questions*). The Judges resolve the same controversies in this proceeding in conformity with that Ruling.

[203] In constructing its proposed definition of Gross Revenues, SoundExchange began with a limited definition of what to include in the base: Subscription revenues and ad revenues including those categories of revenues if they were paid to a parent, subsidiary, or division of the Licensee. SoundExchange then listed types of revenue that should be excluded from the base ''to the extent otherwise included'' in the definition of the base. The result is in the nature of a double-negative configuration. For example, equipment sales income is NOT included in the revenue base, but the exclusion of equipment sales revenues would apply only ''to the extent [those equipment sales revenues were] otherwise included'' in the base. The better approach is to retain the current regulatory language, which states simply, ''Gross Revenues shall exclude . . . .''

[204] SoundExchange asserted that its auditor alerted it to the fact that, throughout the *SDARS I* period (at least), Sirius XM was [REDACTED]. Trial Ex. 101 at 5–6, Schedule 3. As of the time SoundExchange filed its direct case in the present proceeding, Sirius XM continued to assert that the ''separate charge'' language permitted deduction of an allocated part of its Premiere package. Ruling on Referred Questions at 17.

royalty base the price difference, *i.e.,* the Upcharge, between the Premier package and the Basic package.'' *Amended Restricted Ruling on Regulatory Interpretation Referred by the United States District Court for the District of Columbia* at 17, No. 2006–1 CRB DSTRA (2007–12) (*Ruling on Referred Questions*). Given that decision, SoundExchange noted that its proposed clarification may be unnecessary. Nonetheless, in the interest of clarity, SoundExchange urged the Judges to ''confirm again'' their position as to the meaning of the regulatory language concerning exclusions to gross revenues. Bender WDT at 22.

Sirius XM, conversely, criticized the current regulatory language that limits the exclusion to revenue recognized for the provision of data services and non-music channels, programming, products and/or other services to those instances in which the subject programming is offered for a ''separate charge.'' Sirius XM proposed to strike the longstanding ''separate charge'' requirement and add new language to the Gross Revenues definition allowing allocation of all bundle revenue regardless of whether the components of the bundle are offered for a separate charge. That proposed language specifies that the exclusion to be taken in the case of any bundle is ''the difference between: (a) the stated sale price of the bundle, minus (b) the stated sale price of the bundle multiplied by a fraction, the numerator of which is the publicly stated retail price of the standard music/non-music package when sold on a standalone and undiscounted basis, and the denominator of which is the publicly stated retail price of the bundle when sold on a standalone and undiscounted basis.'' Sirius XM First Amended Proposed Rates and Terms at 3 (Feb. 17, 2017); 5/17/17 Tr. 4342–48 (Barry); Barry WRT ¶ 21.

Sirius XM had no choice but to acknowledge that its proposal fails to address the ''economic indeterminacy'' of its bundling approach. In the *Ruling on Referred Questions,* the Judges held that—to use Sirius XM's own words—''the difference between the larger bundle price and the Select package price may not in all cases reliably measure the economic value of the additional programming to consumers, at least absent some objective evidence of the market value of that additional programming.'' SXM PFF ¶ 440.

Sirius XM sought to minimize the importance of this acknowledged economic indeterminacy by noting the importance of bundling to Sirius XM's business model and by pointing out the ubiquity of bundling by many major businesses. Barry WRT ¶¶ 12–18 & n.6. The Judges recognize the importance of product bundling as described by Mr. Barry, both for Sirius XM and numerous retailers of multiple products. As the Judges explained at length in the *Ruling on Referred Questions,* such bundling is a common form of price discrimination that increases revenue. That is, sellers can induce buyers/subscribers to reveal their Willingness to Pay (WTP) and pay more through bundling.

In a context in which the retailers pay for their inputs on a per unit basis, bundled retail pricing is benign, because input suppliers would be indifferent to downstream pricing and bundling. However, when the input suppler, as here, is paid as a percent of retail revenue, and the bundled revenue consists of some revenue attributable to the royalty base and other revenue excluded from the royalty base, the economic indeterminacy of the revenue attributable to each bucket creates a measurement problem, absent further information regarding the WTP of buyers/subscribers to the bundle.

Nonetheless, Sirius XM urged that the ''practical benefits'' of its proposal outweigh such economic indeterminacy. The Judges disagree and reaffirm their conclusions in the *Ruling on Referred Questions* arising from the *SDARS I* proceeding. As Mr. Barry made clear, such bundling was undertaken to increase Sirius XM's revenues and it would be reasonable to assume that Sirius XM has information relevant to the economic allocation of the bundled revenue. However, Sirius XM presented no such evidence at the hearing. Sirius XM must bear the burden of providing evidence that might mitigate the acknowledged ''economic indeterminacy'' problem inherent in bundling, because any such evidence would be in its possession, not in the possession of SoundExchange or the record companies. If Sirius XM lacks allocation information and prices its bundles without that data, it cannot assert ''practical benefits'' as grounds for subjecting licensors to the acknowledged economic indeterminacy of the revenue split.

For all of the reasons stated, and based upon the Judges' analysis in the *Ruling on Referred Questions,* the Judges reject Sirius XM's attempts to rewrite the regulations to reach a contrary result. Because the Judges are reaffirming here their *Ruling on Referred Questions,* which confirmed the meaning of the present regulatory definition of Gross Revenues, they find (as SoundExchange itself anticipated) no need to amend the text of the regulatory definition. Accordingly, SoundExchange's request for a change in that definitional language is rejected as moot.

Finally, Sirius XM proposed a change to the prefatory language in the exclusion from ''Revenues recognized by Licensee for the provision of'' to the simpler ''Licensee revenues for the provision of.'' (That language is set forth in forthcoming § 382.22(b)(7)). As Mr. Barry explained, this is not meant to imply that Sirius XM can exclude revenues that have not been recognized. Rather, it is merely intended to avoid SoundExchange's perpetuating the argument (as addressed and rejected by the Judges in the recent litigation regarding the *SDARS I* period) that Sirius XM could not exclude revenue for portions of a bundle because those items were not separate units of accounting under GAAP (and the revenue for those items therefore was not ''recognized''). Barry WRT ¶ 20 n.8.

SoundExchange argued that there is no reason to delete the reference to ''[r]evenues recognized'' in the preamble, and some risk in doing so. SE Response to SXM PFF ¶ 442. However, SoundExchange did not cite to the record for this assertion of risk, nor did it identify that alleged risk. SoundExchange also noted that, at the hearing, Mr. Barry acknowledged his understanding that revenue would need to be ''recognized'' to be excluded. 5/17/17 Tr. 4401–02 (Barry). Thus, SoundExchange concluded that deleting the reference to revenue recognition would create the implication that that is not the case.

The Judges find that these differences can be bridged. The language at 382.22(b)(7) will read, ''Revenues recognized by Licensee (or otherwise received by Licensee if no GAAP ''recognition'' principles are applicable) for the provision of . . . .''

C. Ephemeral License Terms

The participants in the present proceeding raised two issues relating to the section 112 Ephemeral Recordings license. The first issue was raised by Music Choice regarding the valuation of the ephemeral license. The second controversy between SoundExchange and Music Choice came to light in response to SoundExchange's proposed revisions to §§ 382.3(b) and 382.12(c) regarding advance payments and minimum payments and is discussed *supra,* section XI.A.1. SoundExchange contended that the record in the proceeding ''unanimously'' supports SoundExchange's proposal of a bundled rate for both the Section 112(e) and 114 rights, 5% of which should be allocated as the Section 112(e) royalty for the

making of ephemeral copies and the remaining 95% of which should be allocated as the Section 114 performance royalty. SoundExchange stated that ''[t]he parties agree in substance concerning this matter.'' SX PFFCL ¶ 2369. SoundExchange contended that ''it appears that both SoundExchange and Music Choice agree that the Judges should set some kind of an overall royalty payment and allocate it 95%/5%.'' SX PFFCL ¶ 2373.

Sirius XM mirrored SoundExchange's proposal. *See* SXM PFFCL at 1. Music Choice argued, however, that SoundExchange did not demonstrate that ephemeral copies have any independent value. *See* Del Beccaro WDT at 46–47 (''I am unaware of any marketplace context in which the record labels seek, or get, a separate payment just for ephemeral copies.''). Nevertheless, Music Choice acknowledged that the ephemeral license has been and can be bundled with the sound recording performance license, and took no position on SoundExchange's proposal to continue the current apportionment between the performance and ephemeral copying license. MC PFF ¶551.

SoundExchange, Sirius XM, and Music Choice agreed that a portion of the overall PSS royalties should be attributed to the ephemeral copying license. None of them suggested that the overall PSS royalty rate should be increased to account for ephemeral copying royalties. SoundExchange and Sirius XM proposed that the current 5% allocation of overall royalties to the section 112(e) license should continue in the upcoming rate period, and Music Choice took no position on the allocation. The only apparent issue concerning the ephemeral reproduction license is that Music Choice asserted that that license has no ''*independent* value,'' MC PFF at ¶550 (emphasis added), while SoundExchange contended that ephemeral copies do ''have economic value . . . .'' Designated *Web III* Written Direct Testimony of Dr. George S. Ford, Trial Ex. 51, at 9 (Ford *Web III* WDT). Music Choice did not contend that the ephemeral copies have no economic value—only that the ephemeral copies have no economic value *independent of the Section 114 license*. Music Choice's position was inconsistent with neither SoundExchange's contention that the ephemeral copying does have economic value, nor a bundled rate allocated between the two licenses.

To support both the bundled rate and the proposed 5% allocation to the ephemeral license, SoundExchange relied on the designated testimony of Dr. George Ford from the *Web III* proceeding. *See generally* Ford *Web III* WDT; *see also Web III,* 76 FR at 13042 (''The testimony offered by SoundExchange supports this proposal and we adopt it.''). According to Dr. Ford, ''ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies.'' Ford *Web III* WDT at 9. Dr. Ford noted that ''marketplace benchmarks show that the royalty rate for ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Section 112 and 114.'' *Id.* at 9–10.

As to the specific allocation between the two licenses, Dr. Ford noted that it is not the services, but the ''[r]ecord companies and artists [who] care about what portion of royalty payments are allocated to ephemerals because the higher the portion allocated to ephemerals, the lower the portion paid directly to artists per the terms of the Section 114 license.'' *Id.* at 4. Dr. Ford concluded that, in light of the purported disinterest by the willing buyer (or licensee) in the allocation between the Section 112(e) and 114 licenses, an agreement between the artists and the copyright owners (*i.e.,* the licensors) is the best measure of how a willing buyer and willing seller would allocate royalties between the performance and ephemeral licenses. *Id.* at 10. As evidence of such an agreement, Dr. Ford was informed that ''the recording artists and the record companies have reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities.'' *Id.* at 15. He concluded that ''that appears to be a reasonable proposal.'' *Id.* Upon examination in *Web III,* Dr. Ford clarified that he was informed by counsel for SoundExchange that the SoundExchange board, which includes representatives from record labels and artists, had approved a recommendation that 5% of royalties should be allocated to the ephemeral license. Designated Hearing Testimony of George S. Ford, Trial Ex. 51, at 434 (Ford *Web III* Hrg. Test.).[205]

[205] Dr. Ford represented that he reviewed the minutes of the board meeting that referenced the agreement, and it appears that the Judges in *Web III* admitted the board minutes into evidence. Ford *Web III* Hrg. Test. at 434, 438. Those minutes were not introduced into evidence in the current proceeding, rendering hearsay Dr. Ford's testimony concerning the agreement between artists and record companies. The Judges exercise their discretion under 37 CFR 351.10(a) to admit Professor Ford's hearsay testimony.

The Judges find SoundExchange's proposals concerning the bundling of performance and ephemeral Royalties, as well as the 95%/5% allocation of royalties between the two licenses, to be reasonable and supported by the evidence, and therefore adopt them for both PSS and SDARS.

XII. Conclusion

For all of the foregoing reasons, the Judges issue this Determination of Rates and Terms in the captioned proceeding. 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.

Dated: October 11, 2018.

Corrected: October 15, 2018.

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 382

Copyright, Digital audio transmissions, Performance right, Sound recordings.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges revise 37 CFR part 382 to read as follows:

PART 382—RATES AND TERMS FOR TRANSMISSIONS OF SOUND RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

Subpart A—Regulations of General Application

Sec.

382.1 Definitions.
382.2 Scope and compliance.
382.3 Making payment of royalty fees.
382.4 Delivering statements of account.
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Subpart B—Preexisting Subscription Services (PSS)

382.10 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.
382.11 Calculation of gross revenues for PSS.

Subpart C—Preexisting Satellite Digital Audio Radio Services (SDARS)

382.20 Definitions.
382.21 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings by SDARS.
382.22 Calculation of Gross Revenues for SDARS.
382.23 Adjustments to royalty fee.

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

Subpart A—Regulations of General Application

§ 382.1 Definitions.

In this subpart:

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges.

Copyright Owners means sound recording copyright owners who are entitled to royalty payments made under part 382 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)(5).

Eligible Transmission means a Digital Audio Transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under 37 CFR part 382.

Ephemeral Recording has the same meaning as in 17 U.S.C. 112.

GAAP means generally accepted accounting principles in effect in the United States on the date payment is due.

Licensee means the provider of an Satellite Digital Audio Radio Service (SDARS) or Preexisting Subscription Service (PSS) that has obtained a license under 17 U.S.C. 114 to make eligible transmissions and a license under 17 U.S.C. 112(e) to make Ephemeral Recordings to facilitate those Eligible Transmissions.

Payor means the entity required to make royalty payments to the Collective or the entity required to distribute royalty fees collected, depending on context. The Payor is:

(1) A Licensee, in relation to the Collective; and

(2) The Collective in relation to a Copyright Owner or Performer.

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).

Preexisting Subscription Service (*PSS)* has the same meaning as in 17 U.S.C. 114(j)(11). A service's offering on the internet that is available to a subscriber outside the subscriber's residence is not a Preexisting Subscription Service for purposes of this part.

Qualified Auditor means a Certified Public Accountant independent within the meaning of the American Institute Certified Public Accountants Code of Professional Conduct.

Satellite Digital Audio Radio Service (*SDARS)* means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

Transmission has the same meaning as in 17 U.S.C. 114(j)(15).

Verifying Entity means the party requesting an audit and giving notice of intent to audit. For audits of SDARS and PSS, the Verifying Entity is SoundExchange, Inc. For audits of SoundExchange, Inc. the Verifying Entity is any Copyright Owner or its authorized representative.

§ 382.2 Scope and compliance.

(a) *Scope.* This part codifies rates and terms of royalty payments for the public performance of sound recordings in certain Digital Audio Transmissions by certain Licensees in accordance with 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, 2018, through December 31, 2027.

(b) *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 17 U.S.C. 112(e) and 114, this part and any other applicable regulations.

(c) *Voluntary agreements.* Notwithstanding the royalty rates and terms established in any subparts of this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

§ 382.3 Making payment of royalty fees.

(a) *Payment to the Collective.* A Licensee must make the royalty payments due under subparts B and C of this part to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this part. If any payment due date is a weekend or a federal holiday, then the payment is due on the first business day thereafter.

(b) *Advance payment.* Licensees must pay the Collective an annual advance payment of $100,000 by January 31 of each year. The Collective must credit 5% of the advance payment as payment of the minimum fee for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. The funds are nonrefundable. Any uncredited portion of the funds shall not carry over into a subsequent year.

(c) *Minimum payments.* A Licensee must make any minimum annual payment due under subpart B or C of this part by January 31 of the applicable license year.

(d) *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.

(e) *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.

§ 382.4 Delivering statements of account.

(a) *Statements of Account.* Any payment due under this part must be accompanied by a corresponding Statement of Account that must contain the following information:

(1) 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 the 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.

§ 382.5 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 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 § 370.3 or § 370.4 of this chapter, as applicable, and pursuant to this part.

(2) *Identification of Copyright Owners.* The Collective must use its best efforts to identify and locate copyright owners and featured artists to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but are not limited to, searches in Copyright Office public records and published directories of sound recording copyright owners when consulting those records and directories is likely to be helpful.

(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, 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, it shall be replaced for the applicable royalty period 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**.

§ 382.6 Handling Confidential Information.

(a) *Definition.* For purposes of this part, ''Confidential Information'' means the Statements of Account and any information contained therein, including the amount of royalty payments 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) 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; or

(ii) A Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this part;

(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. 112 or 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.

§ 382.7 Auditing payments and distributions.

(a) *General.* This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify those payments or distributions with an independent audit. 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 Copyright Owners or Performers. Nothing in this section shall preclude a Verifying Entity and the Payor under audit from agreeing to verification methods in addition to or different from those set forth in this section.

(b) *Frequency of auditing.* A Verifying Entity may conduct an audit of each Payor only once a year and the audit may cover 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, 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 send a copy to the Payor.

(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 the Payor made an underpayment or overpayment of royalties. 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 under audit 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 issuing the report, unless the auditor has a reasonable basis to suspect fraud on the part of the Payor, 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 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 reasonably cooperates with the auditor to remedy promptly any factual error[s] or clarify any issue 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 underpaid royalties, the Payor shall remit the amount of any underpayment determined by the auditor to the Verifying Entity, together with interest at the post-judgment rate specified in 28 U.S.C. 1961, accrued from and after the date the payment was originally due. In the absence of mutually-agreed payment terms, which may, but need not, include installment payments, the Payor shall remit promptly to the Verifying Entity the entire amount of the underpayment determined by the auditor. If the auditor determines the Payor overpaid royalties, however, the Verifying Entity shall not be required to remit the amount of any overpayment to the Payor, and the Payor shall not seek by any means to recoup, offset, or take a credit for the overpayment, unless the Payor and the Verifying Entity have agreed otherwise.

(h) *Paying the costs of the audit.* The Verifying Entity must pay the cost of the audit, unless the auditor determines that there was an underpayment of 10% or more, in which case the Payor must bear the reasonable costs of the audit, in addition to paying or distributing the amount of any underpayment.

(i) *Retention of audit report.* The Verifying Entity must retain the report of the audit for a period of not less than three years from the date of issuance.

Subpart B—Preexisting Subscription Services (PSS)

§ 382.10 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.

(a) *Royalty fees.* Commencing January 1, 2018, and continuing through December 31, 2027, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the rate of 7.5 percent of Gross Revenues.

(b) *Ephemeral recordings royalty fee.* (1) 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 that are necessary and commercially reasonable for making noninteractive Digital Audio Transmission as a PSS are included in the 5%.

(2) The minimum fee is $5,000 per year.

§ 382.11 Calculation of gross revenues for PSS.

(a) Gross revenues are monies derived from the operation of the programming service of the Licensee and are comprised of the following:

(1) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;

(2) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(3) Monies received for the provision of time on the programming service to any third party;

(4) Monies received from the sale of time to providers of paid programming such as infomercials;

(5) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(6) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(7) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(8) Bad debts recovered regarding paragraphs (a)(1) through (7) of this section.

(9) Revenues described in paragraphs (a)(1) through (8) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service.

(b) Gross Revenues exclude affiliate revenue returned during the reporting period and bad debts actually written off during reporting period.

Subpart C—Preexisting Satellite Digital Audio Radio Services (SDARS)

§ 382.20 Definitions.

In this subpart:

Directly-Licensed Recording means a sound recording for which the Licensee has previously obtained a license of all relevant rights from the sound recording Copyright Owner.

Pre-1972 Recording means a sound recording fixed before February 15, 1972, that is not a restored work as defined in 17 U.S.C. 104A(h)(6) or otherwise subject to protection under title 17, United States Code.

Reference Channels means internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both, and on which the programming consists primarily of music.

§ 382.21 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings by SDARS.

(a) *Royalty fees.* Commencing January 1, 2018, and continuing through December 31, 2027, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the rate of 15.5% of Gross Revenues.

(b) *Ephemeral recordings royalty fees.* (1) 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 that are necessary and commercially reasonable for making noninteractive Digital Audio Transmissions as an SDARS are included in the 5%.

(2) The minimum fee is $5,000 per year.

§ 382.22 Calculation of Gross Revenues for SDARS.

(a) Gross Revenues are:

(1) Revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS and comprised of the following:

(i) Subscription revenue recognized by Licensee directly from U.S. subscribers for licensee's SDARS; and

(ii) Licensee's advertising revenues, or other monies received from sponsors, if any, attributable to advertising on channels other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions.

(2) Revenues set forth above to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary, or division of Licensee.

(b) Gross Revenues exclude:

(1) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee's SDARS and any shipping and handling fees therefor;

(2) Royalties paid to Licensee for intellectual property rights;

(3) Monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(4) Sales and use taxes;

(5) Credit card, invoice, activation, swap and early termination fees charged to subscribers and reasonably related to the Licensee's expenses to which they pertain;

(6) Bad debt expense; and

(7) Revenues recognized by Licensee (or otherwise received by Licensee if no GAAP ''recognition'' principles are applicable) for the provision of:

(i) Current and future data services offered for a separate charge (*e.g.,* weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

(ii) Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings;

(iii) Channels, programming, products and/or other services provided outside of the United States; and

(iv) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is exempt from any license requirement or is separately licensed, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

§ 382.23 Adjustments to royalty fee.

(a) *Reduction for Direct License Share.* The royalty fee specified in § 382.21(a) may be reduced by the percentage of Eligible Transmissions comprising the Direct License Share.

(1) The Direct License Share reduction is available to a Licensee only if—

(i) The Reference Channels constitute a large majority of and are generally representative of the music channels offered on the Licensee's SDARS; and

(ii) The Licensee provides the Collective, by no later than the due date for the relevant payment under § 382.3(d), a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Directly-Licensed Recordings that is in effect for the month for which the payment is made and of each sound recording for which the Licensee takes the reduction, identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name. Notwithstanding § 382.6, the Collective may disclose such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

(2) To arrive at the percentage allocable to the Direct License Share for each month, the Licensee shall divide the internet Performances of Directly-Licensed Recordings on the Reference Channels by the total number of internet Performances of all sound recordings on the Reference Channels. In no event shall the Direct License Share be an amount greater than the result of dividing the number of plays of Directly-Licensed Recordings on the SDARS by the total number of plays of all sound recordings on the SDARS.

(3) The Licensee may not credit use of a Directly-Licensed Recording under this paragraph if that use is credited as a use of a Pre-1972 Sound Recording for purposes of claiming the Pre-1972 Recording Share reduction to the royalty fee.

(b) *Reduction for Pre-1972 Recording Share.* The royalty fee specified in § 382.21(a) may be reduced by the percentage of Eligible Transmissions comprising the Pre-1972 Recording Share.

(1) A Pre-1972 Recording Share reduction is available to a Licensee only if—

(i) The Reference Channels constitute a large majority of and are generally representative of the music channels offered on the Licensee's SDARS; and

(ii) The Licensee provides to the Collective, by no later than the due date for the relevant payment under § 382.3(d), a list of Pre-1972 Recordings for which the Licensee takes the reduction, identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name.

(2) To arrive at the percentage allocable to the Pre-1972 Recording Share for each month, the Licensee shall divide the internet Performances of Pre-1972 Sound Recordings on the

Reference Channels by the total number of internet Performances of all sound recordings on the Reference Channels.

(c) *Definition of Performance.* For purposes of this section, Performance means:

(1) Except as discussed in paragraph (c)(2) of this section, a Performance is an instance in which any portion of a sound recording is publicly performed to a listener within the United States 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).

(2) An instance in which a portion of a sound recording is publicly performed to a listener within the United States by means of a Digital Audio Transmission is not a Performance if it 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 use during news, talk and sports programming, brief background use during disk jockey announcements, brief use during commercials of sixty seconds or less in duration, or brief use during sporting or other public events; and

(ii) Does not contain an entire sound recording 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), except for ambient music that is background at a public event.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Jesse M. Feder,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Approved by:

Carla D. Hayden,

Librarian of Congress.

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FEDERAL REGISTER

Vol. 83 Wednesday,

No. 243 December 19, 2018

Part III

The President

Proclamation 9833—Wright Brothers Day, 2018

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 9833 of December 14, 2018

Wright Brothers Day, 2018

By the President of the United States of America

A Proclamation

On December 17, 1903, two American brothers from Dayton, Ohio, Orville and Wilbur Wright, launched the first manned, powered flight on a windy beach in Kitty Hawk, North Carolina. Their handcrafted biplane, though aloft a mere 12 seconds, ushered in the age of aviation and changed the course of history. On Wright Brothers Day, we commemorate this monumental achievement and look ahead to new chapters of American aviation in which new scientists, inventors, dreamers, and entrepreneurs will change history, fulfilling the human spirit's relentless quest for exploration and discovery.

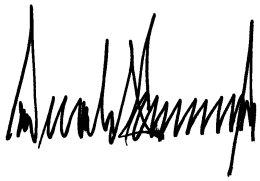
In the 115 years since the Wright brothers achieved their groundbreaking flight, the United States has led the world in aviation innovation. We have developed supersonic jets, walked on the moon, placed increasingly advanced landers and rovers on Mars, and vaulted spacecraft into the far reaches of the universe to explore distant horizons. The aviation industry has transformed the way we live and communicate, strengthening our connections to other nations and continents, expanding the global marketplace, and extending the frontiers of imagination and experimentation. These revolutionary achievements trace their origins back to the triumphs of Orville and Wilbur, two daring pioneers who, fueled by passion, undeterred by years of failure, and empowered by legendary American intrepidity, took mankind to new heights.

We reflect with pride on the historic successes of our Nation's aviation visionaries, and we look ahead to a future of limitless potential and even greater accomplishment. My Administration is working to build on America's heritage as aviation pioneers and the world's greatest space-faring nation. I have instructed Federal agencies to embrace aeronautics and space industries of the future by modernizing our outdated regulations and funding aerospace research and development. We will broaden America's leadership in aerospace technology, including through the return of civil supersonic flight, the growth of commercial unmanned aircraft systems, and continued innovation in space exploration and travel. As we continue our pursuits in flight, we are indebted to the Wright brothers for hazarding to dream and inspiring our Nation to look heavenward.

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

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, do hereby proclaim December 17, 2018, as Wright Brothers Day.

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



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FEDERAL REGISTER

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Part IV

The President

Notice of December 18, 2018—Continuation of the National Emergency With Respect to Serious Human Rights Abuse and Corruption

Federal Register
Vol. 83, No. 243
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Presidential Documents

Title 3—

The President

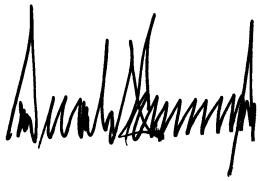
Notice of December 18, 2018

Continuation of the National Emergency With Respect to Serious Human Rights Abuse and Corruption

On December 20, 2017, by Executive Order 13818, the President declared a national emergency with respect to serious human rights abuse and corruption around the world and, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), took related steps to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

The prevalence and severity of human rights abuse and corruption that have their source, in whole or in substantial part, outside the United States, continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared on December 20, 2017, must continue in effect beyond December 20, 2018. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13818 with respect to serious human rights abuse and corruption.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
December 18, 2018.

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